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THE TIMES LAW REPORTS.

Court of Appeal (A. L. Smith and }
Vaughan Williams, L.JJ.) }

1899.
Oct. 25.

FLATAU V. CULLEN.*

Practice—Costs—Taxation.

It being the duty of a Master on taxation to tax each item, the practice of allowing a fixed sum of £1 for the costs of substituted service cannot be justified.

This was an appeal from an order of Mr. Justice Lawrence's, refusing to allow a review of taxation of costs. The writ in the action was issued on July 5, 1899, and was endorsed with a claim for payment of £410 on a guarantee and £3 3s. for the costs of the writ. Some difficulty having arisen with regard to the service of the writ, an order was obtained for substituted service, and such service was effected on July 10. On the same day the defendant paid the plaintiff the principal sum, £3 3s. for the costs of the writ, and £2 10s. for the costs incurred in obtaining the order for substituted service. The defendant objected to the demand for the sum of £2 10s., and only paid it under protest, and on July 17 he took out a summons for taxation of costs. The plaintiff thereupon carried in a bill for £6 4s. 8d., certain additional costs having been incurred in the meantime. The Master allowed the costs at £4 3s.—viz., £3 3s. for the writ and £1 for the substituted service—and he ordered the plaintiff to pay the costs of the taxation, which he fixed at £3 3s. In making this order the Master followed the practice which has been adopted at Chambers of invariably allowing £3 3s. for a specially-endorsed writ, and £1 for substituted service of a writ. The plaintiff took out a summons for a review of taxation, but Mr. Justice Lawrence thought that the recognized practice ought to be followed, and refused to make an order for a review. The plaintiff appealed.

Mr. FOOTE, Q.C., and Mr. EMANUEL, for the plaintiff, contended that the practice adopted by the Masters was unreasonable and contrary to the rules of the Court, and that it ought to be declared by this Court to be bad. The duty of a Taxing Master was to consider the separate items in the bill before him, and not to allow an arbitrarily-fixed sum as applicable in all cases. The result of the practice was that a plaintiff could not now get a writ for a liquidated demand under Order 3, rule 7, unless he stated in the endorsement that the sum he claimed for costs was three guineas. The practice of arbitrarily fixing the cost of substituted service of a writ at £1 could not be supported. The only cases in which the Master was to allow a fixed sum were those provided for by Order 65, rule 27, sub-rule 38, and rule 18 of the Practice Masters' Rules. Where the claim did not exceed £50 the charge for substituted service was fixed at £1, but there was no fixed charge where the claim exceeded £50.

Mr. MONTAGUE LUSH, for the defendant, argued that, in the circumstances of the case, the plaintiff ought not to be allowed to have a review of taxation.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said the writ as issued was endorsed with a claim for a liquidated demand of £410 and three guineas costs. There was then an order for substituted service, and, when the defendant expressed his willingness to pay the debt, the plaintiff claimed that the cost of the substituted service was £2 10s. The defendant paid the principal sum, the three guineas, and the £2 10s., but he protested about the £2 10s., and took out a summons to have the costs taxed. The Master taxed the costs under Order 3, rule 7. He would pass over what the Master did as regards the three guineas, but with regard to the substituted service, although the plaintiff said that the cost of that was £2 10s., the Master said he would only give him £1. The Master did not really tax the item, but, following the practice which had been established, merely allowed a fixed charge of £1. The plaintiff now contended that the Master had no power to tax the cost of substituted service of a writ in this way by rule of thumb. He did not see any answer to that contention. He had expected that Mr. Montague Lush was going to urge something in the way of justifying the practice which had been adopted by the Masters. He, however, had not done so and, in his Lordship's opinion, that practice could not be justified. The case must therefore go back for a review of taxation.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Emanuel, Round, and Nathan, for the plaintiff; G. B. W. Digby, for the defendant.]

Q.B. Div. (Ridley and }
Darling, JJ.) }

1899.
Oct. 25.

THE QUEEN V. WEBBER.*

Justices — Jurisdiction — Poor Law — Distress-warrant — Ministerial act — *Certiorari* refused.

This was an application for a writ of *certiorari* in the following circumstances. On June 29, 1897, an order had been made against the applicant that he should contribute 4s. weekly towards the maintenance of his father and mother, so long as they remained poor and unable to work. The father subsequently obtained employment, but the Poor Law guardians continued their allowance to him for a considerable period. In 1899 they demanded payment from the applicant of £7 9s. 8d. (ultimately reduced to £4 4s.) which they alleged to be due under the order of June, 1897. The applicant disputed his liability on the ground that the order was only in force so long as both his father and mother were poor and unable to work. Thereupon the guardians, without proper notice to the applicant, applied to the respondent for and obtained a distress warrant for the amount in question. The applicant, having unsuccessfully applied to the justices sitting as a Court of summary jurisdiction for the discharge of the distress warrant, the distress was proceeded with, and the amount realized. On September 23, 1899, the

*Reported by F. G. RÜCKER, Esq., Barrister-at-Law.
No. 1.—VOL. XVI.

*Reported by F. E. HAYDON, Esq., Barrister-at-Law.

applicant issued a writ claiming damages for trespass and illegal distress.

Mr. WARD COLDRIDGE, for the applicant, contended that the distress warrant was issued without jurisdiction, inasmuch as it was made without service on the applicant by the guardians of the preliminary complaint and notice of the intended application required by the Summary Jurisdiction Act, 1879. He further contended that a distress warrant could only be issued after a judicial inquiry into the liability of the applicant, which it was not competent for one magistrate sitting alone to make. That even if the respondent had purported to do ministerially an act which could only be done judicially, that fact ought not to prevent the quashing of the order. But that an examination of the distress warrant showed that the order was in reality a judicial act, inasmuch as it declared the liability of the applicant to pay the sum. He cited "*In re Gamble*" ([1899] 1 Q.B., 305), "*Reg. v. Price*" (5 Q.B.D., 300), and referred to the Summary Jurisdiction Act of 1879, sections 6, 35 (2), 47. [Mr. JUSTICE DARLING referred to "*Ex parte Taunton*" (1 D.P.C., 54). In that case the act done was a purely ministerial one.]

Mr. BODILLY, for the respondent, urged that a writ of *certiorari* was not issued *ex debito iudicio*, but was in the discretion of the Court. He argued that even if the distress warrant did involve a judicial act, it did not follow that a writ of *certiorari* should be granted. He submitted, however, that the act here was a ministerial one, and therefore not the subject for such a writ.

The COURT refused the application.

Mr. JUSTICE RIDLEY said that issuing the warrant was a ministerial act and not a judicial one. Moreover, the case was concluded by authority because "*Ex parte Taunton*" (*supra*) decided that a writ of *certiorari* would not issue in the case of a distress warrant.

Mr. JUSTICE DARLING was also of opinion that the act done here was a ministerial one. But whether it was ministerial or judicial the Court had a discretion in the matter, and a writ of *certiorari* ought not to be granted in this case. The learned Judge referred to and distinguished the case of "*Fourth City Mutual Building Society v. Guardians of Ham*" ([1892] 1 Q.B., 661), and intimated that he did not decide that under no circumstances could a distress warrant be quashed on an application such as the present.

Court of Appeal (Lindley, M.R., Sir } 1899.
F. Jeune, P., and Romer, L.J.) } Oct. 26.

ROBERTS V. THE GWYRFAL RURAL DISTRICT COUNCIL.*

Local Government—Watercourse—Interference by local authority—Rights of riparian owner—Public Health Act, 1875, sec. 332—Injunction.

Decision of Kekewich, J. (15 *The Times* L.R., 165), affirmed.

This was an appeal by the defendants against a decision of Mr. Justice Kekewich's (reported in 15 *The Times* L.R., p. 165). The case is one of importance to millowners who are dependent upon a running stream for the supply of the motive power for their mills. The action was brought by the owner of a corn-mill in the parish of Llanllyfni, Carnarvonshire, for an injunction to restrain the defendants from interfering with the natural flow of the stream which worked his mill. The stream in question flowed from a lake at the foot of mountains some distance above the mill. The defendants are the owners of land on one side of the lake, and they have constructed a dam across the end of the lake, of

which the stream forms the outlet, so as to increase the water storage for the supply of water to their district. The defendants constructed a sluice in the dam to regulate the outflow of the stream, and had offered to allow a sufficient outflow to work the plaintiff's mill, but the plaintiff declined the offer, contending that he ought not to be at the defendants' mercy, but was entitled to the free and uninterrupted flow of the water as it had always existed, subject only to the rights of other riparian owners, and he alleged that the subtraction of water for the supply of the defendants' district was not within their rights as riparian owners. The defendants claimed to be entitled to do what they had done, either as riparian proprietors or under the Public Health Act, 1875. Section 51 of the Act empowers a rural authority to provide their district "with a supply of water proper and sufficient for public and private purposes," and for those purposes (*inter alia*) to "construct and maintain waterworks, dig wells, and do any other necessary acts"; and by section 332, "Nothing in this Act shall be construed to authorize any local authority to injuriously affect any reservoir, canal, river, or stream, or the feeders thereof, or the supply, quality, or fall of water contained in any reservoir, canal, or stream, or in the feeders thereof, in cases where any body of persons or person would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, canal, river, stream, feeders, or such supply, quality, or fall of water, unless the local authority first obtain the consent in writing of the body of persons or person so entitled as aforesaid." At the trial of the action Mr. Justice Kekewich granted the injunction asked for, but suspended its operation pending the appeal. The defendants appealed.

Mr. Renshaw, Q.C., and Mr. H. Courthope Munroe were for the defendants; Mr. Warrington, Q.C., and Mr. Bryn Roberts, for the plaintiff, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the plaintiff's right as a riparian proprietor was to have the water of the stream come down in the accustomed way, subject to the rights of the other riparian proprietors higher up the stream. Subject to those rights there was no right to interfere with the accustomed flow of the stream. As riparian proprietors the defendants had no right to do what they had done apart from any statutory power. They were not exercising the rights of a riparian proprietor at all. They were diverting water from the lake for a totally different purpose—viz., to supply water to a township in their district. They could not justify what they had done under their common law right as riparian proprietors. But they said they could justify it under section 51 of the Public Health Act, subject to section 332. Mr. Renshaw fairly said that he claimed a right on the part of the defendants either as riparian proprietors or under the Act. In his Lordship's opinion the defendants had no such right in either way. Mr. Munroe admitted that the defendants had no right, but said that the plaintiff had no ground of complaint, for he had not suffered any damage, and the Court would not in such a case interfere by injunction. That, however, depended upon whether the plaintiff's legal right had been infringed, and it clearly had been infringed. The defendants did not say that they were prepared to stop taking the water, and they really intended to go on taking it. In the course of 20 years they would acquire a prescriptive right to take it. There was no power of the Court more important than that of keeping public bodies within their powers. If such bodies exceeded those powers their action would be oppressive. The defendants ought to endeavour to obtain Parliamentary powers. It was said that a rural

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

district council had no power to promote a Bill in Parliament. That only meant that they could not do so at the cost of the ratepayers. The appeal must be dismissed with costs. But, if the defendants would within a fortnight undertake to apply to Parliament for power to take the water, the operation of the injunction would be suspended for six months. It would be suspended during the fortnight.

The PRESIDENT of the PROBATE DIVISION and LORD JUSTICE ROMER concurred.

[Solicitors—Robbins, Billing, and Co., for Morris Owen, Carnarvon; Hamlin, Grammer, and Hamlin, for Carter, Mostyn, and Co., Carnarvon.]

Q.B. Div. (Ridley and {
Darling, JJ.) }

1899.
Oct. 26.

UCKFIELD RURAL DISTRICT COUNCIL V. CROWBOROUGH WATER COMPANY.*

Local Government—Buildings—Jurisdiction of District Council—By-laws—Water company—Special Act.

This was an argument on a special case stated by the justices of the petty sessional division of Frant, in the county of Sussex. The district council laid two informations against the water company for breaches of two of the council's by-laws, numbered 93 and 94, mentioned below. The justices before whom proceedings were heard dismissed the informations, subject to a special case for the opinion of the Queen's Bench Division, which in substance stated the following facts:—The rural district council for the district of Uckfield in Sussex, of which Crowborough forms part, were constituted under the Local Government Act, 1894, having all the powers of a rural sanitary authority under the Public Health Act, 1875, including powers to make and enforce by-laws with respect to new streets conferred by section 157 of that Act. The council in pursuance of these powers made by-laws, which were in due course confirmed by the Local Government Board. One of these by-laws (numbered 93) provided that any person intending to erect a new building should give notice to the council of that intention, and should deliver to the clerk or surveyor of the council plans and sections of such building, and a description in writing of the materials of which it is intended to construct the same, and also a description in writing of the mode of drainage and means of water supply. Another by-law (numbered 94) provided that notice should be given of the date on which it is intended to commence such building. Other by-laws imposed penalties for breach of the foregoing, and contained provisions for removal of works executed in contravention thereof. The Crowborough District Water Company were incorporated by an Act of 60 and 61 Vict., c. 117. Section 25 of that Act provided that the company should make in the lines and situations and according to the levels shown on deposited plans and sections certain works mentioned in such section and all proper and necessary works, including a high-service water-tower. Among the Acts incorporated with the respondents' special Act was the Waterworks Clauses Act, 1847, section 93 of which provides as follows:—“Nothing herein or in the special Act contained shall be deemed to exempt the undertakers from any general Act relating to waterworks, or any Act for improving the sanitary condition of towns and populous districts, which may be passed in the same Session of Parliament in which the special Act is passed, or any future Session of Parliament.” The water company in October, 1898, began to construct this water-tower without giving any of the notices prescribed by, or in any other wise com-

plying with, the provisions of the above by-laws. The district council thereupon laid informations against the water company for breach of these by-laws, which informations were dismissed as above stated.

Mr. R. E. MOORE, for the appellants (the district council), argued that the by-laws being made under the provisions of the Public Health Act, 1875, and being therefore part of the general law of the land, were binding on the water company in so far as they were not inconsistent with the provisions of that company's special Act, and that there was no such inconsistency. He cited “*Hill v. Hall*” (45 L.J., M.C., 153).

Mr. WHATELEY (Mr. Boxall with him), for the respondents (the water company), was then called on, and argued that the district council had no power, and did not purport to make by-laws in reference to a building of this sort; that the provisions of the Public Health Act and the by-laws made under that Act had no application to the works executed by the water company, because the Public Health Act was not incorporated with the special Act of the water company; and, moreover, the by-laws had been promulgated on January 15, while the special Act was not passed until July 15. The by-laws and the special Act were inconsistent, because the latter obliged the company to construct all proper and necessary works, which meant proper and necessary in the view of the company, while the former made the district council the judges of what was proper and necessary. He cited “*London and Blackwall Railway Company v. Limehouse Board of Works*” (26 L.J., Ch., 164); “*City and South London Railway v. London County Council*” ([1891] 2 Q.B., 513). It was admitted that the deposited plans gave no details of the materials or method of construction to be adopted.

MR. JUSTICE RIDLEY, in giving judgment, said that the question raised by this special case was one of some interest; that after hearing considerable argument the Court had come to the conclusion that the decision of the justices was wrong; and that this case ought to be sent back to them with a direction to convict. The question was whether the water company, having been empowered by section 25 of their special Act to construct all proper and necessary works, including the high-service water-tower, were thereby exonerated from submitting plans and giving notices in accordance with the by-laws numbered 93 and 94. The Court were of opinion that the water company were not so exonerated. Counsel for the water company had contended that when once the company were authorized by the Legislature to erect a water-tower they were empowered to construct it as they thought fit. His Lordship could not assent to that view. In his view the effect of the water company's special Act was to enable the company to erect a tower upon land which was not theirs; an Act was necessary to enable them to do that. But when they had been so empowered they were in the same position as a private person intending to build a house upon his own land, and under a similar obligation to comply with by-laws duly made under the provisions of the Public Health Act. It was contended that these by-laws did not apply because the Public Health Act was not expressly incorporated with the special Act; but the presumption was that the Public Health Act, a general Act and part of the general law of the land, did apply, although not expressly incorporated, unless it could be shown that it was the intention of the Legislature that it should not apply. Section 93 of the Waterworks Clauses Act implied the contrary intention by enacting that nothing in that Act or in the special Act should exempt the company from any sanitary Act which might be passed in the same Session of Parliament in which the special Act was passed or any future Session of Parliament. With regard to existing sanitary Acts, nothing was said; the section was silent. That left untouched the-

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

general principle that the general law of the land applied. With regard to the cases cited, they were both distinguishable. In "London and Blackwall Railway Company v. Limehouse Board of Works" the earlier Act was a special Act, and the later a general Act. There was, therefore, no such inconsistency as would lead the Court to infer that the earlier Act was intended to be repealed; and that that was the test. In the "City and South London Railway Company v. London County Council" the Court held there was a distinct inconsistency, and therefore the two Acts could not stand together; but for that inconsistency the decision would have been the other way. In this case there was no inconsistency between the special Act and the by-laws, and accordingly the water company were subject to the provisions of the latter. With regard to the second point, his Lordship was of opinion that the water-tower was clearly a building within the meaning of the by-laws.

MR. JUSTICE DARLING concurring, the case was sent down to the justices with a direction to convict.

Q.B. Div. (Ridley and }
Darling, JJ.) }

1899.
Oct. 27.

LANE V. RENDALL.*

Weights and Measures—"False or unjust weighing machine"—Paper weighed with article sold—Weights and Measures Act, 1875, sec. 25.

This was a case stated by justices of London. An information was laid against the respondent charging him with having in his possession for use for trade a weighing machine which was false or unjust contrary to section 25 of the Weights and Measures Act, 1875. The respondent, who trades as Melrose, carries on business as a tea merchant at 276, Battersea-park-road. The appellant, who is an inspector of weights and measures for the county of London, visited the respondent's premises and found there a weighing machine which was used for trade. There was a piece of paper underneath the scoop on which the article to be weighed was placed, and between the bottom of the scoop and the cup in which it rests. The weight of the paper was 1½ drachms. Without the paper the machine would have shown the correct weight of the article in the scoop. The machine was, when found by the inspector, being used by the respondent's employees for the purpose of weighing tea to be made up into packets. The piece of paper was put under the scoop by the respondent's manager instead of in the scale, in accordance with his usual practice, to facilitate and quicken the process of weighing the tea, and so caused the customer to assist in defraying the cost of the paper bag or wrapper in which the tea is sold. The respondents make up on Fridays as many as 3,000 ½lb. packets of tea, and it would take them much longer to weigh out the tea for the packets if the tea were in each case first placed in the paper bag in which it was to be sold and then put into the scoop, because any adjustment of the tea to the intended quantity would then have to be made by adding to or taking from the tea in the bag. The piece of paper weighed about half as much as the paper bag in which the tea is sold.

MR. DALDY, for the appellant, contended that the effect of placing the piece of paper beneath the scoop was to render the machine false or unjust within the meaning of section 25. It was just as if a piece of lead or other substance had been fixed to the machine. He cited "Great Western Railway Company v. Baillie" (5 Best and Smith, 928).

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

MR. GEORGE ELLIOTT, for the respondent, argued that it was a long-standing practice in the tea trade, supported by the case of "Harris v. Allwood" (9 The Times L.R., 14), that the tea should be weighed with the paper in which it was contained; and that all that the respondents did was to place a piece of paper beneath the scoop for convenience instead of in each case weighing the tea with the actual paper wrapper which belonged to it. The analogy between the piece of paper and a piece of lead was false, because the piece of paper was in effect part of the thing sold (see "Carr v. Stringer, L.R., 3 Q. B., 433"). If the piece of paper had been in the scoop and not under it, no offence under the section would have been committed. He contended, further, that the proceedings had been taken under the wrong section, and that they ought to have been taken under section 26, which provides for the case of frauds wilfully committed in the use of a weighing machine. He repudiated the idea that there was anything fraudulent in the action of the respondent.

MR. JUSTICE RIDLEY said that the charge not being under section 26 did not involve the respondent in the charge of using the scales fraudulently. It was clear that the respondent did not adopt the practice complained of in order to defraud his customers. It was adopted merely for the purpose of conducting his business, which was a large one, more conveniently. The question here was whether he was guilty of an offence under section 25. It appeared from the case that the scales without the paper showed the true weight of the article in the scoop, but that a piece of paper was put into them of about the same weight as the paper in which it was intended that the tea should be wrapped. When this piece of paper was inserted the scales did not show level and were unjust. In that condition they were used. The important point was to find in what condition the scales were when used. Here as used they were false. His Lordship demurred to Mr. Elliott's contention that there was a custom to weigh the tea with the wrapper. If a man asked for a pound of tea he intended to purchase a pound of tea, not a pound of tea and paper. He could not, therefore, believe that any such custom existed, though it was possible that individual customers might sometimes acquiesce in the practice. Even if the custom did exist, that would not make the scales as used in this case honest scales. The case where the paper was placed on the scoop did not arise, and no decision need, therefore, be given upon it. The case must go back to the justices who ought to have convicted.

MR. JUSTICE DARLING gave judgment to the same effect.

[Solicitors—Blaxland, for the appellant; H. R. Jones, for the respondent.]

Q.B. Div. (Ridley and }
Darling, JJ.) }

1899.
Oct. 30.

THE QUEEN V. THE JUSTICES OF THE WEST RIDING OF YORKSHIRE—EX PARTE THE CORPORATION OF HUDDERSFIELD.*

Justices—Costs—Appeal from a conviction to quarter sessions—Vagrancy Act, 1824, sec. 9—Summary Jurisdiction Act, 1848—Costs, whether payable out of borough or county funds.

In this case cause was shown by the justices of the West Riding against a rule for a *certiorari* to quash an order of the quarter sessions held at Wakefield on April 3 last. Two persons were convicted by the justices of the borough of Huddersfield of an offence under the Vagrancy Act, 1824 (5 Geo. IV., chap. 83). An appeal

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

from the conviction was taken to the quarter sessions, where the conviction was quashed and the treasurer of the borough of Huddersfield was ordered to pay to the defendants and to the police inspector of the borough (the prosecutor) their costs of the appeal. The rule nisi for a *certiorari* to quash the order was obtained by the corporation of Huddersfield upon the ground that, inasmuch as the borough of Huddersfield had no separate Court of quarter sessions, the costs were payable, not by the treasurer of the corporation, but by the treasurer of the riding—that is to say, not out of the borough fund, but out of the county fund. Section 9 of the Vagrancy Act, 1824, empowers the justices at quarter sessions in an appeal from a conviction under the Act to order the costs of the prosecutor to be paid by the “treasurer of the county, riding, division, or place in which the offence shall have been committed.”

Mr. ROSKILL, in showing cause on behalf of the justices against the rule, contended that the order as to costs was good because the place within which the offence was committed was the borough of Huddersfield, and the order as to costs was therefore rightly made against the borough fund. There was no authority as to the meaning of the term “place within which the offence shall have been committed” in section 9 of the Vagrancy Act. In the “Mayor of Reigate v. Hart” (9 B. and S., 129) it was held that the Summary Jurisdiction Act, 1848 (11 and 12 Vict., c. 43), section 31, which directs that penalties or other sums of money are to be paid to the treasurer of the county, riding, division, liberty, city, borough, or place for which such justice or justices (meaning the justices issuing the warrant of distress) shall have acted means a liberty, city, borough, or place which has a Court of quarter sessions. “Reg. v. Dale” (22 L.J., M.C., 44) and “Winn v. Mossman” (L.R., 4 Exch., 292) decided, with reference to a similar provision in the Alehouse Licensing Act, 1828, to the like effect. These decisions did not affect the present question, because here the county or place referred to was the county or place in which the offence was committed, not the county or place for which the convicting justice acted. What was intended was any county or place having a separate commission of the peace.

Mr. T. P. PERKS, who appeared for the defendants, said that if the order was wrong he would ask the Court to amend it in pursuance of section 7 of Bayne’s Act (12 and 13 Vict., c. 45).

Mr. MACMORRAN, Q.C. (Mr. R. G. Glen with him), in support of the rule, contended that it was intended that the costs should be payable out of the same fund to which, in the case of a conviction, the penalty would be payable, that was to say, in the present case, the county fund.

The COURT made the rule absolute quashing the order so far as it related to costs.

Mr. JUSTICE RIDLEY said in the course of his judgment that he did not think that it was intended by the Legislature that one body should receive penalties and that another should pay the costs. There was no magic in the words “for which such justice shall have acted” in section 31 of the Summary Jurisdiction Act, 1848. The difference between those words and the words used in section 9 of the Vagrancy Act was not material. The word “place” should be construed as *ejusdem generis* with the words preceding it, and both on that account and because penalties would be payable to the county fund, he was of opinion that it was intended that the costs should be paid by counties, boroughs, or places with a separate Court of Quarter Sessions. In “Mayor of Reigate v. Hart” no stress was laid on the words “for which such justice shall have acted.” The case was decided on the principle *ejusdem generis*. The liability to pay costs of the

defendant depended not upon the section of the Vagrancy Act, but upon section 27 of the Summary Jurisdiction Act, 1848, so that the order was clearly wrong as to those costs. There was no power to amend the order except in the case of a mistake.

Mr. JUSTICE DARLING said that he was of the same opinion. The power given to the justices at quarter sessions was to order the costs to be paid by their own treasurer. There were no words to show that they were given power to order the costs to be paid by somebody else’s treasurer who was not under their control. The words “in which the offence shall have been committed” were not words from which such an extraordinary result could be deduced. Any other interpretation of the words than that which they now gave them would work great injustice, for such a borough as this would be saddled with the burden of paying the costs without having the corresponding benefit of receiving the penalties.

[Solicitors—Clement Woods, for Trevor Edwards, Wakefield, for the Justices; Dodson and Co., for the defendants; F. C. Lloyd, Huddersfield, for the Corporation of Huddersfield.]

Court of Appeal (Lord Russell of Killowen, C.J., A. L. Smith and Vaughan Williams, L.J.J.) 1899.
Oct. 31.

DAVENTRY DISTRICT COUNCIL v. PARKER.*

Highway—Repair—Liability *ratione tenuræ*—Occupier—Local Government Act, 1894, sec. 25, subs. 2.

This was an appeal from a judgment of a Divisional Court, Mr. Justice Wills and Mr. Justice Bruce. The action was brought by the Daventry District Council to recover £136, the costs incurred by the plaintiffs in repairing two roads passing through a farm of which the defendant was the owner, but not the occupier. The proceedings were taken under section 25, subsection 2, of the Local Government Act, 1894, which provides that where a highway repairable *ratione tenuræ* is not in proper repair the district council may do the necessary repairs and “recover from the person liable to repair the highway the necessary expenses of so doing.” The question was whether “the person liable to repair the highway” was the defendant, who was the owner, or his tenant, who was the occupier. The Divisional Court, following the decision in “Cuckfield Rural District Council v. Goring” ([1898] 1 Q.B., 865, and 14 *The Times* L.R., 362), held that the defendant was not “the person liable to repair the highway,” and gave judgment for him. The plaintiffs appealed.

Mr. Bray, Q.C., and Mr. Morten appeared for the plaintiffs; Mr. Macmorran, Q.C., and Mr. H. W. Rowsell (Mr. J. P. Grain with them) for the defendant. The COURT dismissed the appeal.

The LORD CHIEF JUSTICE said the old practice was, where a road repairable *ratione tenuræ* was allowed to get out of repair, to proceed by indictment against the occupier, who, however, was entitled to be indemnified by the owner. In his opinion the section under which these proceedings were taken was intended to alter procedure only and not to alter the onus of liability. He therefore thought it was impossible to say that the landlord was liable to repair.

LORD JUSTICE A. L. SMITH said he was of the same opinion. He thought the case of “Cuckfield Rural District Council v. Goring” was rightly decided.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

[Solicitors—Kingsford, Dorman, and Co., agents for W. F. and W. Willoughby, Daventry, for the plaintiffs; A. J. Harman, agent for F. H. Bennett, Banbury, for the defendant.]

Court of Appeal (Lord Russell of Killowen, C.J., A. L. Smith and Vaughan Williams, L.JJ.) } 1899.
Oct. 31.

STYLES (SURVEYOR OF TAXES) V. THE TREASURER OF THE MIDDLE TEMPLE.*

Revenue—Inhabited House Duty—House Tax Act, 1851.

Decision of Divisional Court (15 *The Times* L.R., 120) affirmed.

This was an appeal from the judgment of a Divisional Court, Mr. Justice Wills and Mr. Justice Bruce, in which it held that the hall of the Middle Temple was assessable in respect of inhabited house duty. The case is reported in 15 *The Times* L.R., 120.

Mr. Balfour Browne, Q.C., and Mr. J. E. Banks appeared for the Middle Temple in support of the appeal; the Solicitor-General and Mr. Danckwerts for the Crown.

The COURT, without calling upon counsel for the Crown, dismissed the appeal.

Chan. Div. } 1899.
(Byrne, J.) } Oct. 31.

IN RE LORD EVERSLEY—MILDMAY V. MILDMAY.†

Will—Condition—Forfeiture—Name and arms clause—Use of surname.

This was an application for the opinion of the Court, which raised an interesting question on the construction of a name and arms clause in the will of the late Charles Viscount Eversley, who died in December, 1888. The testator devised the Heckfield Place Estate, in the counties of Southampton, Wilts, and Berks, to the use of his daughter the Hon. Emma Laura Shaw Lefevre and her assigns during her life, and from and after her decease to the use of his daughter the Hon. Helena Lady St. John Mildmay and her assigns during her life, and from and after her decease to the use of his grandson, Gerald Anthony St. John Mildmay, the second son of his said daughter Helena and his assigns during his life, with remainder to the use of first and other sons of the said Gerald Anthony St. John Mildmay as tenants in tail male, with divers remainders over. The testator then declared that any person who should become entitled as tenant for life to the actual possession, or to the receipt of the rents and profits, of the hereditaments and premises thereinbefore devised, and who should not then use and bear the surname and arms of Shaw Lefevre, should, within one year after he should so become entitled, take upon himself and use upon all occasions the surname of "Shaw Lefevre" alone or together with his own family surname and quarter the arms of "Shaw Lefevre" with his own family arms, and should, within the said one year, take such steps as should be requisite to authorize him to take, use, and bear the said surname and arms of "Shaw Lefevre." And that, in case any such person should refuse or neglect within the said one year to take, use, and bear such surname and arms, then the limitations thereinbefore contained to the use of such person should absolutely determine. Helena Lady St. John Mildmay

died in September, 1897, and on the death of the Hon. Emma Laura Shaw Lefevre in April, 1899, Mr. Gerald Anthony St. John Mildmay became tenant for life in possession of the settled estate, and he now asked the opinion of the Court whether, according to the true construction of the will of the testator Viscount Eversley, the taking by him within one year from April, 1899, and using the surname of Shaw Lefevre together with and immediately before his own family surname of St. John Mildmay, as "Shaw Lefevre St. John Mildmay," would be a sufficient compliance with the testator's directions to prevent the limitations over from taking effect.

Mr. VAUGHAN HAWKINS, for the applicant, contended that the clause in question gave the tenant for life an option to use the name of Shaw Lefevre either before or after his own family name; that there appeared to be no direct authority upon this point, but that the result of his research was that, according to the practice of conveyancers, if it was intended to provide that a particular name should be used after the incoming tenant for life's own name, express directions should be given to that effect. This had not been done by the present clause.

Mr. Beaumont, for the infant tenant in tail, and Mr. Rowden, Q.C., and Mr. Goddard, for the trustees of the will, raised no objection, being content to leave the matter to the Court.

MR. JUSTICE BYRNE, after a careful examination of the text books and precedents to which he had been referred, said that in his opinion the present clause was an illustration of the option sometimes given by testators as stated by the learned authors to whom he had been referred, and that the applicant by taking the name of Shaw Lefevre before that of St. John Mildmay would be sufficiently complying with the testator's directions. Clauses of this kind, being penal clauses, must be construed strictly, though fairly; but in his Lordship's opinion the present clause did not impose an obligation on the applicant to take and use the name of Shaw Lefevre after his own name. The case of "D'Eyncourt v. Gregory" (1 Ch. Div., 441), where it had been held that the use of the testator's surname before the name of the devisee was not a compliance with the bequest, was distinguishable from the present case on the ground that by the wording of that clause no option was given to the devisee. As a matter of construction his Lordship therefore made a declaration that the taking of the name of Shaw Lefevre before the name of St. John Mildmay was a sufficient compliance with the terms of this devise.

[Solicitors—Warrens; Peacock and Goddard, for Collins, Reading.]

Court of Appeal (Lord Russell of Killowen, C.J., A. L. Smith and Vaughan Williams, L.JJ.) } 1899.
Nov. 1.

SHAMBOCK STEAMSHIP COMPANY (LIMITED) V. STOREY AND CO.*

Ship—Charter-party—Demurrage—Loading Time—"on terms of usual colliery guarantee"—Port of Grimsby.

Decision of Bigham J. (4 Com. Cas. 80) affirmed.

This was an appeal from the judgment of Mr. Justice Bigham at the trial of the action without a jury, reported in 4 Commercial Cases, 80. The action was brought by shipowners against charterers for demurrage. The charter-party, which was dated July 13, 1898, provided that the ship should proceed to Grimsby and

*Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

†Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

*Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

there load, "in the usual manner according to the custom of the place," a cargo of coals for Caen, "the loading time to be 36 running hours, on terms of usual colliery guarantee." The charter-party contained the following exceptions among others:—"Comotions by keelmen, pitmen, or any hands striking work, breakage of machinery, or frost, snow, or floods, or other accidents or causes beyond the freighters' control which may prevent or delay the loading of the steamer." The ship was in dock at Grimsby, and ready to load, on July 19, and notice thereof was given to the charterers on the same day. By reason of a coal strike in South Wales there was at that time an accumulation of shipping at Grimsby, and the ship was thereby prevented from getting a berth under a coal tip until July 29, at 5 p.m., after which date the loading proceeded without further delay, and was completed at 8 p.m. on July 30. The plaintiffs' case was that, according to the usual custom of the port of Grimsby, the loading time began at 6 a.m. upon the day after notice, and they claimed demurrage from 6 p.m. on July 21 till 8 p.m. on July 30. The learned Judge at the trial held that the charterers were not protected from liability for demurrage by the exceptions in the charter-party, but that, by the provisions of "the usual colliery guarantee" in use at Grimsby, the time for loading did not begin to run until the ship was under the tip, and that the charterers were therefore not liable for demurrage. The plaintiffs appealed.

Mr. Joseph Walton, Q.C., and Mr. Montague Lush appeared for the plaintiffs; Mr. Carver, Q.C., and Mr. Leslie Scott for the defendants.

The COURT dismissed the appeal.

The LORD CHIEF JUSTICE said that this was an action for demurrage, and the question was from what point of time the hours allowed for loading were to run. The charter-party was made at Newcastle, and it provided that the ship should proceed to Grimsby and load a cargo of coals in the usual manner, according to the custom of the place, from such colliery or collieries as the charterers should direct. It contained a number of exceptions, and then came this clause:—"The loading time to be 36 running hours on terms of usual colliery guarantee." That clause recognized that there was, in fact, a usual colliery guarantee. What was meant by that? It must mean a usual colliery guarantee in use at the place where the contract was to be performed—i.e., at the port of Grimsby. A thing was not the less usual because there might be exceptions to its use, nor because some persons might object to its use. It was usual, if it was in general use. The evidence showed that there were three forms of colliery guarantee used by various large firms of merchants and shippers at Grimsby, and they all agreed in this respect, that they all provided that the time for loading was not to begin to run until the vessel was under the tip or spout. Whichever, therefore, of the three forms was in most frequent use, it seemed to him that it could be rightly said that there was a usual colliery guarantee in use at Grimsby, and that it fixed the time for the commencement of loading at the time when the vessel came under the tip. Here the vessel came into the loading dock on July 19, but she did not come under the tip till July 29. The latter date, therefore, was the date from which the time for loading was to be calculated. If the charter-party was so construed, it was clear that the charterers were under no liability, and on that ground, in his opinion, the appeal should be dismissed.

The LORDS JUSTICES concurred.

[Solicitors—Botterell and Roche, agents for Vaughan and Roche, Cardiff, for the plaintiffs; Rowcliffes, Rawle, and Co., agents for Dobell and Bagshaw, Liverpool, for the defendants.]

Court of Appeal (Lindley, M.R., Sir F. Jeune, P., and Romer, L.J.) } 1899.
Nov. 1.

THOMAS V. SUTTERS.*

Local Government—By-law—Validity—Prevention of street betting—Municipal Corporations Act, 1882, sec. 23.

By-law held valid.

This appeal against a decision of Mr. Justice Kekewich's raised the question whether one of the by-laws of the London County Council is invalid. The by-law in question came into force on October 1, 1898, and it provides that "no person shall frequent and use any street or other public place, on behalf either of himself or of any other person, for the purpose of bookmaking or betting, or wagering, or agreeing to bet or wager, with any person, or paying, or receiving, or settling bets." The validity of this by-law has been upheld by a divisional Court in "*White v. Morley*" ([1899] 2 Q.B., 34; *The Times* L.R., Vol. XV. p. 360), and the present appeal was really from that decision, which Mr. Justice Kekewich simply followed. The point was raised in the present case in a peculiar way. The plaintiff claimed the dissolution of a partnership between himself and the defendant, and the taking of the usual accounts. The defence was that the principal business of the partnership, and for the carrying on of which it was formed, consisted of betting transactions in streets and public places within the County of London, and that in the course of that business both the plaintiff and the defendant necessarily frequented and used the said streets and public places for the purpose of betting and of paying and receiving of payments of bets. In these circumstances the defendant submitted that by reason of the by-law the partnership was illegal, and that the plaintiff was not entitled to maintain the action. In answer to this the plaintiff contended that the by-law was invalid. The learned Judge, following "*White v. Morley*," held that the by-law was valid. The plaintiff appealed. Section 23 of the Municipal Corporations Act, 1882, which, by section 16 of the Local Government Act, 1888, is made applicable to county councils, provides that "the council (of a borough) may from time to time make such by-laws as to them seem meet for the good rule and government of the borough." The by-law in question purports to be made under these sections.

Mr. G. H. STUTFIELD (with whom was Mr. Joseph Walton, Q.C.), for the plaintiff, argued that the by-law was invalid. It was too wide in its terms, and might extend to such a case as that of a man going several times in a day to a particular street to make a bet with a bookmaker. The by-law was not limited to cases of obstruction or nuisance. The enforcement of morality did not come within the power given to a local authority to make by-laws for "good rule and government." Moreover, in section 23 of the Metropolitan Streets Act, 1867 (30 and 31 Vict., c. 124), the Legislature had dealt with obstruction to a street by persons assembling for betting purposes, and had provided that any three or more persons assembled together in any part of a street within the metropolis for the purpose of betting should be deemed to be obstructing the street, and liable to a penalty not exceeding £5. The by-law was repugnant to the Act.

Mr. A. T. Lawrence, Q.C., and Mr. H. S. Cantley, for the defendant, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the case did not present any difficulty. He agreed that in considering the validity of any by-law regard must be had to the power given to make it. The

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

power in this case depended upon the construction of section 23 of the Act of 1882, which enabled the Council to make by-laws "for the good rule and government" of the county. His Lordship could not see any reason why the Court should limit that language and not give it full effect. The important words in the by-law were "for the purpose of" book-making or betting, &c. It would not prevent walking up and down a street and paying a bet. The "frequenting" must be "for the purpose of" betting. Cases before "*White v. Morley*," as well as that case, were in favour of the by-law. Why should the Court overrule them? It was said that the Act of 1867 regulated betting in a street, and that, therefore, no further by-law could be made about it, and reliance was placed on some words used by his Lordship (the Master of the Rolls) in "*Strickland v. Hayes*" ([1896], 1 Q.B., 290). There was a good deal in that argument, and, though the by-law in that case was hopelessly bad, he had to consider whether it could not be amended by striking out some words, and he thought that it could not, because it was not limited to causing annoyance. In the Act of 1867 the Legislature were dealing with the regulation of street traffic; that was the sole object of the Act. His Lordship declined to stretch what was said in "*Strickland v. Hayes*" and to hold that, because a provision was made by the Act to prevent obstruction of the streets, there was no power to regulate betting for another purpose. His Lordship was unable to see why this by-law could not be reasonably construed as made for the "good rule and government" of the locality. The appeal must be dismissed.

The PRESIDENT of the PROBATE DIVISION agreed. Objections to the validity of the by-law, such as had been raised in other cases, had been ably and forcibly put forward. It was said that the by-law was bad because it dealt rather with morals than with the "good rule and government" of the locality. His Lordship could not take such a limited view of the powers of a municipal body. It was not like the case of a private corporation. He should hesitate very long before saying that a municipality had no power to deal with the respectability and good order of their streets. It was said that Parliament had already dealt with the matter. He agreed that a by-law could not set itself up against Parliament. But here the Act of 1867 only dealt with the obstruction of streets; and he could see no objection to a by-law going rather further than an Act and making somewhat more stringent provisions in the same spirit. Mr. Stutfield argued that the by-law was too wide, because it was not limited to the case of nuisance or annoyance. That was the argument in "*Kruse v. Johnson*" ([1898], 2 Q.B., 91). His Lordship desired to repeat what he then said. In the present case he thought it was sufficient to say that, when persons assembled in a street for the purpose of betting, it was almost certain that nuisance and annoyance would follow, and on that ground the public authority would be justified in prohibiting it. In his Lordship's opinion the previous decisions were right, and Mr. Justice Kekewich was right in following them.

LORD JUSTICE ROMER concurred. In his opinion under section 23 a public authority had power to make a by-law prohibiting the use of their streets, not for an ordinary purpose of passing along them, but for an object which, though not in itself illegal, tended against the morality of the locality and the welfare of its inhabitants. For this reason he thought that the London County Council had power to make such a by-law with regard to betting, and that it was not too wide in its terms nor repugnant to the Act of 1867.

[Solicitors—Lewis and Lewis; C. B. Peachey.]

Chan Div. } 1899.
(Wright, J.) } Nov. 1.
IN RE NATIONAL STORES (LIMITED).*

Company—Winding up—Examination of promoters—Time within which application must be made to discharge order for examination.

This case raised some points on section 8 of the Companies (Winding-Up) Act, 1890, which deals with the subject of public examination of promoters and others. On May 8, 1899, an order was made, on the *ex parte* application and report of the Official Receiver, for the public examination of Mr. F. G. Willett, Mr. J. W. Taylor, and others. Notice of the order was given to Mr. Willett on May 17, and some of the persons named in the order were examined on June 13. Mr. Willett's counsel attended and cross-examined. On July 26 Mr. Willett took out a summons to discharge the order for the public examination of himself. The application was adjourned to the Judge, when the preliminary objections were taken—(a) that the application ought to have been made within 14 days from the date, at any rate, of notice of the order in accordance with the practice of the Chancery Division as to moving to discharge the order of a Judge at Chambers; (b) that by taking part in the examination Mr. Willett had precluded himself from the right to have the order discharged.

Mr. INGLE JOYCE, for the Official Receiver, stated the preliminary objections above named.

Mr. M. MUIR MACKENZIE, for Mr. Willett, argued that there was no time fixed, and that the Judge had in each case a discretion as to whether the application should be entered. The learned counsel also referred to evidence filed to show that the report of the Official Receiver was incorrect in stating that Mr. Willett was one of the persons engaged in the promotion or formation of the company.

MR. JUSTICE WRIGHT said that the application was too late. The applicant did not take out his summons till two months after the service of the order on him. He was, moreover, represented at the examination by learned counsel, and it was impossible to say that his attention was not pointedly drawn to the subject-matter of the examination. His Lordship would not lay down within what time such an application must be made, although there was a consensus of authority in the textbooks that the time for moving to discharge was formerly 21 and now 14 days. At any rate, the applicant ought to come within a reasonable time. On the face of the Official Receiver's report there was sufficient to justify the order. It was sought to show on affidavit that the applicant did not take part in the promotion of the company, and that such evidence ought to be admitted; but such an objection was not necessarily an objection to the jurisdiction, and the admission of the evidence would be contrary to what was laid down in "*In re New Travellers' Chambers*" (L.R., [1895], 1 Ch., 395). Whether the applicant did take part in the promotion was one of the questions which it was the object of the examination to answer. That seemed to be in accordance with the view taken in "*Buckley on Companies*" (7th ed., p. 684)—viz., that "to give the Court jurisdiction . . . it is essential . . . (d) that that individual is, in the words of subsection (3) one who 'has taken part in the promotion or formation of the company'—i.e., who according to the findings of the report is 'reported to have taken' such part." The application must be dismissed with costs.

A similar application by Mr. Taylor, for whom Mr. John O'Connor appeared, was also dismissed with costs. [Solicitors—S. A. Cluck and Co.; Tottenham and Co.; The Solicitor to the Board of Trade.]

*Reported by F. EVANS, Esq., Barrister-at-Law.

Q.B. Div. (Ridley and }
Darling, JJ.) }

1899.
Nov. 1.

COBURG HOTEL V. LONDON COUNTY COUNCIL.*

Metropolis—Building—Line of buildings—
Consent of County Council—Canopy or portico
in front of hotel—London Building Act, 1894,
sec. 22.

This was an appeal by case stated from the order of a metropolitan police magistrate ordering the demolition of a canopy or portico erected by the appellants in front of the Coburg Hotel in Carlos-place, Grosvenor-square, the portico not having been erected by them with the sanction of the London County Council in accordance with section 22 of Part III. of the London Building Act of 1894. It appeared that the appellants obtained permission from the County Council to erect a porch in front of the hotel in July, 1895. In June, 1898, permission was asked to erect a portico or shelter in front of the porch. The plans showed that the portico was to be of glass and iron. The total projection from the porch was to be 6ft., and the height 13ft. 3in. from the pavement. The permission was refused upon the ground that there were no similar structures at the adjacent premises, and on the ground that it was deemed inexpedient to permit the present frontage in Carlos-place to be disturbed, and that it was considered undesirable to agree to the covering over of a portion of the public way. Notwithstanding this the portico in question was erected. It was constructed of iron and glass, 11ft. long and 4ft. 3in. wide, and projected from the porch 4ft. 3in. over the footway. It was supported entirely by the porch at a height of about 13ft. above the footway. The portico projected beyond the general line of buildings in Carlos-place as certified by the superintending architect of metropolitan buildings. The magistrate found as a fact that the portico was dovetailed to and had become a part of the porch, and held that it was a structure within the meaning of section 22 of the London Building Act. Section 22 provides that "no building or structure shall, without the consent in writing of the Council, be erected beyond the general line of building in any street," &c., to which the section applied, "in which the same is situated."

Mr. ERNEST POLLOCK, for the appellants, contended that the portico was not a building or structure within the meaning of section 22, and that the proceedings, if any, ought to have been taken under section 73, which deals with various kinds of projections.

Mr. AVOBY, for the County Council, contended that the portico, being fixed to and part of the porch, was a building. It was also a structure. He cited "Ellis v. Plumstead Board of Works" (68 L.T. 291), and "Venner v. M'Donell" (61 J.P., 181).

Mr. JUSTICE RIDLEY, in dismissing the appeal, said that he was of opinion that the portico was both a building within the section and a structure. It was a building because it was part of the Coburg Hotel. It was true, as pointed out by Mr. Pollock, that projections were separately dealt with in section 73, and with regard to these the vestry were to be consulted, but he was of opinion that in the case of such a projection as this both sections would have to be complied with.

Mr. JUSTICE DARLING said that the magistrate was right in holding that the portico was a building, because he found as a fact that it was dovetailed to the porch. The portico projected beyond the general building line. Therefore the building of which it was a part projected. It was unnecessary to decide whether the portico was a structure. He thought that the County Council had

exercised their power unreasonably, as the reason they themselves gave for refusing permission to erect the portico showed. It would be interesting to know whether they had given permission to erect porticos to all the other hotels which he had noticed were provided with such additions. He could not see how it could be more undesirable to have such a shelter or portico in Carlos-place than in, say, Pall-mall.

[Solicitors—Peake, Bird, Collins, and Co., for the appellant; Blaxland, for the respondent.]

Court of Appeal (Lord Russell of Kil-
lowen, C.J., A. L. Smith and }
Vaughan Williams, L.JJ.) }

1899.
Nov. 2.

THOMAS V. THE CORPORATION OF DEVONPORT.*

Municipal Corporation—Accounts—Auditor—
Duties—Remuneration—Accounts of urban
sanitary authority.

This was an appeal from the judgment of Mr. Justice Phillimore at the trial of the action without a jury. The action was brought by the plaintiff, who was the elective auditor of the Corporation of Devonport, to recover £405 as remuneration for services rendered by him in auditing the accounts of the corporation, and also in auditing the accounts of the urban sanitary authority, the corporation being, under the Public Health Act of 1876, the urban sanitary authority for the borough. The corporation paid into Court the sum of £34 as being sufficient to satisfy the plaintiff's claim. Mr. Justice Phillimore held that the plaintiff was not entitled to any remuneration for his services as elective auditor under the Municipal Corporations Act, 1882. With regard to services rendered by the plaintiff in auditing the accounts of the urban sanitary authority under the Public Health Act, the learned Judge was of opinion that he was entitled to a fee of not less than two guineas for every day during which he was properly employed, and he thought that a reasonable time for the work was about eight days a year. He accordingly held that the sum paid into Court was sufficient, and he gave judgment for the defendants. The plaintiff appealed.

Mr. Macaskie appeared for the plaintiff; Mr. Duke, Q.C., and Mr. J. A. Hawke for the defendants.

The COURT dismissed the appeal.

The LORD CHIEF JUSTICE said that, with regard to the plaintiff's claim for auditing the accounts of the municipal corporation as such, there was no ground whatever for suggesting that he was entitled to any remuneration. Parliament had provided for the constitution of a borough fund, and had laid down what appropriations might be made out of it, but no provision was made for any remuneration to be paid to an elective auditor. With regard to the claim for auditing the accounts of the urban sanitary authority, he agreed with Mr. Justice Phillimore in thinking that the plaintiff was entitled to remuneration at a rate of not less than two guineas a day for the time properly occupied over the work. He did not agree with the view which the learned Judge seemed to have taken as to the duty of an auditor of the accounts of an urban sanitary authority. He could not assent to the proposition that the sole duty of an auditor was to take the accounts and see that there were vouchers in respect of each payment. That seemed to him to be an imperfect and incomplete view of an auditor's duty. He thought an auditor was justified in going further than that, and in considering whether the payments were authorized payments, or whether they were illegal

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.
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*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

or improper, and, if he discovered any illegality, it was his duty to report it to the burgesses. But, even taking that wider view of the duty of an auditor, he saw no reason for thinking that eight days a year was not sufficient time for performing the work. The appeal would therefore be dismissed.

The LORDS JUSTICES concurred.

Court of Appeal (Lord Russell of Killowen, C.J., A. L. Smith and Vaughan Williams, L.J.J.) } 1899.
Nov. 2.

ROWELL V. ROWELL.*

Married Woman—Deed of separation—Question whether deed put an end to by subsequent cohabitation.

This was an appeal from the judgment of Mr. Justice Grantham at the trial of the action without a jury, reported in *The Times* of January 12. The action was brought by Mrs. Rowell, who was the keeper of a boarding-house in Montague-place, to recover from the defendant, her husband, arrears of money which she alleged to be due to her under a separation deed. Owing to domestic differences the parties separated in March, 1896, and the deed of separation which was then executed contained an undertaking by the defendant to pay the plaintiff a weekly sum of £1 10s. so long as they should live separate, and also a sum of 10s. a week for the support of their child, a boy of the age of eight, while he was under 21 and while he was under the tutelage of his mother. The allowance having fallen into arrear, the plaintiff brought this action. The defence was that the deed of separation had been put an end to by the subsequent cohabitation of the parties. It appeared that the parties did not reside under the same roof, the wife continuing to keep her boarding-house, and the husband living in lodgings of his own. But on several occasions in 1897 they had intercourse together. They also often went to theatres and places of amusement together, and the husband frequently had tea at the wife's house, when they spent the evening together. Mr. Justice Grantham held that the evidence did not show that the parties lived together as husband and wife, and he was therefore of opinion that the deed had not been put an end to, and he gave judgment for the plaintiff. The defendant appealed.

Mr. McCall, Q.C., and Mr. Priestley appeared for the defendant; Mr. Witt, Q.C., and Mr. Sinclair for the plaintiff.

The COURT dismissed the appeal.

The LORD CHIEF JUSTICE said the case was not free from difficulty. After going carefully through the provisions of the deed of separation, he pointed out that it was clear that the payment of 30s. a week was to come to an end if the parties ceased to live separate and apart, and that the payment of 10s. a week was to come to an end if the child ceased to live under the tutelage of his mother. The evidence showed that after the deed of separation the parties on four occasions had intercourse together; and in addition to that they met frequently in a more or less friendly way. But, having regard to the circumstances under which the intercourse took place, he thought that they continued to live apart in the real sense of the word, and it was important to notice that the husband continued to make payments after the acts of intercourse. In his judgment, if the Court arrived at the conclusion that a real reconciliation and coming together had taken place, the result would be that the whole deed would have come to an end. But the facts did not seem to warrant that conclusion. If the Court gave judgment for the defendant, the

defendant would not be under any liability at all with regard to the support of the boy, except the common law liability of a father to support his child; for, if the parties had really come together again, the boy would be no longer under the tutelage of his mother. There was no authority which said that casual intermittent acts of intercourse were enough to put an end to a deed of separation, though such acts, if unexplained, were strong evidence of a reconciliation. On the whole of the circumstances, though not without doubt, he thought that the defendant had not discharged the onus which lay upon him of showing that the parties had ceased to live separate.

LORD JUSTICE A. L. SMITH and LORD JUSTICE VAUGHAN WILLIAMS delivered judgments to the same effect.

[Solicitors—Nunn and Popham, for the plaintiff; F. C. T. Mortimer, for the defendant.]

Cham. Div. } 1899.
(Kekewich, J.) } Nov. 2.

THE ATTORNEY-GENERAL V. THE HANWELL URBAN DISTRICT COUNCIL.*

Local Government—Urban District Council—Land acquired for special purpose—Sale of surplus land.

When land has been acquired by an urban authority for a particular purpose under the powers conferred by the Public Health Act, 1875, any land not used for that purpose must be sold, and the Local Government Board have no jurisdiction to authorize its use for another purpose.

This was an action by the Attorney-General at the relation of the Earl of Jersey for an injunction to restrain the defendants, the Hanwell Urban District Council, from erecting an isolation hospital for the reception of patients suffering from infectious diseases on certain lands in the parish of Hanwell, Middlesex, which had been acquired by the rural sanitary authority of the Brentford Union, the defendants' predecessors in title, from the plaintiff, the Earl of Jersey, in 1883 for the purpose of disposing of the sewage of the parish; and from using the lands, or any part thereof, as the site of any such hospital. The plaintiffs claimed a further injunction to restrain the defendants from using the lands as a site for any such hospital so as to be a nuisance to the earl or his tenants, or a nuisance or injury to his adjoining property. The earl is the owner of the Osterley estate in Hanwell, consisting of arable and pasture land, and also of building land. In 1883 the Brentford Union, as the then sanitary authority of the district, purchased from the earl a piece of land of about 12 acres forming part of the Park farm included in the Osterley estate for the express purpose of the disposal of the sewage of the parish of Hanwell. The purchase for that purpose was sanctioned by the Local Government Board on the petition of the sanitary authority, and after an inquiry as to its propriety. The greater part of the land so acquired was accordingly used exclusively for the sewage purposes contemplated; but in 1896 the defendants, as the successors of the Brentford sanitary authority, proposed utilizing about two acres of the land they had purchased, not required for sewage purposes, for the erection of a hospital for infectious diseases other than smallpox. A public inquiry was then held, on December 17, 1896, by a Local Government Board inspector, and the result was that by an order

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

*Reported by G. I. FOSTER COOKS, Esq., Barrister-at-Law.

under the seal of the Board, and dated April 3, 1897, the Board directed that the two acres should be retained by the defendants as a site for the erection of a hospital for infectious diseases other than smallpox. The plaintiffs thereupon brought the present action, contending that the defendants had no power, either statutory or otherwise, to use the land for any other purpose than that for which it had been originally acquired. They also stated that the two acres would be required for a proposed extension of the existing sewage works; also that the erection of the intended hospital would inevitably be a great nuisance to the neighbourhood and, in particular, to the earl himself as owner of the adjoining property, and would completely destroy the value of that property for building purposes. The defendants relied on the order they had obtained from the Local Government Board, and contended that they were entitled to use the two acres for an isolation hospital, although that was not the purpose for which they and the rest of the 12 acres were originally required. They also denied the plaintiffs' allegations of nuisance or injury.

The action now came on for trial. Mr. Renshaw, Q.C., and Mr. Howard Wright appeared for the plaintiffs; and Mr. Warrington, Q.C., and Mr. Stallard for the defendants.

MR. JUSTICE KEENE said the principle from which one approached a case of this kind was that no public body whatever, whether a local authority or a railway company, could, after having properly acquired land for a particular purpose, apply that land for any other purpose. Public bodies were authorized to buy land for particular purposes. So far as the land was not required for the particular purpose, it was land which they were not to hold. Whether they held it under the Public Health Act, 1875, with a direction to sell, was immaterial. The land was not absolutely theirs; they had not got the fee-simple free from all charges, encumbrances, and limitations; they only held it for certain purposes. The question, therefore, in the present case resolved itself into this, Could this public body, having acquired this land for sewage purposes, be said to hold it for the purpose now contemplated? If they had not the power, if it was not within their ownership, then they were using their property for purposes which were unauthorized, and they would be restrained. The question put by the defendants really depended on section 175 of the Public Health Act, 1875. They had acquired the land with perfect propriety; they had acquired it for sewage purposes. The section said:—"Any local authority may for the purposes and subject to the provisions of this Act purchase or take on lease, sell or exchange any lands, whether within or without their district. . . . Any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold. . . ." To make that section apply it must be ascertained that the land was not required for the purpose for which it had been acquired. Unless that was done the local authority did not bring themselves within the section at all. His Lordship was not now concerned with any question as to whether this land ought to be sold or not; but he was told that there was a fetter on the sale, a limit introduced, no doubt, by the Legislature to avoid questions under the Lands Clauses Act. If the Local Government Board directed that the land not required for the purposes for which it had been acquired should not be sold, it would not be sold. But then it was argued that the meaning of the section was that the Local Government Board might not merely direct a sale, but might direct the local authority to apply the land to other purposes. That would be using words which

were certainly not within the statute. All that the Act said was that the Local Government Board might direct that the land should not be sold, leaving other questions open. He saw no reason for concluding that, because the Board had discretion to say the land should not be sold, therefore it was empowered to say that the land should be applied to purposes other than those for which it had been acquired. On that construction of the Act he certainly agreed with the counsel for the plaintiffs. It was strange that though the order of the Local Government Board, dated April 3, 1897, purported to be made under section 175, the draftsman of the order did not follow the words of the section. In his Lordship's construction of the Act there was no jurisdiction whatever in the Local Government Board to make such an order as this. It would be giving the local authority an entirely new power, a power entirely alien to the purposes for which the land had been acquired and totally unauthorized. Then it was said the case was concluded by section 295, which enacted that "all orders made by the Local Government Board in pursuance of this Act shall be binding and conclusive in respect of the matters to which they refer." That would not prevent the Court from considering a question of jurisdiction. If it could be properly made, then, no doubt, an order made under section 175 would be conclusive. The authorities, his Lordship did not think, required to be examined in detail. The only one he thought it necessary to refer to was "Attorney-General v. Teddington Urban Council" ([1898] 1 Ch., 66). There Mr. Justice Romer held that the local authority must not use land for purposes inconsistent with the purposes for which it had been acquired. That case also showed that the Court would be liberal in considering the purposes for which the land had been acquired. But the learned Judge was quite clear that the local authority was not entitled to use land for purposes which, though not entirely alien to the purposes for which it had been acquired, would yet permanently interfere with those purposes. The result was that the defendants, the local authority, were without any order on which they could properly rest, and were using this land for purposes for which it was not originally acquired—this they had no authority to do. The plaintiffs were therefore entitled to an injunction to restrain the defendants from using this land as a site for a hospital for infectious diseases other than smallpox. The claim for an injunction on the ground of nuisance went too far, but that did not disentitle the plaintiffs to the whole costs of the action. It was sufficient to grant an injunction to restrain the defendants from what his Lordship considered to be an excess of their statutory powers.

[Solicitors—Freshfields and Williams; Warren & James.]

Q.B. Div. (Ridley and
Darling, JJ.) } 1899.
Nov. 2.

SHARMAN V. MASON.*

Bankruptcy—Order and disposition—Goods lent
for use in business.

This was an appeal from the Mayor's Court. The action was brought to recover possession of 32 stands used in the business of a mantle dealer to show off the dresses to advantage, or damages for their conversion. These stands were the property of the plaintiff, who had lent them to his brother to enable him to set up in business as a mantle maker at 57, Newington-causeway. The brother afterwards, in or about January, 1896, sold his business to a Mrs. Wright, a mantle-

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

dealer, who traded under the name of Roberts and Co., he himself becoming manager of the business so sold. In January, 1898, Mrs. Wright was adjudicated a bankrupt, and the defendant, the trustee in bankruptcy, took away the stands and removed them to 113, Newington-causeway. The plaintiff then demanded the goods, and a correspondence ensued between the solicitors to the parties, the defendant offering to return certain stands which the plaintiff denied were the stands removed. This action was then brought to recover the stands removed or damages for their wrongful detention. The plaintiff, in his evidence before the Recorder in the Mayor's Court, said that he knew Mrs. Wright was using these stands in her business as Roberts and Co. The defendant pleaded section 44 of the Bankruptcy Act, 1883, and that the stands were in the order and disposition of the bankrupt, so that she was the reputed owner of them, and that, therefore, the defendant, as trustee, was justified in taking them. The learned Recorder left the question to the jury whether these stands were "in the possession, order, and disposition of the bankrupt in her trade or business by the consent and permission of the true owner under such circumstances that she was the reputed owner thereof." The jury answered in the affirmative, and the learned Judge accordingly gave judgment for the defendant. The plaintiff appealed.

Mr. Jelf, Q.C., and Mr. Crampton appeared for the appellant; Mr. Danckwerts for the respondent.

MR. JUSTICE RIDLEY, in the course of reading his written judgment, said that the question for decision was whether these stands used for the exhibition of goods for sale, but not being a part of the goods for sale, were goods in the order and disposition of the bankrupt within the meaning of section 44, subsection 3 of the Bankruptcy Act, 1883. The words of that section had more than once been the subject of judicial construction. See "*In re Jenkinson*" (15 Q.B.D., 441; 54 L.J., Q.B., 601); "*Colonial Bank v. Whinney*" (30 Ch.D., 261; 55 L.J., Ch., 585; 11 Ap. Cas., 426; 56 L.J., Ch., 43). In the latter case the decision was that, as the custom of the firm was to buy shares out of the partnership money, and use them for the partnership business, and as those shares were intended to be so used, they were within the order and disposition of the bankrupt within the meaning of the statute. The stands, though in a different way, were quite as much connected with the trade or business as were the shares in the "*Colonial Bank*" case. There was evidence upon which the jury might properly find as they did, and the appeal must be dismissed.

MR. JUSTICE DARLING concurred. Having regard to the language of Judges of late years, he could not think that such phrases as "The goods must be such as the party suffers the trader to sell as his own" could now be accepted, although they were quoted with apparent approval by Parke, B., in "*Whitfield v. Brand*" (16 M. and W., 286). It was there pointed out by Parke, B., that the words now stand as "possession, order, or disposition," instead of "possession, order, and disposition." He (Mr. Justice Darling) thought, therefore, that it was enough if these goods were in the possession of the bankrupt in his trade or business, although they were not in his disposition therein in the sense that they were such things as he sold in his trade. The words "order or disposition" seemed to him necessary to enlarge the word "possession" so as to include something beyond visible occupation by a reputed owner. There was extreme force in the following passage from the judgment of Cotton, L. J., in "*Colonial Bank v. Whinney*":—"What meaning are we to give to these words? Of course where the goods are in the nature of stock in trade there is no difficulty, goods apparently forming part of the stock in

trade of the firm must be in the order or disposition of the bankrupt in his trade or business. But, in my opinion, the words go further than that. I think the true construction is that the goods must be in his order or disposition for the purposes of or purposes connected with his trade or business." It was plain that the words used by the Lord Justice would cover goods much less directly connected with the bankrupt's trade than were those in question. Further on in the same case, Lindley, L. J., construed these words as meaning "not merely visibly employed in his trade or business, but acquired for the purposes of the business and used for those purposes." The decision of the Court of Appeal in which these expressions were used was reversed by the House of Lords, but the reasoning of the Lords Justices upon those points remained unaffected by that decision.

Appeal dismissed.

[Solicitors—S. S. Seal, for the appellant; C. Butcher, for the respondent.]

Court of Appeal (Lord Russell of Killowen, C.J.; A. L. Smith and Vaughan Williams, L.JJ.) 1899.
Nov. 3.

CORNFORD V. THE CARLTON BANK (LIMITED).*

Malicious Prosecution—Corporation—Malice—Evidence.

Decision of Darling, J. (15 *The Times* L.R., 156), affirmed, but the damages reduced.

This was an appeal by the defendants from the judgment of Mr. Justice Darling in an action for malicious prosecution, reported in 15 *The Times* L.R., 156; [1899] 1 Q.B., 392. In this case Mr. Justice Darling held that an action for malicious prosecution would lie against a corporation, and, as will be seen, counsel for the appellants declined to argue this point in the Court of Appeal. The facts were shortly these. The plaintiff, a married woman, was the owner of a grocer's shop at Hastings with an off licence attached to it, and her name appeared in small letters over the door of the shop as the licensed person, while simply "Cornford" in large letters appeared over the shop. The defendants were a limited company incorporated under the Companies Acts, who lent money and whose head office was in London. One Gower applied to the defendants through their agent at Hastings for a loan and they advanced £5 upon a promissory note signed by Gower and by the plaintiff's husband as surety. Before the plaintiff's husband became surety he, at an interview with the defendants' agent, filled up a form of declaration to the effect that he was a householder, that the business belonged to him, and that the goods at the shop were his. At this interview the plaintiff and Gower were present, the plaintiff going in and out of the room during the interview. Default having been made in repayment of the loan, judgment was obtained against the plaintiff's husband, and execution was levied on the goods in the shop. The plaintiff claimed the goods, and upon an interpleader issue in the Hastings County Court, Judge Martineau gave judgment for her. The Judge, in his judgment, said that he saw no reason to suppose that the plaintiff knew the contents of the declaration signed by her husband, and he was of opinion that neither the plaintiff nor her husband intended to deceive. Subsequently, an information was sworn by the defendants' agent against Gower, the plaintiff, and her husband, charging them with conspiracy to defraud, and a summons was issued. The case was heard before the borough magistrates, when

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

the charge against the plaintiff and Gower was dismissed and the husband was committed for trial, but the grand jury threw out the bill. The plaintiff thereupon brought this action. The learned Judge, who tried the action without a jury, held that the prosecution was instituted without reasonable and probable cause, and that the defendants acted with malice. He also held that an action for malicious prosecution would lie against a corporation. He accordingly gave judgment for the plaintiff, and assessed the damages at £100. The defendants appealed.

Mr. MCCALL, Q.C., and Mr. P. ROSE-INNES, for the defendants, contended that the plaintiff had not proved absence of reasonable and probable cause, and that there was no evidence of actual malice. The learned counsel stated that he did not propose to argue the point that an action for malicious prosecution would not lie against a corporation. Upon the question of malice, he contended that there was no evidence of malice in the directors of the company, nor in any servant or agent of the company, and, even if the Court came to the conclusion that there was evidence of malice in a servant or agent of the company, that was not evidence of malice in the directors, and the company were not liable.

Mr. MARSHALL HALL, Q.C., and Mr. R. E. MOORE appeared for the plaintiff, and said that they would leave the question as to the amount of damages in the hands of the Court.

The COURT dismissed the appeal, reducing the damages, however, to £50.

The LORD CHIEF JUSTICE said that to entitle the plaintiff to recover she must prove two things; first, that there was no reasonable and probable cause for the prosecution, and, secondly, that the defendants in instituting the prosecution were actuated by malice. His Lordship then went carefully through the evidence, and stated that he wished to deal with a proposition advanced by the defendants' counsel that the Court had only to consider the state of mind of the directors of the company. A limited company as a legal entity was itself as incapable of malice as it was of love or affection. Malice must be deduced from the acts of servants and officials of the company, and in determining whether there was malice or not regard must be had not only to the acts and conduct of the directors, but also to the acts and conduct of other servants or agents of the company who were acting within the scope of their authority and charged with the institution of the prosecution. His Lordship came to the conclusion upon the whole of the facts that the learned Judge was justified in holding that there was no reasonable and probable cause for the prosecution, and in his (the Lord Chief Justice's) opinion there was evidence of actual malice, and the learned Judge who heard the witnesses came to the conclusion that there was malice, and he (the Lord Chief Justice) saw no reason to interfere. In his opinion, however, the damages were excessive, and justice would be met by assessing them at £50.

The LORDS JUSTICES delivered judgment to the same effect.

[Solicitors—C. H. Waugh, for H. G. Phillips, Hastings, for the plaintiff; S. J. Debenham, for the defendants.]

Chan. Div. } 1899.
(North, J.) } Nov. 3.

THE CONSOLIDATED EXPLORATION AND FINANCE
COMPANY (LIMITED) V. MUSGRAVE.*

Contract—Illegality—Bail in criminal case—Indemnity to surety—Deposit of shares.

An indemnity given to his bail, whether by the prisoner or by some third person, is illegal.

This was an action connected indirectly with the Brinsmead frauds. It may be recollected that three of the persons connected with the Brinsmead transactions were called Jordan, Bernard, and Ainsworth. Bernard and Ainsworth were prosecuted criminally and convicted, and are now undergoing sentence. The defendant in this action became bail for Jordan in £1,500. Jordan absconded and the bail was estreated. An arrangement had been made between Ainsworth and Musgrave that 1,500 shares in the London Woollen Company, which were transferred by the plaintiff company into the name of Musgrave, should be held by him as security to recoup Musgrave every loss suffered by him on account of his becoming bail for Ainsworth and Jordan. The object of this action was to compel Musgrave to retransfer the shares to the plaintiff company, who are now in liquidation. The question of legal interest in the case was whether, it being admitted by the defendant's counsel that an indemnity given by a prisoner to his bail was illegal, such indemnity given by a third person is also illegal. It is somewhat odd that no actual case could be found in the books covering the facts. The circumstances were complicated to a degree that can best be expressed by the popular epithet—mixed; and evidence as to what happened was scanty. Bernard and Ainsworth were company promoters connected with a large number of companies that may be said to have been identical with one company—the Consolidated Contract Corporation, whose name appears in these transactions. Among the companies they then controlled was the plaintiff company, which was a company that had a number of *bona-fide* shareholders. The documents in evidence were the transfer of shares by the plaintiff company to Musgrave for a nominal consideration in common form; a minute of a resolution of directors in the plaintiff company, dated December 23, 1897, in the following terms:—"The matter of guaranteeing costs *re* Brinsmead was considered, and the Consolidated Contract Corporation having agreed to pay by way of premium £100 and guaranteeing to indemnify this company against loss, it was resolved that 1,500 shares (London Woollen Preference) be lodged with Mr. C. G. Musgrave, on receipt of cheque from the Consolidated Contract Corporation, and a further 1,000 London Woollen Preference shares with Mr. J. Pronk"; and a letter dated December 23, 1897, from Musgrave to Harrison as follows:—"In consideration of your transferring into my name 1,500 shares in the London Woollen Company (Limited) I agree to become surety for you and Mr. Francis Richard Jordan in the sum of £1,500 each to appear at the High Court of Justice on the trial of 'Regina v. Brinsmead and others,' and also to enter into the required recognisances with regard thereto and as to payment of costs. And I further agree in the event of my not being called upon under the terms of my recognizance to make any payment to retransfer the said shares to you, or, in the event of my being called upon to provide any sum of money, to dispose only of sufficient shares to recoup for me the amount so paid by me, it being clearly understood, on the other hand, that should I be called upon to pay such an amount as the shares in question are not sufficient to realize, that you will pay me any such amount over and above the amount realized by the sale of the shares." That letter was written when proceedings of *certiorari* were pending to remove criminal proceedings against Jordan, Ainsworth, and others to the High Court. Those proceedings fell through, and Musgrave gave fresh

*Reported by D. FITZGERALD Esq., Barrister-at-Law.

bail to the magistrates to produce the prisoners for trial at the Central Criminal Court. The bail for Jordan was extracted, and Musgrave retained the shares. In the investigation of the plaintiff company's affairs by the liquidator, the proceedings came to light, and this action resulted.

Mr. Halsane, Q.C., and Mr. Kenyon Parker were for the plaintiffs; the Hon. E. C. Macnaghten, Q.C., and Mr. Cassel for Musgrave; and Mr. Stewart Smith for the London Woollen Company, a formal party.

Mr. Justice North held that, apart from the question of illegality, Musgrave was entitled to enter into an arrangement as to the shares with Harrison. He had no notice of the resolution of the plaintiff company, or knowledge that the shares belonged to them, the inference to be drawn from the fact that the shares had stood in the name of the plaintiff company, and were transferred by them for a nominal consideration that he should himself draw was that the shares did not belong to the company. As to the illegality of the transaction, it had been argued that there was a difference between the case where indemnity was given by a prisoner himself and the case where it was given by a stranger to the bail. No reported case had been before the Courts where an indemnity had been given by a stranger; but the principle on which the cases were decided and the reasons given were equally applicable to a case where the indemnity was given by the prisoner himself, and to the case where the indemnity was found by a stranger; the public had not the same protection in the interest of the bail to enforce the powers he had to see that the prisoner did not abscond. His lordship read from the judgment in the case of "*Cripps v. Hartnoll*" (4 Best and Smith, 414), a passage from "*Petersdorp on Bail*," stating that it was essential to the security of the bail that the principal should be compelled to appear, and setting out what powers the bail had to enforce the appearance. These powers a person who was not himself bail did not possess. His lordship referred to the statements of the law relied on by defendants' counsel in "*Pollock on Contracts*" and "*Leake on Contracts*," saying that the effect of the cases was correctly epitomized and the statements did not bear out the defendants' contention. He must hold that the transaction was illegal and void. Then it was said that the plaintiff could not get back the property. He could understand that if Ainsworth was proceeding against Musgrave he could see a difficulty in his way. It was proved to him that the plaintiffs were the real owners and he must make a decree for a retransfer.

[Solicitors—Ralph Raphael; Ashurst, Morris, and Co.; Nash, Field, and Co.]

Q.B. Div. (Ridley and) 1899.
Darling, J.J.) } Nov. 3.

LONDON COUNTY COUNCIL V. READ.*

Bread—Weighing bread—Selling bread otherwise than by weight—Selling twopenny loaf—3 (Geo. IV., c. cvi., sec. 4.

This case raised the question whether a baker or grocer is entitled to sell household bread under the description of a "twopenny loaf" without any regard to its weight. In form it was an argument on a special case stated by justices of the peace for the County of London sitting as a Court of Summary Jurisdiction in the Town-hall, Kensington. A summons had been issued on the complaint of H. C. Strugnell, an inspector in the employment of the County Council, charging William Read with having on March 15, 1899,

sold bread otherwise than by weight contrary to statute 3 Geo. IV., c. cvi., s. 4. That Act, in effect, provides that from and after the passing of the Act all bread sold by bakers or sellers of bread shall be sold by weight, and in case it is sold otherwise the baker or seller shall incur a penalty; provided that nothing in the Act is to prevent the sale otherwise than by weight of French bread, fancy bread, or rolls. The ingredients of which bread dealt with by the statute is to be made are specified in section 2 thereof. The justices dismissed the summons subject to the special case, which set out the material facts in substance as follows:—The respondent, William Read, was a grocer and general dealer carrying on business in North End-road, Fulham. On March 15 the inspector, H. C. Strugnell, sent one Alfred Bond to purchase a loaf of bread at Read's shop. Alfred Bond entered the shop, and asked for a twopenny loaf and was served by Read with a loaf similar in shape and appearance to the ordinary cottage loaf usually sold as a twopenny loaf, for which he paid twopence. Bond said that this loaf was not weighed by any one in his presence, and that nothing was said to him as to its weight. There was no evidence before the justices that the loaf had ever been weighed. It was subsequently weighed by the inspector himself and found to weigh some 2oz. less than 2lb. At the hearing of the summons it was contended on behalf of Read that he was not asked for bread by weight, but was asked for a twopenny loaf, and accordingly supplied one of that value; that he was not a baker but only a seller of bread; that he had bought this particular bread knowing that the weight of each loaf was less than 2lb., it having been made of the weight of about 1½lb. each loaf on purpose for sale at 2d. per loaf; that he could not afford to sell 2lb. in weight at 2d., and that his price for a 2lb. loaf was 2½d.; that the purchaser had asked not for a 2lb. loaf but for a twopenny loaf. The justices held that the vendor was not bound to sell 2lb. or any particular weight of bread and dismissed the summons, and the inspector being dissatisfied with this decision applied for and obtained the special case as above stated.

Mr. HORACE AVORY, for the London County Council, contended that the object and policy of the Act, 3 Geo. IV., c. cvi., was that household bread should be sold by weight and in no other way whatever, and that a seller of bread was not excused from selling bread by weight merely because the purchaser had asked for bread by denomination and without specifying the weight he required. Before this statute bread could only be sold in loaves weighing 4lb. This statute enabled bakers and sellers of bread to sell bread by any weight, provided it was sold by weight and not otherwise. Counsel cited the case of "*Hill v. Browning*" (L.R., 5 Q.B., 458).

The justices were not represented.

The COURT, after expressing regret that no argument was forthcoming in support of the decision of the justices, held that that decision was wrong in law and remitted the case to the justices with a direction to convict.

Court of Appeal (A. L. Smith and) 1899.
Vaughan Williams, L.J.J.) } Nov. 4.

THE MORGENGRY AND THE BLACKCOCK.*

Ship—Collision—Tug and tow—Damages—Apportionment.

The ship A collided with the B, which was in tow of the C. In an action against the owners of the B and C judgment went against the former

*Reported by W. HUMBY (UNIFFITH, Esq., Barrister-at-Law.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

by default, and the B, which had been sunk by the collision, was raised and sold for £855, which was paid into Court. As regards the C, both the A and the C were held to blame.

Held, that the C was liable to pay half the A's damage without getting credit for the £855 paid into Court, so long as the owners of the A did not get more than the total amount of their loss.

This was an appeal from an order made by Mr. Justice Bucknill sitting in Admiralty, reported in 15 *The Times* L.R., 547. The action was brought by the Newry and Kilkeel Steamship Company, as the owners of the steamship *Mourne*, against the owners of the barque *Morgengry* and the owners of the steam-tug *Blackcock*, for damage by collision. At the time of the collision the *Morgengry* was in tow of the *Blackcock*, and the actual collision was between the *Mourne* and the *Morgengry*. The owners of the *Morgengry*, who were foreigners, made default in delivering a defence, and a decree was made for judgment by default, and the *Morgengry*, which had been sunk by the collision, was raised and sold for £855, which sum was paid into Court. The action, as against the *Blackcock*, came on for trial before Mr. Justice Bucknill, and both vessels, the *Mourne* and the *Blackcock*, were held to blame. The question of damages was referred to the Registrar, and when the matter came before the learned Judge to determine what amount the *Blackcock* should pay it appeared that the damage sustained by the *Mourne* had been assessed at £4,230. The plaintiffs contended that, according to the Admiralty rule applicable where both vessels are held to blame, the owners of the *Blackcock* were liable to pay half that sum—viz., £2,115. The owners of the *Blackcock*, on the other hand, contended that they were entitled to have credit given to them for the sum of £855, which had been paid into Court. Mr. Justice Bucknill held that the plaintiffs were entitled to take the £855 out of Court and to receive from the owners of the *Blackcock* the sum of £2,115, so long as they did not recover more than the total amount of their loss. The owners of the *Blackcock* appealed.

Mr. Carver, Q.C., and Mr. D. Stephens appeared for the defendants, the owners of the *Blackcock*; Mr. Batten appeared for the plaintiffs.

The COURT, having taken time to consider, delivered judgment, dismissing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—On December 17, 1898, a collision took place in the Bristol Channel between three ships, the steamship *Mourne*, the barque *Morgengry*, and the tug *Blackcock*, which then had the barque in tow, and it is not in dispute that by reason of the collision the steamship *Mourne* sustained damage to the amount of £4,146. Under a decree of the Court of Admiralty in a suit instituted by the owners of the steamship against the barque, the latter was sold and the net proceeds of the sale, which only realized the sum of £855, were paid into Court. The question is whether the owners of the tug under the circumstances which exist in this case have any claim to be credited in any way and what way with this £855. My brother Bucknill has held that they are not, and has ordered the £855 to be paid out to the plaintiffs in part satisfaction of their damage of £4,146, and against this order it is that the owners of the tug appeal. To understand this case it is necessary to bear in mind what judgments have been given and are still standing; for these in my opinion play an important part in the determination of this case. And when these and the other facts are understood, much of the complexity which has arisen during the arguments of the learned counsel for the appellants, the

tug-owners, vanishes. The material facts are these. The collision having taken place as above mentioned, the owners of the steamship brought an action in the Admiralty Division against the owners of the barque for the damage occasioned to them by the collision brought about, as they alleged, by the negligent navigation of those on board the barque, which damage we know amounted to £4,146. Subsequently the plaintiffs added the owners of the tug as defendants. The owners of the barque upon being served with process, though they at first appeared, did not further contest their liability to the plaintiffs, they filed no preliminary act, they put in no defence, they set up no cross-claim, and their appearance was struck out for default of filing a preliminary act; and they thereby, as it appears to me, clearly admitted as regards themselves that they were solely to blame for the collision complained of by the plaintiffs. In these circumstances, upon February 27, 1899, the learned President pronounced in favour of the plaintiffs for damages against the owners of the barque, subject to a reference to the Registrar and merchants to report thereon, and he condemned the barque in the said damages and costs, and decreed the barque to be appraised and sold. This decree stands unreversed and unappealed against. The sale took place, and the sum of £855, which was all the barque realized after payment of expenses, was in due course paid into Court in the plaintiffs' action. If the barque had realized the sum of £4,146, in my opinion the plaintiffs, under their judgment against the owners of the barque, would have been entitled to the whole of that sum, and, if they had been responsible persons, the plaintiffs under their judgment might have recovered that amount from them. As, however, the net value of the barque by no means covered the damage sustained by the plaintiffs by reason of the collision—viz., the £4,146—the plaintiffs proceeded with their action against the owners of the tug, the owners of the barque being entirely left out and taking no part in the matter. The owners of the tug in the action against them set up by way of defence that the collision was solely caused by the negligent navigation of the steamship *Mourne*. When the action came on for trial the owners of the tug defended it, and Mr. Justice Bucknill, after hearing the evidence, assisted by the Elder Brethren, on March 24, 1899, pronounced that those on board the steamship *Mourne* and those on board the tug had been guilty of negligence as regards the collision, and he condemned the owners of the tug and their bail in a moiety of the damages proceeded for by the owners of the steamship *Mourne*, and referred the same to the Registrar and merchants to report the amount. The amount which has been thus reported was the moiety of the £4,146—viz., £2,073. The learned Judge, as appears from the shorthand notes of his judgment, found that there had been a bad look-out on board the tug, and that there was also a wilful obstinacy on the part of those on board the tug in not taking sufficient or proper steps to try and avoid a collision, and that they held on keeping with their engines full speed ahead and hard starboarding their helm. The learned Judge then proceeds to point out what the tug ought to have done, if she was in circumstances of difficulty in consequence of the negligent navigation of the *Mourne*, and that the tug did none of these things. No finding was asked for at the trial on the part of the owners of the tug, as is now in argument suggested for them, that the collision had been brought about solely by the joint negligence of the tow and tug, and, in the face of the finding of the learned Judge that there had been a bad look-out on board the tug and also wilful obstinacy on the part of those on board the tug, if such a finding had been asked for, it does not seem to me that it would necessarily have been obtained, as contended for on

behalf of the tug-owners. But, at any rate, it was not asked for or obtained. No controversy arises as to the rule of the Court of Admiralty respecting damages when a collision has occurred by reason of the default of each of the colliding ships. The difference between the Admiralty rule and the common law rule is pointed out in many cases, in none more tersely than by Lord Blackburn in the House of Lords in the case of "Cayser v. Carron Company" (9 App. Cas., at p. 881). I need not refer further to it, for no dispute arises thereon, and the rule is well known. But the point which is now taken by the owners of the tug, when the plaintiffs ask for the payment out of Court of the £855 paid in under their judgment of February 27, 1899, against the owners of the barque, is that this £855 should be credited to them, and that the damages recoverable by the owners of the steamship under their judgment against the tug-owners is £2,073—being half of the £4,146—less £855, or that if the plaintiffs receive out of Court the £855 this £855 must be given credit for by them against the £2,073 payable by the tug-owners, so that the sum payable by them to the plaintiffs is £1,218, and not £2,073; or, if this be not correct, the £855 should be credited against the actual damage suffered by the owners of the steamship—viz., £4,146—which leaves a balance due from the tug-owners to the plaintiffs of £1,045—i.e., £4,146 minus £855, which comes to £3,291, half of which is £1,645, so that this sum, and not £2,073, must be paid by the tug-owners to the plaintiffs subject to a limitation decree to the amount of £1,802 the tug-owners have obtained, which does not affect this point. Now, in the circumstances of this case, in the face of the two separate and independent judgments in favour of the plaintiffs, one of February 27 against the owners of the barque, and the other of March 24 against the tug-owners, how can the tug-owners maintain they are entitled to credit for this £855 when called upon to pay under the judgment of March 24 the £2,073 adjudged against them? That the plaintiffs are entitled to the £855 for their own use under their judgment of February 27 is clear, and a great deal more if the barque had sold for more or its owners had been responsible people and able to pay, though it is now said by the tug-owners that the plaintiffs must credit this £855 to them in one or other of the ways above set out. How so? Under the plaintiffs' judgment of March 24 against the tug-owners it is decreed that the tug-owners shall pay to the plaintiffs a moiety of the damages proceeded for. What are they? Why, a moiety of the £4,146, the damages which they had in fact sustained, for it was the £4,146 which they proceeded for against the tug-owners, and not £4,146 minus £855. This is not the case where the plaintiffs have recovered their whole damages, £4,146, from the owners of the barque, and are then proceeding against the owners of the tug. These two separate judgments, the one against the owners of the barque and the other against the tug-owners, in my opinion conclude this case; they are clear upon their face, and are unappealed against. But, if it were otherwise, I do not agree with the argument of the tug-owners' counsel, that in the Admiralty Court in the case of a collision by a tow and its tug with a third vessel the acts of the tug are always held to be the acts of the tow, so that separate damages cannot be awarded against each, and that as a matter of law the collision must always be held to be brought about by the joint negligence of both tow and tug, if by negligence at all. It may be and is so in many cases, but as a matter of law certainly not in all cases. In the case which it was suggested at the bar covered the present, viz., the "Englishman and the Australia" ([1894] P., 239), it will be seen that the learned Presi-

dent, when holding the tow liable for the acts of the tug, expressly found that the tow could and should have restrained, but did not restrain, the speed of the tug, and held, therefore, both tow and tug jointly to blame for the collision. In the present case there is no such finding, and indeed, in my opinion, the finding as far as it goes is to the contrary; and moreover, in the case of the "Englishman and the Australia" there were no two separate and distinct judgments standing, as in the present case, against the tow and the tug. It is clear, too, from the judgment of Sir James Hannen in the "Niobe" (13 P.D., 55), that a tow is not always responsible for the acts of its tug, though in many cases it is. If it were open to me in this case now to hold that the negligent acts of the barque and the tug were joint acts of negligence upon the materials before me I could not do so, for what facts I have lead me to the conclusion that they were not; but in my opinion this is beside the real point I have to consider. For the reasons above, in my opinion, the plaintiffs are entitled to the £855 under their judgment of February 27 against the owners of the barque, and also to a moiety of the damages proceeded for under their judgment of March 24 against the owners of the tug—i.e., £2,073, though the tug-owners have been able, as before stated, to limit their liability as to this amount to the sum of £1,802. This appeal must be dismissed with costs.

LORD JUSTICE VAUGHAN WILLIAMS read the following judgment:—I think that the judgment of Mr. Justice Bucknill was quite right. The action, which is an action in the Admiralty Division for damage sustained by the Mournie from collision at sea, was originally against the owners of the Morgengry alone, but the writ was amended by the addition of the owners of the tug Blackcock as defendants. At the time of the collision the Morgengry was being towed by the Blackcock. The owners of the Morgengry appeared in the action, but, as they did not file their preliminary act within the time limited, their appearance was struck out, and the plaintiffs took judgment by default against the Morgengry for damage subject to a reference, and the Morgengry, which in the collision had been sunk in the mud and damaged, was by the judgment decreed to be appraised and sold. This judgment was given after hearing counsel for the owners of the tug Blackcock. The sale of the Morgengry yielded a net sum of £855 5s. 11d., which was lodged in Court to the credit of the Morgengry. This is the history of the action so far as it relates to the Morgengry. The other defendants, the owners of the tug Blackcock, defended the action and charged that the collision was due to the negligence of the plaintiffs, and at the trial it was adjudged that both the Mournie, the plaintiffs' vessel, and the Blackcock, the defendants' tug, were to blame; and, as the tug was not damaged, it was decreed that the owners of the Blackcock should be condemned in the moiety of the damage, that is, of the damage sustained by the Mournie, subject to a reference to assess the damage. The report on the damage has been made in pursuance, as I understand, of the orders in the respective judgments against the Morgengry and the Blackcock; and it appears by the report that the whole damage in which the Morgengry is condemned amounts to £4,231 0s. 3d., and that the moiety in respect of which the Blackcock is condemned amounts to £2,115 10s. 1d. These figures have been somewhat altered by matters which do not affect the question I am discussing. Subsequently to the making of this report the plaintiffs, the owners of the Mournie, moved for an order that the £855 5s. 10d., the net sum resulting from the sale of the Morgengry, should be paid out to the plaintiffs in part satisfaction of the amount of damage, interest, and costs pronounced for in this

action; and the learned Judge, Mr. Justice Bucknill, after hearing counsel in Court both for the plaintiffs and for the owners of the Blackcock, made the order. This is the order appealed against by the owners of the Blackcock, who contend that in some shape or other they are entitled to credit for the £855 against the moiety of the damage in respect of which they have been condemned, either by writing it off the total damage before making the division to arrive at the moiety, or by writing it off the moiety itself. I think the owners of the Blackcock are entitled to nothing of the sort. The judgments obtained were no doubt interlocutory, because such judgments were subject to a reference, but the declaration of liability was final, and the liability was different as against the several defendants. I have no doubt that since the amendment adding the owners of the Blackcock as defendants the action might be treated as joint or several, and that, having regard to what has happened, the action must now be treated as resulting in several final judgments against the Morgengry and the Blackcock respectively. The judgments are different, the former has been condemned in the whole damage, the latter in the moiety. There is no reason why the owners of the Blackcock should have any credits in respect of moneys paid by the Morgengry, at all events till such payments exceed that moiety of the damage for which the Morgengry alone is responsible. In actions for tort at common law in which interlocutory judgments have been signed against some defendants for default such defendants do not get the benefit, as a rule, of the defences of defendants who go to trial and succeed; and, notwithstanding that such defendants who have gone to trial may have succeeded wholly or partially, damages may be assessed against the defaulters. It may be that, if there are two separate judgments for the same tort, and the measure of assessment is the same, a plaintiff cannot proceed to execution against a defendant without giving credit for any amounts he has received from other defendants. But in such a case each defendant is liable for the whole of the damages, and it seems to me that cannot apply where the respective defendants are not liable for the same damages, the one being liable for the whole and the other for half. It is also to be observed that there is no judgment or finding that the Mourne was to blame as against the Morgengry. If the Blackcock wished for such a finding, I think they should have asked for it by their defence.

Q.B. Div. (Ridley and { 1899.
Darling, J.J.) } Nov. 6.

THE QUEEN V. W. H. NASH, ESQ., REVISING BARRISTER
—EX PARTE GORDON.*

**Election Law—Registration—Local Government
—Parochial electors—Revising barrister—Local
Government Act, 1894.**

It is the duty of a revising barrister to revise the ownership and occupation lists of parochial electors and the ownership claims for registration as parochial electors.

In this case cause was shown by the revising barrister appointed to revise the lists of voters in the Tewkesbury and Stroud Divisions of the county of Gloucester against a rule for a *mandamus* obtained by the clerk of the Gloucestershire County Council calling upon him to revise the parochial electors' lists in the said divisions, and to hear and determine the claims of persons to have their names entered in the said lists in respect of ownership and occupation of property in the said divisions. It appeared from an affidavit made by the relator that

the revising barrister had declined to revise the ownership and occupation portions of the parochial electors' lists of voters and the ownership claims to be placed upon such lists on the ground that he had no jurisdiction to do so.

Mr. H. SUTTON (Mr. M. Powell with him) showed cause on behalf of the revising barrister. He said that the Local Government Act of 1894, by which the parish councils were created, did not provide for the separate revision by the revising barrister of lists of parochial electors. The only lists he was authorized to revise were (1) the lists of persons entitled or claiming to be entitled to a Parliamentary or local government vote in respect of an ownership qualification, and (2) those entitled or claiming to be entitled to a like vote in respect of an occupation qualification. The Act of 1894 did not authorize the preparation of any list over and above these two lists. All that that Act did was to provide for the marking of names appearing on the two lists for its own purposes, so that afterwards an official might pick out the names of voters in any given parish so as to form the register of parochial electors. It was said that an inconvenience would arise if this view were adopted, because a married woman not being entitled to be on the register of Parliamentary ownership voters would have to make a claim year by year in order to ensure that her name should appear upon the register of parochial elections. But the only guide to be followed was the Act of Parliament itself. Confirmation of the revising barrister's view would be found in it. Section 2 (1) provided as follows:—"The parish meeting for a rural parish shall consist of the following persons, in this Act referred to as parochial electors, and no others—namely, the persons registered in such portion either of the local government register of electors or of the Parliamentary register of electors as relates to the parish"; section 43 provided:—"For the purposes of this Act a woman shall not be disqualified by marriage for being on any local government register of electors, or for being an elector of any local authority . . ."; and section 44 (9) provided:—"Any person may claim for the purpose of having his name entered in the parochial electors' list, and the law relating to claims to be entered in lists of voters shall apply." It was intended that a person not already on the register of Parliamentary or local government voters and who desired to be on the register of parochial electors should make a claim to be put on the Parliamentary register of voters, and then, under section 44 (6), if the claimant was not entitled to be registered as a Parliamentary voter, but only as a parochial elector, the name would be marked by the revising barrister in such a way as to indicate that he was only entitled to be registered as a parochial elector. The revising barrister's position in the present case was twofold. In the first place he declined to look at the claims to be on the parochial register unless made for the Parliamentary or county electors' register, thence to be transferred, if necessary, to the parochial list; and, secondly, that having revised the two lists—the ownership and the occupation lists—he had done all that was required of him.

Mr. Macmorran, Q.C., and Mr. Roskill appeared for the Gloucestershire County Council in support of the rule.

Mr. MACMORRAN, Q.C., said this rule was not obtained because it was thought that the revising barrister had not properly discharged his duty, but in order to raise a pure point of law. In the ownership list if the name of a person appeared as qualified in respect of two parishes a mark would be placed against the name as regards one of the parishes and the name would go into the parochial electors' list.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

If the revising barrister did not in succeeding years revise the last-mentioned list the name would remain on the list perpetually, notwithstanding the person might have ceased to be qualified in that parish. It was clearly, therefore, the duty of the revising barrister to revise not only the ownership and occupation lists and the list of claims, but also the list of parochial electors. Section 44 (6) provided that, in any case where a name had to be marked or erased because it appeared more than once in the list, the revising barrister shall, where it appeared that the person was entitled to vote only as a parochial elector, place a mark against the name, signifying that the person was entitled to be registered as a parochial elector, and that the name so marked should not be printed in the Parliamentary register of electors, but in a separate list of parochial electors. Subsection 8 of the same section provided that "such separate lists shall form part of the register of parochial electors of the parish . . . and the law relating to the register of electors shall, with the necessary modifications, apply accordingly, and the lists shall, for the purposes of this Act, be deemed to be part of such register." Therefore, if the revising barrister did not revise the list of parochial electors and claims to be parochial electors, he only revised a portion, and not the whole, of the lists. The Registration Order, 1895, provided a separate form for the list of claimants to be entered in the parochial electors' list. The revising barrister was wrong in refusing to revise that part of the list which consisted of parochial electors only, and in not revising the list of ownership claims to be registered as parochial electors only.

MR. JUSTICE RIDLEY said that the rule must be made absolute. The revising barrister was bound to take into consideration the ownership and occupation lists of parochial electors and the ownership claims to be registered as parochial electors. Section 2 of the Act of 1894 gave ground for the opposite contention, but its provisions were subject to other provisions of the Act. Section 43 showed that there were certain persons who, though not entitled to a Parliamentary vote, could yet be registered as parochial electors, and section 44, subsection 6, provided for the creation of a separate list of parochial electors. Subsection 8 showed that that list was to be looked upon as part of the register of electors, and when that list came before the revising barrister it was in effect a part of the register. If there had been no machinery for the revision of this list it would remain just as it was and unrevised. Surely that could not have been intended. With regard to the list of claimants both as to ownership and occupation qualifications the case was clear, because it was expressly provided by subsection 9 of section 44 that a person may claim for the purpose of having his name entered in the list of parochial electors, and a separate form was provided for the lists of such claimants.

MR. JUSTICE DARLING gave judgment to the same effect.

The rule was accordingly made absolute.

[Solicitors—The Treasury Solicitor, for the Revising Barrister: Field, Roscoe, and Co., for the Clerk of the Peace of Gloucester.]

Q.B. Div. (Lord Russell of Killowen, C.J.) } 1899.
Nov. 6.

BOSTOCK V. RAMSEY URBAN DISTRICT COUNCIL.*

Malicious Prosecution—Obstruction of highway—Liability for act of *employe*—Reasonable and probable cause—Acting on counsel's opinion.

This was an action for damages for malicious prosecution. The defendants, in their defence, said that they had reasonable and probable cause for taking the proceedings they did against the plaintiff, and that they acted without malice and in the *bona fide* belief that they were discharging a public duty.

Dr. Blake Odgers, Q.C., and Mr. P. Rose-Innes appeared for the plaintiff; and Mr. Lawson Walton, Q.C., and Dr. Cooper were for the defendants.

Dr. BLAKE ODGERS, in opening the case, said that this action had arisen in the following circumstances. The plaintiff, Mr. Edward Henry Bostock, was the past proprietor of Wombwell and Bostock's Menagerie, but he resided at Glasgow and managed a menagerie which was permanently stationed there. His brother-in-law, Mr. Frank Bostock, managed a travelling menagerie, and on the occasion out of which the present dispute arose was taking the show from York to London. On December 15, 1897, it arrived at Ramsey, a town situated near Huntingdon. It appeared that at Ramsey there was a broad open space, with houses on either side, called the "Great Whyte," and a market was held there every Wednesday. Lord de Ramsey was lord of the manor and had the right of levying tolls on all carts, stalls, &c., standing on the "Great Whyte" on market days. This right he had let to a lady named Miss Groomes. On previous occasions the plaintiff's menagerie had visited Ramsey and the show had been held on the "Great Whyte." Everything went on smoothly until, after the passing of the Local Government Act, the urban district council came into office. The menagerie arrived at Ramsey on December 15, 1897, and the foreman saw Miss Groomes and obtained a contract from her for the use of the ground after payment of the fee of two guineas, and the show was set up on the "Great Whyte." An official of the district council then came and said that the show must not remain there; but he was told that a fee had been paid for the ground and was shown the space the vans would take up, after which he went away. The show was held and the next morning the menagerie proceeded to London. Nearly a year after this, on November 25, 1898, the plaintiff, Mr. E. H. Bostock, who had had no intimation that there had been any difficulty about the menagerie at Ramsey, received a letter from the district council informing him that they had preferred an indictment against him at the previous Huntingdon sessions for wilfully obstructing the highway at Ramsey, and that the grand jury had found a true bill. They further informed him that the next step would be for an application to be made for a warrant for his apprehension, and they therefore suggested that he should consent to appear before a justice and be bound over to attend the next assizes. The plaintiff expressed much surprise, and said he could hardly arrange to come from Glasgow to Huntingdon to answer an offence he knew nothing about. A good deal of correspondence then passed between the clerk of the council and the plaintiff, and the latter was told that unless he was willing to come to Ramsey to be bound over to attend the assizes a warrant must issue in the ordinary way. The plaintiff wrote apologizing for the obstruction and the answer was a demand for 30 guineas for costs which had been incurred. He declined to pay this, but came down from Glasgow to Ramsey and was bound over to appear at the Huntingdon Assizes on January 16. The case was tried before Mr. Justice Wilks, who in the course of the case expressed his opinion that Mr. Bostock was not responsible, and the jury found him not guilty. The plaintiff then brought this action against the defendants for malicious prosecution.

The LORD CHIEF JUSTICE intimated that this was a case in which counsel ought to come to some agreement.

*Reported by E. HARRISON, Esq., Barrister-at-Law.

Mr. LAWSON WALTON said that specific notice had been given to the plaintiff's manager not to cause the obstruction complained of.

The plaintiff was called and said that he had not been to Ramsey for 13 years, and the last time he was there the menagerie was pitched on the "Great Whyte" and no objection was made.

Cross-examined, the plaintiff said that his was the only name which appeared on the vans.

Mr. Henry Hines, the plaintiff's foreman, said that he was in charge of the show on the day in question. He had been to Ramsey once before a good many years ago. He went to see Miss Groomes when he arrived at Ramsey and she showed him where the ground was, and, after drawing up the vans, a gentleman came up and objected. Witness said he had a contract with the lady for the ground, and, after showing him where the vans would stand, he went away. Witness paid Miss Groomes two guineas. The show remained at Ramsey one night and started off early next morning.

Cross-examined, witness said he was asked to take the show to a field but he objected, because the lady had already let the ground to him.

Mr. Frank Bostock said that he had gone on to London, but returned to Ramsey the same evening. About 9 p.m. he received a document notifying that the district council had resolved that the "Great Whyte" was not to be obstructed by the menagerie.

Miss Groomes said that the Wednesday market was held originally in the High-street, but for more than 20 years she had taken tolls for stalls, carts, &c., standing in the "Great Whyte." She paid Lord de Ramsey rent for that right. The menagerie had always set up their vans on the "Great Whyte" as long as she could remember, and she had received tolls for them. The foreman on the occasion in question came to see her and asked if the show could stand on the "Great Whyte." She demurred, as she knew that the council objected, but gave leave as the day was market day, and she considered she had the right to.

Cross-examined, witness said that for some years there had been very few market stalls on Wednesdays. The council had objected to stalls standing on the "Great Whyte." She therefore suggested that the show should be held in the field.

Re-examined.—The menagerie used to come once in four or five years and the townspeople liked it.

For the defendants, Mr. Serjeant, clerk to the council, was called and he said that he remembered a time when a river ran down the "Great Whyte," which was subsequently covered over. A resolution in 1874 was passed by the local board, of which Lord de Ramsey was chairman, expressing the opinion that the property in the "Great Whyte" was vested in the local board. The menagerie was a considerable obstruction, and after discussion a resolution was passed that the clerk should take such proceedings as might be advisable against Messrs. Wombwell and Bostock. Counsel's opinion was taken, and it was resolved to prefer an indictment for obstruction against them. Witness could not find out where Mr. Bostock was, and it was not till November, 1898, that he discovered that he was living in Glasgow. The apology said to have been made by him was never received by the defendants. The defendants were in no way actuated by malice, but simply followed counsel's advice.

At the close of the evidence, Dr. BLAKE ODGERS contended that there was no reasonable and probable cause for preferring an indictment against the present plaintiff. The man who ought to have been indicted was the man who actually did obstruct. He also argued that the course of conduct pursued by the defendants towards the plaintiff was evidence of malice.

There being no questions of fact to go to the jury,

The LORD CHIEF JUSTICE gave judgment, and said that the plaintiff had failed to make out his claim. There was no dispute about the facts. The plaintiff was not at Ramsey on the occasion in question, and knew nothing of what was done there, but he was the employer of the persons who did the things complained of, and his was the only name which appeared on the menagerie vans. There was distinct authority that if an act of obstruction was effected by an *employé*, even contrary to the instruction of the employer, yet he would be held liable ("Reg. v. Stephen," 7 Best and Smith, 710). Therefore if there was an obstruction in fact, which was not disputed, it was an indictable offence, for which the employer might be indicted, though he was not present and did not know the act was done. It was idle to suggest that in the proceedings taken the defendants were actuated by malice, or that there was an absence of reasonable and probable cause, if counsel's advice was taken and acted upon. A usual course had been adopted, and there must be judgment for the defendants, but without costs. This was not the case of a person coming and insisting on a right to do a particular act with the intention of persisting in it, but it was the case of a casual visitor, who had no notion of contesting the right of doing the thing complained of. In his Lordship's opinion the proper remedy for the defendants to have taken would have been to have ordered the vans to be promptly removed.

Judgment was entered for the defendants without costs.

Q.B. Div. } 1899.
(Bigham, J.) } Nov. 6.

BOOKER AND CO. V. THE POCKLINGTON STEAMSHIP COMPANY (LIMITED).*

Ship—Charter-party—Construction—"All salvage shall be for owners' and charterers' equal benefit"—Deductions before division—Net pecuniary result.

This action was tried upon an agreed statement of facts, which was as follows:—1. The defendants are the owners of the steamship Pocklington. The plaintiffs at the time material to the questions in this action were the charterers of the steamship. 2. By a charter-party dated August 9, 1898, and made between the plaintiffs and the defendants, the plaintiffs chartered the Pocklington for three round voyages between the United Kingdom, the West Indies, and (or) Bermuda at the rate of £525 per calendar month. The charter-party provided by Clause 2 that the owners should maintain the vessel in a thoroughly efficient state in hull and machinery for and during the service; by Clause 6, that if any damage prevented the working of the vessel for more than 24 hours the hire should cease until she was again in an efficient state to resume her service. Clause 20, "All derelicts and salvage shall be for owners' and charterers' equal benefit. Penalty for non-performance of this contract estimated amount of damages." 3. The plaintiffs' claim is to a moiety of some salvage earned by the Pocklington during the charter-party and to a return of hire. 4. On January 3, 1899, during the second voyage under the charter-party, the Pocklington fell in with the disabled steamer Dart, and rendered salvage services to her by towing her into Queenstown Harbour. 5. On January 9, 1899, the owners of the Pocklington, the defendants in this action, commenced an action in the Admiralty Court to recover salvage from the owners of the Dart, her cargo, and freight. 6. At the conclusion of her voyage in January, 1899, the Pocklington was

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

docked, and repairs were being executed upon her from January 11 until January 24. 7. By their statement of claim in the salvage action the owners of the Pocklington alleged that "the Pocklington towed the Dart 313 miles and stood by at request for a very long time, and lost four days. Her hull, engines, and towing gear were strained and damaged and part of her cargo lost, and losses and expenses have been incurred." Particulars of the claim of such losses and expenses were delivered in the action, and consisted of (1) repairing damage done to the vessel; (2) renewing fractured tail-end shaft; (3) ropes and gear used in towage; (4) extra oil and coal; (5) port bill at Queenstown; and (6) detention during repairs. 8. The action for salvage came on for hearing before Mr. Justice Phillimore, who by his judgment awarded to the owners of the Pocklington the sum of £2,750, as well as the costs of the action. 9. The defendants contend that before dividing the award there should be deducted therefrom (1) the amount of the repairs attributable to the salvage services, (2) the cost of renewing the fractured tail and shaft, (3) the cost of ropes and gear used in towage, (4) the cost of extra oil and coal consumed, (5) the port bill at Queenstown, (6) the hire for the period during which the Pocklington was under repair, and (7) the balance of costs incurred in the salvage action over and above the taxed costs recovered from defendants, and that the balance is devisible between the present plaintiffs and defendants. 10. The plaintiffs contend that the amount to be divided should be the amount of the award, namely £2,750, less the extra costs in the salvage action as above, and that half of the balance is due from the defendants. The plaintiffs further contend that if the defendants are entitled to deduct the amounts set out in paragraph 9 hereof the plaintiffs are also entitled to have deducted from the award and paid to them in full the loss of time during the services and the cost of extra coal consumed. This contention the defendants admit. 11. The plaintiffs further contend that the defendants are not entitled to deduct the hire during the time the Pocklington was under repair inasmuch as the same does not represent hire earned under the terms of the charter-party. The opinion of the Court is desired upon the above contentions.

Mr. Carver, Q.C., and Mr. A. D. Bateson appeared for the plaintiffs; Mr. Butler Aspinall, Q.C., and Dr. Lennard for the defendants.

MR. JUSTICE BIGHAM read the following judgment:—If Clause 20 of the charter-party stood alone there could, I take it, be no doubt as to its meaning. "Equal benefit" cannot be accorded to shipowner and charterer without taking into account what each has contributed towards securing the benefit. Salvage in this clause does not mean the amount recovered in the suit in the Admiralty Court. It means the net pecuniary result of the salvage operations. Therefore, it follows that from the sum awarded by the Admiralty Court all the losses mentioned in paragraph 9 of the case must be deducted by the shipowner, and the balance only divided. Such a division will satisfy the requirements of Clause 20. But it is said that Clause 20 must be read by the light of the other clauses of the charter-party, and particularly of Clauses 2 and 6. I agree that the document is to be read as a whole, and that if it appears that some clauses are intended to qualify the interpretation of others effect must be given to such intention. I do not, however, think that any clause in the charter-party is intended to affect or alter what I conceive to be the clear meaning of Clause 20. Clause 2 provides that the shipowner is to maintain the vessel in a thoroughly efficient state for and during the service, and Clause 6 provides that if any damage prevents the working of the vessel for more

than 24 hours the hire shall cease. The charterers say that the interpretation which I put on Clause 20 relieves the shipowners of the burdens which these two clauses impose upon them, and does it at the charterers' expense, inasmuch as it has the effect of reducing the amount of salvage to be divided. I do not however agree with this contention. It is the salvage operations which have caused the damage and the loss of hire, and the Admiralty Court, though not awarding to the ship a specific sum in respect thereof, has taken both heads of loss into consideration in fixing the amount payable by the salvaged vessel. In other words, if there had been no loss of hire and no damage to the vessel the award would have been proportionately less, and the charterers would have got what they get now, neither more nor less.

Judgment for the defendants.

[Solicitors—Field, Roscoe, and Co., for Batesons, Warr, and Wimshurst, Liverpool, for the plaintiffs; Downing, Bolam, and Co., for Bolam and Co., Sunderland, for the defendants.]

Chan. Div. }
(Farwell, J.) }

1899.
Nov. 7.

ROGERS V. ROSEGOOD.

Vendor and Purchaser—Contract—Covenants—
Restrictive covenant—Covenant running with
the land—Rights of assignees.

This action was brought by the trustees of the will of the late Sir John Millais, as owners of property in Palace-gate, and by W. R. Rogers, the owner of adjoining property, for the purpose of enforcing restrictive covenants against the defendant, who is the owner of the property known as Thorney-house at the corner of Palace-gate and Kensington-gore, and proposes to build a large block of residential flats upon it. On May 31, 1869, the then Duke of Bedford purchased a plot of land, which was part of the property to which the action related, from Messrs. Cubitt and Co., and covenanted to erect thereon not more than one messuage, or dwelling-house, which was to be used for a private residence only, and no trade or business was to be carried on there. Subsequently, on July 31 in the same year, he purchased an adjoining plot upon similar conditions, except that there was no restriction as to the number of houses to be built upon it. These covenants were expressed to be intended "to enure for the benefit of" Messrs. Cubitt and Co., "their heirs and assigns, or others claiming under them for any of their lands adjoining or near to" the property purchased by the Duke. The Duke subsequently purchased another adjoining plot, with respect to which no covenants were entered into. Sir John Millais bought his property in Palace-gate from Messrs. Cubitt in 1873 and built a house upon it. The conveyance to him contained no express assignment of the benefit of the covenant entered into by the Duke of Bedford. In 1872 the Duke of Bedford died, and his successor no longer wished to live at Thorney-house. In order to enable him to dispose of the property more freely, Messrs. Cubitt in 1876 executed a deed releasing him, so far as they could, from the covenant relating to the number of houses to be built on the property. The plaintiff Rogers, who was one of the firm of Cubitt and Co., and consequently one of the original covenantees, purchased property in Palace-gate from the firm after the date of this release. The defendant had purchased from the Duke's devisees.

MR. HALDANE, Q.C., and Mr. CHRISTOPHER JAMES, for the plaintiffs, argued that the cases relating to the enforcement of restrictive covenants by the assignees

of the original covenantee fell into three classes—(1) those where there is a building scheme; (2) those where there has been an express assignment to the assignee of the benefit of the covenants; and (3) those where there has been a distinct expression of intention that the covenants shall be for the benefit of the assignees. The present case fell under the last head. The covenants were intended to enure for the benefit of the assignee, even if he was unaware of their existence. The benefit of the covenant was distributed and, as it were, annexed to every part of the covenantees' adjoining land; in this respect the case was like that of a building scheme. The benefit of the covenants ran with the land at law, and not only in equity. Even if Sir John Millais and his executors did not become entitled to the benefit of the covenants, yet the plaintiff Rogers was entitled to enforce them. The projected block of flats would involve a breach of the covenants. Either it was more than one house, and consequently a breach of the portion forbidding the erection of more than one, or else, if it was only one house, it involved carrying on a trade or business, and was not used as "a private residence," an expression which could not be interpreted to mean several private residences.

The defendant called Mr. Williams, the architect of the proposed building, who put in and explained the plans. He explained that it was not intended that there should be any portions of the building common to the use of the tenants, except the hall, courtyard, and staircases, and that none of the flats were intended to open directly into the street. The flats were intended to open on to staircases leading down to an open court-yard surrounded by cloisters intended to enable the tenants to get to the front entrance dryshod.

Mr. HUGHES, Q.C., and Mr. A. J. ALLEN, for the defendant, said that there had been some confusion as to the meaning of covenants entered into for the benefit of the covenantee and of other persons. Covenants were primarily entered into with the covenantee, and he was sometimes given the power of assigning the benefit of them to his assignees, but he was (except in the case where there was a building scheme) under no obligation to use his right for the benefit of his assignees. No one could have any right except through the covenantee. There were thus two questions which should be kept distinct:—(1) Did the vendor acquire the right to transfer the benefit of the covenant to other persons? (2) Had he in fact assigned the benefit to the particular purchaser? In this case there could be no question that Messrs. Cubitt and Co. had the power to transfer the benefit of the covenants to a purchaser from them, but they had not assigned them to Sir John Millais. The covenant was a purely personal obligation, and not annexed to the land. There was strong evidence that it was not intended to give Sir John Millais the benefit of the covenants, because the conveyance to him contained a partial recital of the conveyance to the Duke, but the recital stopped before it reached the restrictive covenants. The covenants were not reciprocal—for instance, Sir John Millais's covenant as to the restraint of carrying on a trade or business was of a much more limited character than that in the conveyance to the Duke of Bedford. It would be unreasonable to give Sir John more extensive rights against the Duke than the Duke had against him. There could be no doubt that the plaintiff Rogers had no right to stop the erection of any number of houses. But the proposed block would not be more than one house. If a house was inhabited by several families that would not make it more than one house, nor would the existence of more than one entrance door.

MR. JUSTICE FARWELL delivered the following considered judgment. After stating the facts he continued as follows:—In this state of facts three questions arise

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for determination:—(1) Whether the building proposed to be erected by the defendant is a breach of the covenant in the indenture of May 31, 1869; (2) of that in the indenture of July 31, 1869; and, if so, (3) whether the plaintiffs or any of them are entitled to sue in respect of such covenant. In considering the first two questions I have to determine three points:—(1) Whether the building proposed to be erected is one message or dwelling-house; (2) if it is one only, is it adapted and used as and for a private residence only; (3) will a trade or business be carried on upon the premises by the mode in which the defendant proposes to use the same. In my opinion, a block of flats such as is proposed is not one message, but several. I cannot see any substantial difference for the purposes of a covenant of this nature between a terrace of adjoining residences, separated from one another vertically, and a pile of residences separated from one another horizontally. If the building of the defendant was carried no higher than the ground floor it would, in my opinion, be impossible to contend that each of the residences opening on to the inner area was not a separate house, and I cannot see that the superposition of seven other rows of residences can make any difference. This is a mere question of construction, on which a rating case such as that cited ("Attorney-General v. Mutual Tontine Westminster Chambers Association, Limited"; 1 Ex. D., 469) can have little bearing; but I would point out that in that case the Court held that the whole block was a house, but pointed out that each set of chambers might be a house also. The case of the *domus mansionalis* cited at page 477 has some bearing on the point. The covenant in the deed of July, 1869, differs from that in the earlier deed in that it contains no express covenant that there shall be one message only; but on the true construction of the covenant I have come to the conclusion that the result is the same. In my opinion a large building which is to be used as 30 or 40 separate residential flats does not answer the description of a message to be used as and for a private residence. But even if the whole structure could be regarded as a private residence only, it is difficult to see how 30 or 40 different families and establishments can find place therein, unless the owner of such entire message is carrying on the trade of letting apartments. The third question is that which was most elaborately argued—viz., whether the benefit of the covenants in the two indentures of 1869 passed to Sir John Millais and through him to his trustees so as to enable them to maintain this action. It is not contended that the burden of these covenants has not passed to the defendant; he is obviously bound by reason of notice, whether the covenant as regards him runs with the land or not. ("Tulk v. Moxhay"; 2 Ph., 774.) It has been argued that this is a covenant the benefit of which runs with the land at law, or if not at law, at any rate in equity, and further that even if this is not so the benefit of the covenants passes by the express general words "rights, easements, or appurtenances belonging or reported to belong thereto." In my opinion the benefit of the covenants runs with the land now vested in the Millais trustees at law. I do not think it necessary to call in aid the analogy of easements, as suggested by Mr. Haldane, on the authority of "L. and S.-W. Railway v. Gomm" (20 Ch.D., 562). The accurate expression appears to me to be that the covenants are annexed to the land and pass with it in much the same way as title deeds, which have been quaintly called the sinews of land (Co. Litt., 6 a.). Thus the right to sue on such covenants passes to the heir and not to the executor; the assignee of such covenants could sue under the old law in his own name in the days when

the assignee of no other chose in action could do so ; and before the practice as to venue was abolished, actions on such covenants, when brought by lessees, were local and not transitory (see "Thursby v. Plant," 1 Wms. Saund., 299 n. 10). The law, in fact, acted on the sound principle of giving damage to the party aggrieved. Covenants which run with the land must have the following characteristics :— (1) They must be made with a covenantee who has an interest in the land to which they refer. (2) They must concern or touch the land. It is not contended that the covenants in question in this case have not the first characteristic, but it is said that they fail in the second. I am of opinion that they possess both. Adopting the definition of Mr. Justice Bayley in "Mayor of Congleton v. Pattison" (10 East, 135), the covenant must either affect the land as regards mode of occupation or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land. It is to my mind obvious that the value of Sir J. Millais's land is directly increased by the covenants in question. If authority is needed I would refer to "Mann v. Stephens" (15 Sim., 377), a case very similar to the present, "Vyvyan v. Arthur" (1 B. and C., 415), "the Priors case" (1 "Smith's L.C.," 56), "Fleetwood v. Hull" (23 Q.B.D., 35), "White v. Southend Hotel Co." [1897] 1 Ch. D., 767. I see no difficulty in holding that the benefit of a covenant runs with the land of the covenantee, while the burden of the same covenant does not run with the land of the covenantor. This must always be the case with regard to grants in fee if it be the better opinion—as Lord Justice Cotton in "Austerberry v. Corporation of Oldham" (29 Ch. D., 775) and the editors of "Smith's L. C." think—that the burden of such covenants never runs with the land. At common law the lessee's covenants ran with the land, but the lessor's did not run with the reversion ; the Statute 32 Hen. VIII., c. 34, was passed to give the reversioner the same benefit the lessee had ; and the definition of a covenant which runs with the land, stated by the learned editors of "Smith's Leading Cases" (p. 58), is "when either the liability to perform it or with right to take advantage of it passes to the assignee of that land." But a covenant may have the two characteristics above mentioned and yet not run with the land ; it is in each case a question of intention to be determined by the Court on the construction of the particular document, and with due regard to the nature of the covenant and the surrounding circumstances. No covenant can run with the land which has not the two characteristics above mentioned, but every covenant which has those two characteristics does not necessarily run with the land. That it is a question of intention in each case to be determined on construction is apparent from the judgment of Vice-Chancellor Hall, in "Renals v. Cowlishaw" (9 Ch. D., 125), a judgment of the highest authority, not only from the weight attaching to the opinion of the learned Vice-Chancellor, but also from the approval that it has received in the Court of Appeal and the House of Lords. See "Martin v. Spicer" (14 Ap. Ca., 12), and "Nottingham Brick and Tile Co. v. Butler" (15 Q.B.D., 269). The Courts have drawn the inference that the parties intended, or in other words the Courts have held on the true construction of the documents that they have contracted, that the covenants shall or shall not run with the land from various circumstances. Thus in "Renals v. Cowlishaw" there was nothing to show what assigns were intended by the words of the covenant ; there was no necessary implication that each assign of each parcel of the vendor's land, whether acquired before or after the date of the deed, was to have the benefit of the covenant ; the impression, indeed, was to the contrary, and the Courts accordingly

held that the covenant did not run, but must be expressly assigned in order to pass. Contrast this with the case of ordinary covenants for title ; these undoubtedly run with the land and each purchaser of each portion of the land gets the benefit of the covenants so far as they relate to the land purchased by him. In both these cases the covenants are entered into with the heirs and assigns, but in the first case the word "assign," on its true construction of the deed, means "assign of the covenant," in the latter "assign of the land, to which is annexed the benefit of the covenant by virtue of the evidence of intention so to contract which is found in the deed and the surrounding circumstances." Again, take the cases of building schemes. There is no express assignment of the benefit of the covenants, but it is held that the true intent of the parties, and consequently the true construction of the covenant, is to be found by applying the words of the deed to the surrounding circumstances. A similar conclusion has been arrived at in cases where there is no general scheme, but various persons enter into similar covenants with reference to lands that lie adjacent to one another. It is sufficient for me to refer to "Nottingham Brick and Tile Co. v. Butler" (15 Q.B.D., at p. 248, affirmed 16 Q.B.D., 778), "Western v. MacDermott" (L.R., 1 Eq., 499 ; 2 Ch., 72), "Whitman v. Gibson" (9 Sim., 196), "Coles v. Sims" (Kay, 56). Treating it then as a question of construction, I find an express contract. The draftsman would appear to have had Vice-Chancellor Hall's words before him when he framed this covenant and I think it would be difficult to express the intention in clearer words. Inasmuch as the covenantees at the date of the covenant owned the land now belonging to the Millais trustees, and such land is in fact "near to" the defendant's land, I see no uncertainty as to the land to be benefited. I should add that in my opinion there can be no difference between law and equity in construing such covenants with a view to seeing whether they do or do not run with the land. The same words in the same document must necessarily bear the same meaning in all the Courts. It is true that in many of the cases decided by the Court of Chancery expressions are found to the effect that the defendants are bound in equity whether the covenants in strictness run with the land or not. But I think that such expressions are due to the reluctance that the Vice-Chancellors felt to expressing any opinion on points of common law, and for the reason that I have already stated I cannot see how such covenant could run in equity if it does not run at law. One other point was made by Mr. Hughes—viz., that Sir J. Millais knew nothing of the existence of these covenants at the time that he bought, and I assume this to be the fact, as no evidence to the contrary was tendered, but in my opinion it is immaterial ; such knowledge has never been held a necessary condition to success in an action on a covenant which runs with the land at law. The plaintiff's right in such an action does not depend upon what he believes himself to have bought but upon what he has in fact bought, and he has bought the land with the covenants annexed. The defendant is not injured, for he bought the land with knowledge of the covenant and he can claim no more than the land with that burden upon it. If authority is needed for this, "Child v. Douglas" (Kay, 560) is expressly in point and is not affected in this respect by anything said on the appeal or at the trial or by any subsequent authority. It is not necessary for me to determine whether the benefit of the covenants would pass under the general words to which I have referred above, if such covenants did not run with the land. If they are not in fact annexed to the land it may well be that the right to sue thereon cannot be said to belong

or be reputed to belong thereto, but I express no final opinion on this point. In the view that I take of the rights of the Millais trustees I must make a distinction and grant an injunction as asked, but it is at their suit alone that I do so. The plaintiff Rogers joined in a deed of October 30, 1876, whereby Cubitts released the devise of the late Duke of Bedford from the covenant as to the erection of one dwelling-house only. I have already held that the defendants threatened and intended to erect a number of dwelling-houses, and this, as against Rogers, they are entitled to do. I cannot hold that these facts constitute a business, although if I had thought that they constituted one dwelling-house only, I might have come to a different conclusion. I think that the proper course is to dismiss the action so far as it sets up any claim by Rogers; it would not be right that the judgment should appear to be made at his suit or that he should be in a position to enforce an injunction which is obtained on the strength of another's title. The defendant was restrained from building as above described and ordered to pay half the general costs of the action.

Q.B. Div. (Ridley and { 1899.
Darling, JJ.) { Nov. 7.

WRIE V. DYER.*

Landlord and Tenant—Yearly tenancy—Notice to quit—Sufficiency of.

This was an argument on a special case stated by justices sitting in the petty sessional division for the district of Weston-super-Mare. The respondent, William Dyer, made an application to the justices to recover certain premises known as 4, Holland-street, Ashcombe, under the Small Tenements Recovery Act, 1838 (1 and 2 Vict., c. 74). The respondent was the owner of the house in question, and the appellant was the tenant upon a yearly tenancy from Lady Day to Lady Day at a rent not exceeding £20 a year. On March 24, 1898, the respondent served on the appellant a notice to quit in these terms:—"I hereby give you notice to quit and deliver up to me all that cottage, garden, and premises situate and known as No. 4, Holland-street, Ashcombe, Weston-super-Mare, on the 24th day of June, 1898, or at the end of your current year's tenancy. Dated this 24th day of March, 1898." The notices prescribed by the Act having been duly served, the justices issued a warrant of possession, holding that the notice to quit above set out was a valid legal notice to quit on March 25, 1899. The appellant, being dissatisfied with this decision in point of law, applied for and obtained a special case which substantially set out the facts above stated.

Mr. BROOKE LITTLE, for the appellant, argued that, as the tenancy was a yearly tenancy, six months' notice to quit was requisite to determine it. The notice in question was bad because it prescribed either June 24, 1898, which was only three months distant in point of time, or the end of the current tenancy, which was the following day. He cited "*Doe and Mayor of Richmond v. Morphet*" (7 Q.B., 577), in which "*Doe and Lord Huntingtower v. Culliford*" (4 D. and R., 248) was dissented from. The latter case practically covered the present. It was further considered as overruled in *Cole on Ejectment*, *vide* p. 58. [MR. JUSTICE DARLING referred to "*Doe and Williams v. Smith*," 5 A. and E., 350.]

Mr. Layman, for the respondent, was not called upon to argue.

The COURT dismissed the appeal.

*Reported by W. HUMBY GRIFFITH, Esq., Barrister-at-Law.

MR. JUSTICE RIDLEY, in giving judgment, said that the notice to quit was, in his opinion, a good notice to quit on March 25, 1899. In considering the cases dealing with notices to quit the particular terms of the notice in each case must be considered. In no two cases were the terms of the notice identical, and all one could do was to extract the principle from the cases previously decided. In "*Doe v. Morphet*" (7 Q.B., 577) the earlier case, "*Doe v. Culliford*" (4 D. and R., 248), had been treated as bad law, and particularly an opinion expressed by Mr. Justice Bayley had been observed upon. But with great respect his Lordship said it seemed to him that the opinion of Mr. Justice Bayley in the earlier case was correct, and there was in his view nothing in the decision of "*Doe v. Morphet*" which militated against that opinion. The principle was that these notices should be construed so that a sensible meaning might be given to them. The construction contended for by the appellant in this case—namely, that the notice was given to quit in a few hours—was not a sensible meaning to put upon the words.

MR. JUSTICE DARLING concurred, and thought he could not do better than apply to the notice to quit in this case words used by Lord Denman in "*Doe and Williams v. Smith*" (5 A. and E., at p. 350) with reference to the notice given in that case. That notice was certainly described by Mr. Justice Littledale as a lame and inaccurate notice, but "I think," said Lord Denman, "this notice was well enough."

Q. B. Div. { 1899.
(Phillimore, J.) { Nov. 7.

CLARKE V. HASTIE.*

Married Woman—Liability—Separate estate—Contract during coverture—Jointure accruing on husband's death.

In this case, the trial of which was begun on November 2, Mr. Rawlinson, Q.C., and Mr. C. E. Jones appeared for the plaintiff; Mr. Bray, Q.C., and Mr. H. D. Bonsey for the defendant, Mrs. Hastie (late Angerstein), now wife of Colonel James Hastie.

The plaintiff's claim was against the defendant as maker of a joint and several promissory note (with her late husband, William J. Angerstein) for £1,000 and interest at 5 per cent. from its date, January 7, 1876, payable one month after the death of William Angerstein, father of William J. Angerstein, who died in August, 1897. It was alleged that the defendant had separate estate at the date of the making of the note, which she intended to make liable, and still has separate estate. The defendant denied that she made the note. She further pleaded that at the date of the note she had no separate estate free from restraint on anticipation or in respect of which she could contract, and that, if she had such estate, none of it was now existing nor had she now any separate estate liable for payment of the note. She denied that she made the note (if at all) in respect of or with intent to bind her separate estate, and pleaded that she made it (if at all) at the request of and under the compulsion of her late husband, and that it was payable only in the event of his surviving his father and succeeding to his property, which he did not do. She denied that there was any consideration for the note and pleaded the Statute of Limitations in bar of any claim for interest beyond the last six years. She further denied that plaintiff was holder of the note at the commencement of the action, and alleged that he had proved against the estate of the late W. J.

*Reported by H. G. SNOWDEN, Esq., Barrister-at-Law.

prospectors. He thought the meaning of that was that the syndicates agreed to pay that sum for every block of ten claims when a company was formed to take over and work the block, so that the syndicates need not put their hands into their own pockets to pay the prospectors. The Mashonaland mining regulations showed that certain conditions precedent had to be performed by persons who desired to be holders of claims, and in those regulations occurred the phrase "flotations of blocks." In his opinion the plaintiffs failed to show that there had been a flotation of blocks within the meaning of the mining regulations. Further, and he preferred to base his judgment on this ground, he thought there had been no sale at all to a third company. The parties to the amalgamation scheme never intended that there should be a sale. In a circular addressed by Sir John Willoughby to the shareholders of the companies attention was directed to the alternative courses of flotation and increase of capital. It seemed to be clear that the scheme was not a scheme for flotation, but was one by which the companies were to increase their capital and keep the property to themselves. He thought that the judgment of the Lord Chief Justice was right.

LORD JUSTICE COLLINS was of the same opinion. The onus was on the plaintiffs to show that the conditions precedent to their right of action had been fulfilled. The agreements between the prospectors and the syndicates were made on the basis of the existing mining regulations, and the meaning of the word "flotation" in the agreements was to be understood by reference to the rules which defined what was meant thereby. A prospector who obtained a licence was by the regulations entitled to peg out a block of ten claims, and he was thereupon required to sink a shaft within four months and do certain other work. This was a condition precedent to another step, viz., an application for an inspection certificate. Provision was made for the transfer of the blocks to the syndicate, and then came the further step, viz., of flotation of blocks to joint-stock companies. In his opinion, the flotation so provided for in the rules was the flotation referred to in the agreements. The secretary of the Development Company had been examined in Court to-day, but his evidence did not show that the conditions precedent had been fulfilled. He thought, therefore, that there had been no flotation, and he was the more satisfied because it seemed to him that this interpretation carried out the intention of the parties to the amalgamation scheme; for the syndicates clearly intended to keep to themselves the power of making a flotation hereafter.

LORD JUSTICE VAUGHAN WILLIAMS delivered a judgment in which he arrived at the same conclusion.

Chan. Div. } 1899.
(Stirling, J.) } Nov. 8.

SALTON V. THE NEW BEESTON CYCLE COMPANY.*

Principal and Agent—Solicitor—Warrant of authority to defend action—Action against a company—Revocation of authority by dissolution of company before judgment—Liability of solicitor for costs.

This was a motion on behalf of the plaintiff that the proceedings in the action might be set aside as from November 12, 1898, and that the solicitor for the defendant company might be ordered to pay the costs. The writ in the action was issued on February 25, 1898, and on March 4, 1898, an appearance was entered on behalf of the defendant company.

On March 17, 1898, the statement of claim was delivered; on April 13, 1898, the defence was put in; on April 18, 1898, the reply was delivered, and on April 20, 1898, the action was set down for trial. On November 18, 1898, the statement of claim was amended, and on December 9, 1898, and February 1, 1899, the statement of defence was amended and re-amended, while on February 14, 1899, an order for particulars was made. The action was tried on March 16, 1899, and on March 23, 1899, judgment was given for the plaintiff against the defendant company for £566 13s. 4d. and costs. (See L.R. [1899] 1 Ch., 775.) When the plaintiff came to enforce his judgment it was discovered that the company had been dissolved on November 12, 1898, whereupon notice of the present motion was served. It appeared that at extraordinary general meetings of the company held on October 14 and November 2, 1897, resolutions were passed for the voluntary winding up of the company, and a liquidator was appointed and directed to carry into effect two contracts for the sale of the assets of the defendant company to two new companies proposed to be formed. One of these new companies was the Beeston Cycle Company, which took over certain assets and liabilities of the defendant company (including the liability to the plaintiff which was the subject of the present action), and by the agreement that company was authorized to defend in the name of the defendant company all actions brought against it with reference to the liabilities so taken over. On February 26, 1898, the writ in this action was left by the liquidator of the defendant company, or by his direction, with the solicitor of the Beeston Cycle Company with instructions to attend to it. The solicitor thereupon brought the matter before the directors of the Beeston Cycle Company, and, by their instructions, appeared to the writ and defended the action. It was not disputed that the solicitor had authority to appear and defend the action down to November 12, 1898, but it was contended that his authority terminated on that day. It now appeared that on July 25, 1898, the liquidator held a final meeting of the company pursuant to section 142 of the Companies Act, 1862, and made a return of that meeting to the Registrar on August 4, and that such return was registered on August 12. Consequently, by virtue of section 143 of the Act, the defendant company was on November 12, 1898, dissolved. In opposition to this motion the solicitor deposed that he did not know of the final meeting having been called until March 16, 1899, the day of the trial, when he was for the first time informed of it by the secretary of the Beeston Cycle Company. It was stated by the junior counsel for the solicitor upon this motion that the secretary gave this information at a conference held with him immediately before the trial, that he then inquired whether the defendant company had been actually dissolved, but was informed by the secretary that he did not know; and that he (counsel) advised that no advantage should be taken of the dissolution by way of defence, but that the action should be defended on the merits. That course was adopted and the action was tried without the learned Judge (Mr. Justice Cozens-Hardy) being informed of the position of the defendant company.

Mr. Jenkins, Q.C., and Mr. T. L. Wilkinson appeared for the plaintiff on the motion; and Mr. Upjohn, Q.C., and Mr. Younger for the defendant.

MR. JUSTICE STIRLING, after stating the facts as above set out, said that he did not quarrel with the advice given as to the defence of the action, but there was one point to which in his opinion sufficient attention had not been paid—viz., whether either solicitor or counsel had authority to represent the defendant company at the trial. It would have been easy to send some one to examine the documents at the office of

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

the Registrar of Joint Stock Companies, and an inspection of those documents would have shown that the company was dissolved. His Lordship thought that the fact of the dissolution ought to have been mentioned to the Judge and his opinion taken whether the trial ought to proceed. It was contended, however, that the judgment was perfectly valid, mainly on the authority of "Whiteley Exerciser (Limited) v. Gamage" (L.R. [1898] 2 Ch., 405). In that case on August 5, 1897, the plaintiff's action was dismissed with costs. The defendant proceeded to tax his costs, and the taxing master made his certificate. On February 4, 1898, the defendant took out a summons to vary the certificate, but owing to the state of business it did not come on until July 15 following. In the meantime on April 14 the company was dissolved in the same way as in the present case. It was held by North, J., that the summons could proceed, and he made an order on it adverse to the company. This decision, as his Lordship understood it, rested on the ground that the delay was entirely due to the state of business in the Court, and consequently that the maxim *actus curie nemini facit injuriam* applied. See "Cumber v. Wane" (1 Sm. L.C., 9th Ed., 384). In his Lordship's opinion, however, that reasoning did not apply to the present case, for the simple reason that the delay was not shown to have been entirely due to the state of business of the Court. The action was no doubt set down for trial on April 20, and would have been ripe for trial so far as the Court was concerned early in May; but long after that it was found necessary to amend the pleadings. The delay, therefore, was partly attributable to the parties themselves. It was further contended that the solicitor was not liable, because he had originally authority to defend the action and had no knowledge that the authority had been revoked by the dissolution of the defendant company. The law upon that point was laid down in "Smout v. Ilbery" (10 M. and W., 1). In that case, where a man who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad, it was held that the wife was not liable for goods supplied to her after his death, but before information of his death had been received; and that decision was given notwithstanding the fact that there was no remedy against the estate of the deceased. Alderson, B., in the course of his judgment, said:—

"Here the agent had in fact full authority originally to contract, and did contract in the name of the principal. There is no ground for saying that in representing her authority as continuing she did any wrong whatever. There was no *mala fides* on her part, no want of due diligence in acquiring knowledge of the revocation, no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God. The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is that there must be some wrong or omission of right on the part of the agent in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come."

That decision was referred to in "Story on Agency," 265a, in the following passage:—

"But let us suppose another case, where an agent contracts in the name of his principal, having an original authority so to do; and it turns out that, unknown to both parties, the authority has been revoked by the death of the principal, so that in contemplation of law there exists no principal; the question will then

arise whether, inasmuch as neither the principal nor his legal representative is bound by the contract, the agent, who has acted *bona fide*, will, under such circumstances, be responsible to the other contracting party for any loss or damage sustained thereby. It has been recently held upon very full consideration, and upon reasoning entirely satisfactory, that the agent will not, under such circumstances, be responsible, upon the ground that the continuance of the life of the principal must be deemed to be a fact equally within the contemplation of both parties as the basis of the contract." It seemed to his Lordship that the principle there laid down applied to a solicitor appearing for a party in an action, inasmuch as he was an agent for a special kind and known to the opposite party to be such. The principle also applied just as much to the dissolution of a legal entity or corporation as to the death of an individual. In his Lordship's opinion the solicitor ought not to be held liable for any costs down to March 16, 1899. He thought, however, that on that day he did not use due diligence to ascertain whether the defendant company was dissolved or not, and that any costs incurred by the plaintiff after that date ought to be borne by him. There would be no costs of the present application.

[Solicitors—Robert Greening; Sharpe, Parkers, and Co., agents for Hughes and Masser, Coventry.]

Prob., Divorce, and Adm. Div. (Sir } 1899.
Francis Jeune, P., Gorell Barnes, J.) } Nov. 8.
JOHNSON v. JOHNSON.*

Married Woman—Separation order—Summary Jurisdiction (Married Women) Act, 1895, sec. 7—Variation of order upon "fresh" evidence.

Fresh evidence means evidence which had not come to the party's knowledge at the time of the trial, or evidence which he could not then have called.

This was an appeal by Mary Anne Johnson from an order of the Henley-on-Thames justices made on August 17, 1899. The case raised a novel point as to the meaning of "fresh evidence" in section 7 of the Summary Jurisdiction (Married Women) Act, 1895.

Mr. Lynch was for the appellant; Mr. Clarke Hall for the respondent.

It appeared that on June 15 last the wife obtained a separation order against her husband on the ground of his desertion and wilful neglect. Just before the hearing the husband was taken very seriously ill, and had to leave the Court, so that he was unable either to indicate the lines of the defence or to give the names of his witnesses. His solicitor, however, acting on the brother's instructions, declined to have an adjournment. On August 3 the husband, having neglected to comply with the order of June 15, was again summoned by the wife, and on August 10 the husband applied to have the order of June 15 discharged. On August 17 both summonses were heard with the result that the order of June 15 was discharged.

Mr. LYNCH now submitted that the evidence which was called by the husband on August 17 was not "fresh evidence" within the meaning of the Act, but "further evidence" which he either knew of, or might have known and called on June 15. The justices were wrong in admitting such evidence and in acting upon it. "Fresh evidence," within the meaning of section 7, meant evidence of some fact which had come into existence after the date of the trial.

Mr. CLARKE HALL contended that the facts deposed

*Reported by J. H. MURPHY, Esq., Barrister-at Law.

to by the three witnesses called on behalf of the respondent were not known at the trial, and he admitted that the legal adviser of the respondent had not acted wisely in refusing an adjournment.

MR. JUSTICE GORELL BARNES pointed out that the respondent when before the justices had claimed on the second hearing to call witnesses as of right; a claim which was wholly untenable, for that would enable parties to withhold witnesses in order to produce them at a later period.

The PRESIDENT, in delivering judgment, said that the case was quite free from all doubt, and was one of some interest. Section 7 of 58 and 59 Vict., c. 39, enacted that the "Court of summary jurisdiction . . . may on the application of a married woman or her husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court at any time, alter, vary, or discharge such order. &c." And in his opinion "fresh evidence" meant evidence which had not come to the party's knowledge wishing to call it at the time of the trial, or evidence which he could not then have called. It certainly did not mean evidence which could have been called and was not. Applying these principles to the facts in this case, he thought that the justices had made a mistake, because all the facts were not before them. They certainly ought to have seen the affidavit of the medical man relating to the respondent's health, and from these causes a miscarriage of justice had very nearly ensued. The case would, therefore, go back to the justices for rehearing, and the respondent would have to pay the costs.

MR. JUSTICE GORELL BARNES, in concurring, said that merely because certain evidence was not given at the first trial it did not follow that it was "fresh evidence." It should be clearly understood that "fresh evidence" only referred to such evidence as a party had not at the time of the trial, or which he could not with reasonable diligence have obtained.

[Solicitors—Campion; Webster and Webster.]

Court of Appeal (Lindley, M.R., Sir } 1899.
F. Jeune, and Romer, L.J.) } Nov. 9.

WALTER V. LANE.*

Copyright—Newspaper—Reports of public speeches.

A newspaper has no copyright in its shorthand reports of the speeches of public men.

Decision of North, J. (15 *The Times* L.R., 538), reversed.

Judgment was delivered upon this appeal against a decision of Mr. Justice North's (reported in *The Times* of August 11 last, and in 15 *The Times* L.R., 538) upon the important question whether there is under the Copyright Act of 1842 a copyright in a newspaper report of a speech delivered in public, the speaker not having taken any steps to secure a copyright to himself. The action was brought by the proprietors of *The Times*, claiming an injunction to restrain the defendant from publishing a book called "Appreciations and Addresses delivered by Lord Rosebery," on the ground that five of the addresses which are contained in it are in substance *verbatim* copies of reports of speeches of Lord Rosebery which had been previously published in *The Times*. The reporter had assigned his copyright (if any) to the plaintiffs. Mr. Justice North held that the plaintiffs were entitled to copyright in their reports, and he granted the injunction. The defendant appealed.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

Mr. Birrell, Q.C., and Mr. Scrutton were for the defendant; Mr. H. Terrell, Q.C., and Mr. McSwiney were for the plaintiffs.

It was agreed that the appeal should be treated as an appeal from a judgment at the trial of the action. The appeal was argued on Monday and Tuesday in last week, and the judgment of the Court was then reserved.

The COURT allowed the appeal.

The MASTER of the ROLLS delivered the judgment of the Court, in which, after stating the order appealed from, he continued:—The articles copied were reports of speeches made by Lord Rosebery on various occasions, the reporter being a Mr. Brain. He tells us that he was one of the staff of *The Times*, that he was employed to make the reports of the speeches, and then he says:—"In the course of our duty the reporters of *The Times* have to exercise their judgment and skill so as to represent in a form fit for publication the features of the meetings and the material parts of and the sense of the speeches made at them. This involves considerable skill and labour. Notes of the proceedings and speeches are taken in shorthand which are afterwards carefully corrected and revised, and written out and punctuated fit for publication." This was the course of procedure in the case of the reports which the defendant has copied. Now the case turns on the true construction of the Copyright Act of 1842, the 5th and 6th Victoria, chapter 45. That Act defines "copyright" and "book" (by section 2) and confers copyright on every "author" of a book and his assigns (by section 3). Periodical publications are dealt with in section 18. The Act contains no definition of "author," but it confers copyright on the authors of books first published in this country. There can be no copyright in what is not published in a book; but it does not follow that the first person who publishes a book acquires a copyright in it. The meaning of the word "author" as used in the Act must be gathered from its own language and the decisions upon it. The word occurs constantly throughout the Act, but nowhere is it used in the sense of a mere reporter or publisher of another man's verbal utterances. It is plain that a person who is not the author of a work may nevertheless be the proprietor of the copyright in it; for example, in the ordinary case of an assignment of copyright, the author is one person, the proprietor of the copyright is another. The expression of "proprietor of copyright" constantly occurs in the Act. Sometimes the expression clearly includes author; sometimes it as clearly does not, but means his assigns. The latter part of section 3, which relates to the publication of books after the death of their authors, shows that authors and first publishers are by no means synonymous expressions. Again section 16, which relates to actions for infringement and objections to the title of the plaintiff, shows that authors and first publishers may stand on different footings. The wording of these sections justifies the view that the owner of an unpublished manuscript, although not the author of it, acquires copyright in it by first publishing it. That has been decided in Scotland, and the cases are referred to in Mr. Phillips's book on Copyright, pages 55 and 56. The author of an unpublished manuscript has no copyright in it, but he has a right to acquire copyright in it; and this right he may impliedly transfer to any one to whom he sells or gives the manuscript. Further, the author who sells or gives away an unpublished manuscript composition of his own may be fairly inferred to transfer his own right to publish it, unless he expressly or impliedly prohibits the publication of the manuscript which he sells or gives. This is intelligible, but it does not carry the plaintiffs far enough. A thief or other unlawful possessor of an unpublished manuscript would not acquire copyright in it

by first publishing it. He would not be the author or proprietor of the manuscript. Again, Lord Rosebery had no copyright in his speech, and although he could have acquired copyright in it by putting it into writing, or printing and publishing it, he did not do so; and there is no evidence whatever to justify the inference that he transferred to the plaintiffs his right to acquire the copyright in his own compositions, whether written or verbal. The plaintiffs do not derive their title to their publication from Lord Rosebery. Section 18 of the Act refers to copyright in what is printed in newspapers and periodical publications. Unless otherwise agreed, the copyright in such matter belongs to the author. But the publisher or proprietor of the newspaper can himself obtain the copyright in any article published in the newspaper, &c., if he employs some one to "compose" what is published on the terms that the copyright shall belong to the publisher or proprietor. The word "compose" here cannot mean copy or write from dictation; it obviously means compose in the sense of being the author of the matter published. This is made perfectly clear by the language of the provisos, which prevent the publisher or proprietor of the newspaper, &c., from publishing the article in a separate form without the consent of the "author"; and which entitle the author to publish it himself in a separate form. The "author" here is the person employed to "compose" the article. The more closely the Act is studied the more clearly it appears that, in order that the first publisher of any composition may acquire the copyright in it, he must be the "author" of what he publishes, or he must derive his right to publish from the author by being the owner of the manuscript or in some other way. It was contended, and Mr. Justice North took the view, that, although the reporter had no copyright in the speech, he was entitled to copyright in his report of it. But we cannot follow this. The report and the speech reported are, no doubt, different things, but the printer or publisher of the report is not the "author" of the speech reported, which is the only thing which gives any value or interest to the report. The printer or reporter of a speech is not the "author" of the reported speech in any intelligible sense of the word "author." To hold that every reporter of a speech has a copyright in his own report would be to stretch the Copyright Act to an extent which its language will not bear, and which the Legislature obviously never contemplated. The Act was passed to protect authors, not reporters. Moreover, although it may be that reporters and their employers ought to be protected from the unauthorized appropriation of their labours by others, it by no means follows that Parliament would place reporters and their employers on the same footing as authors. It is only by treating reporters as authors of what they report, which they clearly are not, that they can be brought within the existing Copyright Act. Although we have no sympathy with the defendant, we are quite unable to decide in favour of the plaintiffs. Plausible as are the arguments addressed to the Court on their behalf, those arguments are all based on the untenable doctrine that, for the purpose of copyright, reporters are authors. The analogy of directories, road books, maps, &c., is, in our opinion, wholly misleading. There, each man who himself makes a directory, &c., and publishes it is the author of what he publishes. The reporter of a speech is not. The distinction is all-important, but it is only by wholly ignoring it that the decisions on directories, &c., can be invoked by the plaintiffs. If the reporter of a speech gives the substance of it in his own language; if, although the ideas are not his, his expression of them is his own and not the speaker's, with immaterial differences, the reported speech would

be an original composition, of which the reporter would be the author, and he would be entitled to copyright in his own production. This is the ground on which copyright in law reports is based. They are by no means mere transcripts of judgments delivered in Court. But we have not to deal with speeches recast by the reporter. He has reproduced to the best of his ability not only the ideas expressed by the speaker, but the language in which the speaker expressed those ideas. In other words, we are dealing with the most accurate report of the speaker's words which the reporter could make. No doubt it requires considerable education and ability to make a good report of any speech. But an accurate report is not an original composition, nor is the reporter of a speech the author of what he reports. The appeal must be allowed and the action dismissed with costs here and below.

Mr. H. TERRELL, Q.C., said that the plaintiffs proposed to take the opinion of the House of Lords.

It was then arranged that the usual undertaking as to costs should be given.

[Solicitors—Upton, Atkey and Co.; Soames, Edwards, and Jones.]

Court of Appeal (Lindley, M.R., Sir } 1899.
F. Jeune, and Romer, L.J.) } Nov. 9.
IN RE THE TRADE MARK (NO. 76,176) OF CLEMENT
ET COMPAGNIE.*

Trade Mark—Registration—Capacity for—Fancy word—"St. Raphael."

Decision of Kekewich, J. (15 *The Times* L.R., 231), affirmed.

This was an appeal against a decision of Mr. Justice Kekewich's (reported in *The Times* of February 25 last, and in 15 *The Times* L.R., 231). The appellants were the Société Anonyme du St. Raphael Quinquina. They are dealers in a tonic wine called St. Raphael Quinquina, and they applied to the Court by motion asking that the register of trade marks might be rectified by removing therefrom the mark No. 76,176 of Messrs. Clement et Cie., in class 3, or, in the alternative, by adding to the entry thereon of the mark a disclaimer of any right on the part of Clement et Cie., or other the registered proprietor of the mark, to the exclusive use of the words St. Raphael or Saint Raphael. The applicants had recently applied for registration in the United Kingdom of a label bearing the name of St. Raphael Quinquina, but the Comptroller had refused the application, because on August 11, 1888, Clement et Cie., trading as the "Compagnie du Vin de St. Raphael," at Valence, Drôme, France, and also in London, had already registered trade mark No. 76,176, in class 3, for "Saint Raphael Tannin Wine." Mr. Justice Kekewich held that the words "St. Raphael" formed part of the registered label and were not an "addition" to it within the meaning of section 74 of the Act. Consequently no disclaimer was necessary.

Mr. Neville, Q.C., Mr. Warrington, Q.C., and Mr. G. F. Hart were for the appellants; Mr. Sebastian was for Clement et Cie.; Mr. Ingle Joyce was for the Comptroller.

The COURT dismissed the appeal on the ground that the respondents were not claiming to be the owners of a registered word or a fancy name. They claimed only the label which they had registered, to which the words "St. Raphael" were not an addition, but they were part of the registered mark or label.

LORD JUSTICE ROMER added that the present decision

*Reported by W. L. CARELL, Esq., Barrister-at-Law.

must not be taken as authorizing the notion that the registration of words which would not in themselves constitute a valid trade mark would be good as a registration of a label merely because a flourish was placed round the words.

[Solicitors—Chappell, Griffith, and Broadbridge ; Frere, Cholmeley, and Co. ; The Solicitor to the Board of Trade.]

Court of Appeal (Lindley, M.R., Sir } 1899.
F. Jeune, and Romer, L.J.) } Nov. 10.

IN RE ROBERTS.*

Bankruptcy—Property of bankrupt—Rights of trustee—Personal earnings—Bankruptcy Act, 1883, sec. 44.

After bankruptcy and before discharge whatever property a bankrupt acquires belongs to his trustee, save only what is necessary to support himself and his wife and family.

This was an appeal from a decision of Mr. Justice Wright's, reported in *The Times* of July 25. The application was by the trustee in bankruptcy of John Roberts, the celebrated champion billiard player, for an order that the bankrupt might deliver up to him all the bonzoline billiard balls which the bankrupt had received since March 2, 1899, from the Bonzoline Manufacturing Company (Limited) under a certain contract. John Roberts had been adjudicated a bankrupt early in the year 1898, and was still undischarged. On October 5, 1898, he entered into a written contract with the Bonzoline Manufacturing Company (Limited) whereby it was mutually agreed as follows:—"The company, in consideration of the agreement on the part of the said John Roberts hereinafter contained, will for a period of five years from the date hereof, subject to the determination of this agreement at the expiration of three years from the date hereof as hereinafter provided, supply the said John Roberts or his nominees annually during such period as aforesaid, free of cost, with 2,000 bonzoline balls as manufactured by the company, such balls to be supplied as and when required by the said John Roberts, on his giving to the company not less than seven days' notice requiring the same. In consideration of the company undertaking to supply him with such balls as aforesaid . . . the said John Roberts hereby agrees with the company that he will not during the said period of five years, or during the said period of three years from the date hereof in the event of this agreement being determined at the expiration of such period as hereinafter provided, play any public exhibition of billiards, pyramids, or other game on a billiard table other than with bonzoline balls manufactured and supplied by the company." Under this agreement the bankrupt had received from the company 2,000 balls. The balls were said to be worth about 6s. each, so that the gross total value would be £600. It was estimated that the bankrupt after deducting the expenses of advertising the balls would clear about £450 from the sale of them. The bankrupt alleged that he had already sold all except about £80 worth. On behalf of the trustee it was contended that the balls passed to him under section 44 of the Bankruptcy Act, 1883. On the other hand it was contended for the bankrupt that these balls were really earned by him as payment for his professional services and were therefore personal earnings which did not pass to the trustee. The learned Judge held that, assuming that these balls could properly be regarded as the fruits of the bankrupt's skill as a billiard player, the sum which they would produce was

more than sufficient for the personal maintenance of the bankrupt, and he thought that substantial justice would be done by ordering him to deliver to the trustee all balls not exceeding £200 in value which he had in his possession on May 1, 1899, on which date he undertook not to part with any more balls during the pendency of these proceedings. The bankrupt appealed.

Mr. Tindal Atkinson, Q.C., and Mr. F. C. Willis were for the bankrupt ; and Mr. Reed, Q.C., and Mr. Holloway for the trustee.

The appeal was argued on October 27, when judgment was reserved.

The MASTER of the ROLLS now delivered the judgment of the Court, dismissing the appeal. He said:—Mr. Roberts, a professional billiard player, was adjudicated bankrupt in April, 1898, and on July 24, 1899, an order was made by the Judge in Bankruptcy for the delivery by Roberts to his trustee of certain billiard balls worth £70 or £80, which Roberts had in his possession on May 1, 1899. He had acquired these under an agreement made by him, after his bankruptcy, with the Bonzoline Company (Limited) and dated October 5, 1898. The trustee claims these billiard balls under section 44 of the Bankruptcy Act, 1883. Mr. Roberts contends that he is entitled to retain them upon the ground that they are his personal earnings, and are therefore excepted from the operation of that section. The alleged exception is not to be found in the Act itself, but is said to be an implied exception based upon a long series of authorities and well recognized for the last 100 years. On looking into these authorities we are of opinion that they have no application to the present case. The exception is based upon the case of "*Chippendale v. Tomlinson*," decided in 1785 and reported in 4 Dougl., 318, and Cooke's Bankruptcy Law, 428, 8th edition, and referred to in a note in 7 East, 58. In this case a solicitor, who had become bankrupt, brought an action for professional services rendered by him after his bankruptcy. His assignees made no objection and made no claim to the money which he sought to recover, and it was held that under these circumstances the bankruptcy of the plaintiff was no bar to the action. That was the only point really decided. There are numerous subsequent authorities to the same effect, and, so far, the law seems clear. According to the report in Douglas Lord Mansfield said, "the single question is whether the assignees are entitled to the earnings of a bankrupt, and we are clearly of opinion that they are not." According to the report in Cooke's Bankruptcy Lord Mansfield said, "the only question is whether the assignees of a bankrupt are entitled to the profits of his personal labour. The assignees cannot let out the bankrupt ; they cannot contract for his labour." Attempts have been made to establish on the foundation of these statements the doctrine that whatever a bankrupt earns by his personal labour or ability after the bankruptcy belongs to him. "*Chippendale v. Tomlinson*" is not an authority for any such proposition, and both Mr. Justice Buller and, according to a note in Douglas, Lord Mansfield also stated that if a bankrupt acquired a large sum of money or considerable effects they would undoubtedly belong to his assignees. So also said Lord Alvanley in "*Hesse v. Stevenson*," 3 Bos. and P., 565, in which it was held that a patent acquired by a bankrupt after his bankruptcy passed to his assignees. Lord Alvanley's observations on pp. 577-78 appear to us to represent the true doctrine on this subject. It may be that a bankrupt's trustee cannot maintain an action for money earned by the bankrupt since his bankruptcy by his personal exertions if such money is required by him for his personal support and maintenance (see "*Williams v. Chambers*," 10 Q.B., 337, the pleadings in which, however, alleged promises to pay to the

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

assignees for work done by the bankrupt). The Bankruptcy Act of 1893, like its predecessors, excepts a bankrupt's tools and contemplates the acquisition of future property by a bankrupt, and he must live to use his tools and acquire such property. The present Act, like previous Bankruptcy Acts, must be construed so as to enable him to do so, and the language of section 14, clear and express as it is, must not, therefore, be taken so literally as to deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live. But, on the other hand, the necessity is the limit of the exception. This is in entire accordance with modern decisions. "Benwell's Case" (14 Q.B.D., 341), does not conflict with other cases. That case turns entirely on section 53, and is only an authority for the proposition that a prospective order cannot be made impounding the future personal earnings of a bankrupt. Similar observations apply to "*In re Rhine*" ([1892] 1 Q.B., 622). Those cases are no authority for the proposition that property of a bankrupt acquired by his personal exertions since his bankruptcy and not wanted for his present support do not belong to his trustee. No such doctrine can be maintained in face of section 44. After bankruptcy, and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. He may sue for and recover his earnings if his trustee does not interfere, but what he recovers he recovers for the benefit of his creditors, except to the extent necessary to support himself and his wife and family. The exception seems to include them. In this case, we have not to consider the right of the trustee to sue a stranger for money payable to the bankrupt, for the bankrupt has in his own possession the property ordered to be delivered up. Moreover, that property is not wanted for the bankrupt's support. He can, and does, support himself without it. Even if, therefore, the billiard balls can be regarded as obtained by the personal exertions of the bankrupt, the order for the delivery to the trustee would be quite right. This being so, it is unnecessary to consider whether the billiard balls can be properly regarded as personal earnings. They are delivered to the bankrupt under an agreement which imposes no obligation on him to play billiards or otherwise exert himself. All he undertakes to do is not to play in public (except in genuine championship matches), with any billiard balls except those made by the Roncolina Company. The agreement is no doubt based on the assumption that Roberts will play billiards in public; but, after all, its object is to advertise the company's balls, and as Roberts need not play at all, or otherwise exert himself, it is not easy to see how the case could be brought within the exception even if it were wider than upon examination it turns out to be. The appeal must be dismissed with costs.

[Mellish—Letts Brothers; Roscoe and Hincks.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Nov. 10.
JOHN V. BIRNBEIN.*

Pound Breach—Distress—Constructive possession
11 Geo. II., c. 10, sec. 10.

Where goods distrained for rent have been impounded on the premises it is not necessary that some one should be left in possession of the goods.

This was an appeal by the defendant from the judgment of the Divisional Court (Mr. Justice Lawrence and Mr. Justice Channell) reversing the decision of the Judge of the Southwark County Court; reported in

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

15 *The Times* L.R., 164; [1899] 1 Q.B., 470. The action was brought to recover treble damages for pound breach. The plaintiff was the owner of a house which was let to a tenant at a yearly rent. On Wednesday, July 13, 1898, the rent being in arrear, the plaintiff put in a distress, when the bailiff took an inventory of the goods, and left a man in possession. The County Court jury found that everything required for impounding the goods within 11 Geo. II., c. 19, s. 10, was done. The goods seized were almost entirely the property of the defendant, who was a furniture dealer, the tenant being in possession of them under a hire-purchase agreement. On the night of Thursday and Friday the man in possession went home to sleep about 10 o'clock, returning next morning, as there was no sleeping accommodation in the house. On Saturday the man in possession left the house in the evening and did not return until Monday. During his absence the defendant came in and took possession of the goods. This was the pound breach complained of. The County Court Judge found that the goods had been impounded; that the man in possession had no reasonable necessity for his absence, and, therefore, that he had abandoned possession, but that he intended to return on Monday, so that he had not abandoned the distress, and might be considered in constructive possession, if that was sufficient. He held, however, that to support the action as against the true owner of the goods real possession was necessary. He therefore gave judgment for the defendant. The Divisional Court reversed this decision and entered judgment for the plaintiff, holding that, as the goods had been seized and impounded, and were therefore in the custody of the law, it was not necessary to keep a man in actual possession. The defendant by leave appealed.

Mr. SCHWABE, for the defendant, contended that where the impounding was brought about merely by a man being left in possession the man must continue in possession. If there was not a physical pound, the man must remain in possession. In this case the goods were not locked up in one room, but were left as they were before the seizure, and they only remained in the custody of the law as long as the man remained in possession. He referred to "*Bagshaw v. Deacon*" ([1898] 2 Q.B., 173).

Mr. J. D. Crawford, for the plaintiff, was not called upon.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that leave to appeal had been given in this case by the Divisional Court upon one point only. The County Court Judge found that the goods had been actually impounded, and upon that hypothesis the Divisional Court gave judgment. The learned counsel here sought to say that there had been no impounding, but that point was not open to him now. That being so, the only question was whether the man must always remain in possession of the goods in order to keep them in the custody of the law. The question had only to be stated to carry its own answer. Where there was, as here, an impounding, a man need not be left in actual possession.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—C. J. Parker, for the plaintiff; H. E. Tudor, for the defendant.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Nov. 13.
ATTORNEY-GENERAL V. LONDON AND NORTH-WESTERN
RAILWAY COMPANY.*

Railway Company—Level crossings—Speed of
trains—Contravention of Railway Clauses Con-

*Reported by F. G. ROGER, Esq., Barrister-at-Law.

solidation Act, 1845, sec. 48—Speed exceeding four miles an hour over level crossing—Injunction.

Decision of Bruce, J. (15 *The Times* L.R., 39), affirmed.

This was an appeal by the defendants from the judgment of Mr. Justice Bruce, reported in 15 *The Times* L.R., 39; [1899] 1 Q.B., 72. It was an information filed by the Attorney-General, on the relation of the Warwickshire County Council, against the defendants for an injunction to restrain them from allowing their trains to cross the Watling-street at the level crossing adjoining Atherstone railway station at a speed greater than four miles an hour. The Watling-street at the point in question was a main road within the meaning of the Highways and Locomotives Act, 1878, section 13, and was within the county of Warwick and was vested in the county council pursuant to section 11 of the Local Government Act, 1888. The defendants or their predecessors in title had obtained power by the Trent Valley Railway Act, 1845 (8 and 9 Vict., c. cxii.), to carry their railway across the road in question on the level, and with this Act was incorporated the Railways Clauses Consolidation Act, 1845. By section 48 of the last mentioned Act, "where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater rate of speed than four miles an hour." The road in question came within the above section. The defendants had for a long time past constantly caused their trains to cross the level crossing at a speed greatly exceeding four miles an hour. The crossing was part of the main line, and a large number of express, ordinary, and goods trains passed over the crossing every 24 hours. The vehicular traffic on the road was seriously impeded by reason of the railway traffic. The gates were kept closed against the public during the 12 hours from 6 a.m. to 6 p.m. for a period ranging from 275 to 319 minutes, or for an average during each hour during that period varying from 23 to 26 minutes. The defendants alleged that the inconvenience to the public would be increased if they were obliged to slow down the speed of all their trains as they approached the level crossing, as each train would remain a longer time in the section of the line, as worked upon the block system, in which the level crossing was situate, the practice being to close the gates across the road at the level crossing so long as any train was within the limits of the section in which the crossing was situate. They therefore contended that the Court ought in its discretion to refuse to grant an injunction. Mr. Justice Bruce held that he could not go into questions of convenience, it being the duty of the Court to enforce the express terms of the statute, and he accordingly granted the injunction. The defendants appealed, and it was stated that the real dispute between the parties was as to whether the railway company should bear the expense of making a bridge to carry the road over the railway.

Sir Edward Clarke, Q.C., Mr. Cripps, Q.C., and Mr. Ernest Moon appeared for the defendants; Mr. Asquith, Q.C., Mr. Dickens, Q.C., and Mr. P. Bagnall Evans appeared for the informant.

The COURT, without calling upon counsel for the informant, dismissed the appeal.

LORD JUSTICE A. L. SMITH said this was an appeal from an injunction which had been granted to restrain a railway company from passing their trains by a level crossing over a turnpike road at a greater rate of speed

than four miles an hour. The company or their predecessors had power conferred on them by Act of Parliament to make a railway over the road in question, but a fetter was placed on that power by section 48 of the Railways Clauses Act, 1845, which said that where a railway crossed a turnpike road on a level adjoining to a station (which was the case here), all trains passing over such a crossing should slacken their speed to a rate not greater than four miles an hour. There was no doubt that the railway company had for a long time been disregarding this section, and the question was whether the Attorney-General was within his rights in taking these proceedings to enforce the provisions of the Act of Parliament. The company now came into Court, and said that the course which they were adopting of sending their trains over the crossing at a great rate of speed was more beneficial to the public than it would be to slacken the speed of their trains to four miles an hour, and that therefore the Attorney-General was not entitled to obtain an injunction against them. This was the first time that he had ever heard of such a thing as that a person, who was indictable for the offence of breaking a statutory obligation, should by way of defence say that it was better for him to break the statute than not. Counsel for the company admitted that they had no authority supporting their contention, but they suggested that there was no authority against it. In his opinion the authorities bore against it. He would not discuss the question whether running the trains at an excessive speed kept the gates shut a longer or a shorter time than running them at the lower speed. It could not be the duty of the Court, when the Legislature said that trains should not go over a certain point at a greater rate than four miles an hour, to inquire whether it would be for the benefit of the public that trains should be allowed to go at a faster rate. It was said that the Attorney-General was not entitled to maintain these proceedings unless he showed some injury to the public arising from what the defendants were doing. But he could not see in any of the cases which had been cited any trace of such a rule, where the express obligation of an Act of Parliament had been broken. His Lordship referred at some length to the cases of "Attorney-General v. Cockermouth Local Board" (L.R., 18 Eq., 172); "Attorney-General v. Great Eastern Railway Co." (11 Ch.D., 449); "Attorney-General v. Shrewsbury (Kingsland) Bridge Co." (21 Ch.D., 752); and "Attorney-General v. Great Western Railway Co." (7 Ch. App., 767). This was the case of a clear statutory enactment imposing a duty, and the injunction for enforcing it had been rightly granted. The appeal must be dismissed.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS delivered judgments to the like effect.

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.JJ.) } Nov. 14.

WEIR V. GIRVIN, ROPER, AND CO.*

Ship—Charter-party—Advance freight.

A portion of the cargo put on board was destroyed by fire before completion of the loading; held, that advance freight was not payable under the charter-party on the portion so lost.

Decision of Lord Russell of Killowen, C.J. (15 *The Times* L.R., 69), affirmed.

This was an appeal from the judgment of the Lord

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Chief Justice at the trial of the action without a jury, reported in 15 *The Times* L.R., 69; [1899] 1 Q.B., 193. The question in the action shortly was whether, under a charter-party which provided that freight should be payable two-thirds in cash three days after sailing from final port of loading, and the balance on unloading and right delivery, where a portion of the cargo put on board had been destroyed before completion of the loading, two-thirds of the freight was payable in advance in respect of the cargo so lost. The facts were as follows:—The plaintiffs, as owners of the Olivebank, entered into a charter-party, dated March 31, 1898, with the defendants, who carried on business in London as agents for Messrs. Girvin and Eyre, of San Francisco. The following were the material clauses of the charter-party:—"The said vessel shall proceed to a loading berth in the River Tyne or Tyne Dock, and there load a full and complete cargo of coke and lawful merchandise (excluding coals, subject to stipulations in margin, scrap iron, acids, gunpowder, and explosives), the cargo being of such a nature as will load vessel to Lloyd's freeboard (subject to provisions of side clause) not exceeding what she can reasonably stow and carry, and being so loaded shall proceed to San Francisco and deliver the same. The captain to sign bills of lading for the weight of cargo taken on board as presented, without prejudice to the tenor of this charter, provided same equal the amount of the chartered freight. Charterers' liability with respect to this charter to cease, except for freight as provided, on the vessel being loaded, the captain and the owner to have an absolute lien on the cargo for all unpaid freight and demurrage. Freight for the said cargo to be paid on final discharge at the rate of 16s., except on cargo shipped in Hull, as hereinafter provided, per ton of 2,240lb. on the quantity to be delivered to the consignees. The freight to be due and paid as follows:—Two-thirds in cash, less 6 per cent. for all charges, three days after sailing from Tyne, ship lost or not lost, and the balance on unloading and right delivery of the said cargo. The act of God . . . fire, &c., mutually excepted." The charter-party contained in the margin the following clause:—"Charterers undertake to ship, and owners to load, 1,000 tons of dead-weight cargo (of which 500 tons may be cannon coal in charterers' option) in manner required by master in Hull on due notice being given, vessel being where cargo can be delivered in the usual manner, freight on cargo shipped at Hull being paid at 14s. per ton. In event of charterers not loading vessel to her marks, it is agreed that freight shall be paid on the basis of 4,350 tons, which owners hereby guarantee to be vessel's capacity of cargo for the voyage, less *pro rata* freight on any quantity of cargo short delivered in San Francisco." The charter-party was signed by the defendants "as agents for Girvin and Eyre, of San Francisco." The Olivebank went to Hull and there loaded about 967 tons of cement and 50 tons of cannon coal, all dead-weight cargo. She then proceeded to the Tyne and loaded about 461 tons of firebricks. When the loading had proceeded so far, a fire broke out on board the vessel, and the cargo was damaged to such an extent that the cannon coal had to be taken out and sold, and the firebricks unshipped. Five hundred and sixty-seven tons of the cement were taken out, and the remaining 400 tons were left on board as stiffening and carried on in the vessel as ballast, and not as cargo, and for the purposes of the case were treated as if they had been destroyed and taken out. Assuming that the defendants were bound, under the marginal clause, to ship 4,350 tons of cargo, there remained, after deducting the 1,478 tons destroyed and taken out, 2,872 tons to be shipped by the charterers. The charterers, in fact, shipped a further

quantity of 2,590 tons, which, with the original cargo, would have filled the vessel. They thus shipped in all 282 tons less than the quantity stipulated for in the margin of the charter-party. By an arrangement between the parties (which, it was agreed, did not affect the question in the case) the owners took on board 500 tons of coke at a freight of 16s., payable in advance. The ship sailed, and three days after sailing the advance freight became payable. At the time of the hearing of the action the Olivebank was still upon her voyage to San Francisco. The defendants assumed any responsibility that Messrs. Girvin and Eyre might be under in respect of the advance freight on the cargo damaged by fire. The plaintiffs claimed two-thirds of the freight upon 4,350 tons, less 6 per cent. The defendants brought into Court the amount of two-thirds of the freight upon 2,590 tons, the cargo which was being carried to its destination, less 6 per cent. As to the advance freight on the 282 tons short loaded, they did not admit liability. It was proved in evidence that a dead-weight cargo of 4,300 tons would just sink the vessel to her marks, and that the total weight of cargo provided by the charterers would not have done so. The Lord Chief Justice held that advance freight was not payable under the charter-party on the portion of the cargo which had been destroyed by fire, and gave judgment for the defendants. The plaintiffs appealed.

Mr. Carver, Q.C., and Mr. J. A. Hamilton appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. T. E. Scrutton for the defendants.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that by the charter-party the charterers had to do two things, to load a full and complete cargo, and to load the ship down to her marks, and there was a clause in the margin which provided that in the event of the charterers not loading the ship to her marks there was to be a conventional figure—viz., 4,350 tons, upon the basis of which freight was to be paid. The charterers loaded less than a full cargo by 282 tons, and so the marginal clause came into operation, and freight was to be payable on 4,350 tons. What happened was this—1,478 tons of the cargo were shipped, and before the time arrived for payment of the advance freight the 1,478 tons were burnt. It seemed to his Lordship that the case of "*Aitken, Lilburn, and Co. v. Ernsthausen and Co.*" ([1894] 1 Q.B., 773), which was a decision of the Court of Appeal, was important, for there a fire occurred on the ship and destroyed a portion of the cargo on board before the ship sailed, and it was held that the charterers could not be called upon to load further cargo to take the place of that burnt, nor were they liable to pay freight in respect of such part of the cargo. The shipowners could have filled up the space so left vacant with other cargo provided that in so doing they did not delay the voyage. Here 1,478 tons were put out of question altogether when the advance freight became payable. The 1,478 tons were eliminated from the adventure. Then came the question, upon what was the advance freight to be paid? It was said that it should be paid upon the 1,478 tons burnt. But why? That part of the cargo was taken out of the adventure. The Lord Chief Justice held that in the circumstances of the case the conventional amount of 4,350 tons was reduced by the 1,478 tons burnt, which left 2,872 tons as the right earning part of the cargo, and two-thirds of the freight payable as advance freight would be calculated on that basis. With that view he (the Lord Justice) agreed. The judgment would therefore be affirmed.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Thos. Cooper and Co., for the plaintiffs; Hollams, Sons, Coward, and Hawksley, for the defendants.]

Chan. Div. }
(Stirling, J.) }

1899.
Nov. 14.

THE VALENTINE MEAT JUICE COMPANY V. THE
VALENTINE EXTRACT COMPANY.*

Trade Name—Imitation—Using own name—*Bona fides*—Injunction refused.

In this case the plaintiffs, who were an American company and proprietors and manufacturers of the well-known extract called "Valentine's Meat Juice," sought an injunction to restrain the defendant company from carrying on business as manufacturers or vendors of any preparation of extract of meat or meat juice under any name or title of which the name "Valentine" or "Valentine's" formed part; and to restrain the defendant, C. R. Valentine, from carrying on any such business under any such name or title, without clearly distinguishing such business from the business of the plaintiffs. The business of the plaintiffs was originally founded in 1871 by Mr. Mann T. Valentine, who had discovered a mode of preparing meat juice; and the business had always and still consisted entirely in the manufacture and sale of that preparation. In 1892, on the death of the founder, the business passed into the hands of the plaintiffs. They had no depôt, and employed no agent, in England, although they made annual consignments to a few firms in this country to the extent of upwards of a quarter of a million bottles of their meat juice. Their preparation was mainly, but not exclusively, used by sick people and invalids. It was a liquid, and had always been sold in bottles of one size and of a distinctive shape, and under some designation of which the name "Valentine" formed part. In some cases it had been sold or referred to as "Valentine" simply. Until 1898 there was no other preparation of meat on the market connected with the name of Valentine. The defendant company was incorporated in this country in 1897 with a capital of £4,000, divided into 3,000 preferred shares of £1 each and 1,000 deferred shares of a like value, and having amongst its objects the carrying on of the business of meat extract or meat juice manufacturers and vendors. This company was promoted by the defendant, Charles Richard Valentine, and he was its managing director. In 1895 he was in the employment as manager of the Colonial Consignment and Distributing Company, who were dealers in colonial produce, including, at one time, extract of meat manufactured according to Liebig's and other processes. Some time in 1895 the defendant Valentine conceived the idea of putting up solid extract of meat in the form of globules enclosed in a protecting cover, so that it could be carried about in small quantities, and be made readily available as food by travellers and others. For this process he subsequently obtained a patent which, in 1897, he sold to the defendant company for £1,440, to be paid as to £500 in cash and the balance in deferred shares. The memorandum of association was signed by seven clerks who were nominees of the defendant Valentine, but the company was not, in his Lordship's opinion, altogether what is ordinarily understood as a "one man company." The defendant Valentine left the service of the Colonial Consignment Company in June, 1898, and the defendant company then commenced the sale of meat globules. They were at first packed in boxes bearing labels describing them as "Valentine's Valtine Meat Globules," the word "Valtine" being a registered trade-mark which was acquired by the company on its formation from the defendant Valentine. Since the commencement of this action the description on the labels had been altered to

"Valtine Meat Globules." The plaintiffs did not now complain that the defendants had got up their goods so as to resemble the plaintiffs', but that the defendants had made use of the name "Valentine" in such a way as to deceive the public into the belief that the goods sold by the defendants were manufactured by the plaintiffs.

Mr. Meulton, Q.C., Mr. Swinfen Eady, Q.C., and Mr. Sebastian appeared for the plaintiffs; Mr. Upjohn, Q.C., and Mr. A. Sims for the defendants.

MR. JUSTICE STIRLING, in giving his reserved judgment, after stating the facts and reviewing the evidence which had been given at great length at the trial of the action, said that it was not unimportant to observe that the goods of the plaintiffs and defendants respectively were of a different nature. The plaintiffs' preparation was a liquid, the defendants' was a solid. The plaintiffs' was principally intended for use with cold water, the defendants' was most conveniently used with hot water. Speaking broadly the plaintiffs' preparation was a medicine; the defendants' was a food, and on the evidence his Lordship found that there was no substantial competition between the two articles. He then considered the law applicable to such a state of facts upon the assumption that all the acts complained of were being done by the defendant Valentine personally. The law might be very shortly stated. It was this—"Nobody has any right to represent his goods as those of somebody else," per Lord Halsbury, L.C., "*Reddaway v. Banham*" ([1896] A.C., 204). If a plaintiff complained that such representations were being made by a defendant, it was not necessary in order to obtain an injunction that he should prove any intent to deceive on the part of the defendant. This point was decided by Lord Cotton in "*Millington v. Fox*" (3 My. and Cr., 338), and again more recently by the Court of Appeal in the case of "*Reddaway v. Bentham Hemp-Spinning Co.*" ([1892] 2 Q.B., 639), and had been distinctly stated to be the law of the Court by the Lord Chancellor in "*Cellular Cloth Co. v. Maxton*" ([1899] A.C., 326). It was, therefore, for the plaintiff in a case such as the present to establish that the defendant was selling his goods in such a way as to represent to the public that they were the manufacture of the plaintiffs. Where the defendants bore the same name as the plaintiff it was not an easy task to satisfy that burden. "If a man," said the Master of the Rolls in "*Powell v. Birmingham Vinegar Brewery*" ([1896] 2 Ch., 69), "uses his own name to denote his own goods, it would be intolerable to confer on him the right to prevent other people of the same name from honestly using their own name to denote their own goods, even although they might be of the same kind as his and be undistinguishable from them, '*Burgess v. Burgess*' (3 D., M., and G., 896); '*Turton v. Turton*' (42 Ch. D., 128)." This point had recently been considered by Mr. Justice Byrne in "*Jameson v. Jameson*" (15 R.P.C., 169). That learned Judge was of opinion that a burden was cast on the new trader to take care to distinguish his goods from those of the original trader, and on the facts he was of opinion that the defendant had not discharged the onus which lay on him. The Court of Appeal, before whom the case afterwards came, did not differ from the law thus laid down, but did differ on the question of fact, being of opinion that the defendant had taken sufficient care to distinguish his goods. There the defendant had simply placed his own Christian name and surname on his goods, which were of the same kind and were got up in the same way as the plaintiffs', that got up being common to the trade. That the Court of Appeal held (in the absence of *mala fides*) to be enough.

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

It was sought in argument to distinguish "*Jameson v. Jameson*" from the present case on the ground that the plaintiffs had established that in the market their goods had come to be known by the name of "*Valentine*." The evidence did show, in his Lordship's opinion, that the plaintiffs' preparation had been designated as Valentine's Meat Juice, or Valentine's Extract, or Valentine's simply; and if the defendants were selling a preparation similar to the plaintiffs', it might be that the latter would have succeeded in establishing what the Lord Justice called their first premise. The plaintiffs, however, had never manufactured or sold any goods such as the defendants had put on the market. The articles sold by the defendants were both in appearance and in reality different from that made and sold by the plaintiffs. No one buying the defendants' article could possibly suppose that he had ever bought such an article of the plaintiffs'; the defendants' article had never been known on the market as the plaintiffs'. If the well-known firm of Bass and Co. brewed nothing but pale ale, and that ale had acquired the name of Bass, could that firm restrain another brewer of the same name from selling porter or stout manufactured by the second brewer, giving his name or address? His Lordship thought not, and in his judgment the defendant Valentine, if he were honestly carrying on the business of selling these meat globules in his own name and on his own account, could not be restrained from using his own name in connexion with that business. His Lordship then considered the question whether the defendant Valentine had not done something more than use his own name in such a way as to render him liable to be restrained from carrying on business as he had done, and he proceeded to deal with certain attacks made by the plaintiffs upon the good faith of the defendant Valentine, but on the whole, though he thought the case had many features of suspicion, he came to the conclusion that want of good faith had not been established. There still remained the question whether the defendant company was entitled as against the plaintiffs to make use of the name Valentine. If the defendant Valentine had himself commenced the business and carried it on under his own name, his Lordship thought he would have been entitled to assign to a company formed for the purpose the goodwill of that business, and the right to use his name in connexion with it, always supposing that all this was done in good faith. The defendant Valentine, however, had never himself carried on the business of manufacturing and selling these globules. He formed the defendant company, giving it his own name, and making over to it a so-called goodwill, consisting of the benefit of promises made to him by persons well disposed towards him and the business proposed to be carried on. Such a goodwill could not be of any substantial value, though it was possible that rights in respect of it might have been enforced in equity upon the principles laid down in "*Trego v. Hunt*." Still the defendant Valentine was the inventor of these globules; he had a reputation as a man of business, though not in connexion with extract of meat; and he intended that the business of the globules should be carried on for his own benefit, though his own resources were not sufficient to enable him to start it. His Lordship thought that under these circumstances the defendant Valentine was entitled, acting in good faith, to give his own name to the company which he founded. The case did not fall within the principle of such authorities as "*Day v. Day*," where a man having no real interest in a business was introduced into it simply to give it the desired name. The action therefore failed, but under the circumstances it would be dismissed without costs.

[Solicitors—Wilson, Bristows, and Carpmal; Campion and Co.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Nov. 15.

MOXHAM AND OTHERS V. GRANT.*

Company—Winding up—Directors—Misfeasance
—Payment of dividend out of capital.

Directors who had been compelled to pay the liquidator capital improperly, but with the assent of the shareholders, distributed as dividends held entitled to recover such dividends from the shareholders.

Decision of the Divisional Court (15 *The Times* L.R., 180) affirmed.

This was an appeal from the judgment of the Divisional Court (Mr. Justice Lawrence and Mr. Justice Channell), reported in 15 *The Times* L.R., 180; [1899] 1 Q.B., 480. The plaintiffs were directors of a company named Cory's Steamers (Limited). The company owned a steamship named the *Primrose*, which was lost in 1894. The underwriters paid £719 2s. 6d. in respect of the loss. That sum represented capital, as it represented the steamship. In April, 1894, the directors sent a circular to the shareholders in the following form:—"We have a sum of money in hand from insurance received on account of the loss of the *Primrose*. We propose remitting 10s. per share. If you see no objection, we will send you £—, being 10s. on your — shares, on your sending a receipt on enclosed form, and provided all the shareholders consent. There will be a considerable sum more to receive for insurance of *Primrose*." The form of receipt was as follows:—"Received of Cory's Steamers (Limited) the sum of £—, being a reduction of 10s. per share on the — shares held by me." In reply to the circular the defendant sent the following letter:—"I quite agree with the proposition of your letter of April 10, and enclose my receipt for £13, being 10s. on my 26 shares." Other similar payments were made to the defendant, the total amount being £35 15s. Upon December 29, 1896, a winding-up order was made against the company, and on December 22, 1897, the liquidator of the company obtained an order under section 10 of the Companies (Winding-up) Act, 1890, declaring that the payment to the defendant and other shareholders of the various sums, amounting in the whole to £719 2s. 6d., was a payment of part of the capital of the company and was unlawfully and improperly paid in reduction of the capital of the company, and it was further ordered that the directors should pay to the official liquidator the sum of £719 2s. 6d. The order was expressly made without prejudice to the right of the directors to be recouped by the shareholders the amounts paid by the directors to them. The directors, the plaintiffs, then brought an action against the defendant to recover the £35 15s. they had paid to him. The County Court Judge gave judgment for the plaintiffs, and the Divisional Court affirmed this decision. The defendant appealed.

Mr. J. G. Witt, Q.C., and Mr. Poley appeared for the defendant; Mr. Meager appeared for the plaintiffs.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that it was admitted that the £719 2s. 6d., which was paid by the underwriters on the loss of the *Primrose*, was part of the capital of the company. The directors and shareholders agreed that they did not want this money as capital and resolved to divide it. Therefore the shareholders knew that it was part of the capital of the company. It was not a case where shareholders received money of the company in ignorance that they had no right to receive

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

it. There was no order of the Court obtained for the reduction of the capital of the company. When the company was wound up the liquidator discovered what had been done, and, in his Lordship's opinion, the liquidator might have taken proceedings against every one who had received portions of the £719 2s. 6d. Instead of doing that, the liquidator, as the most convenient course, took proceedings against the directors, who had received the money and who had distributed it among the shareholders, and he recovered the whole amount from them. The directors thereupon brought an action against the defendant to recover from him the amount which he had received, and which the directors had been compelled to pay to the liquidator. What was the position of a shareholder who had received money of the company with notice that it formed part of the company's capital? It seemed to his Lordship that the position of the shareholder in such a case was, as laid down by Sir George Jessel in "*Russell v. Wakefield Waterworks Company*" (L.R., 20 Eq., 474, at p. 479), that of a constructive trustee. That being so, the rule of equity as between two trustees had been explained in many cases, and in "*Chillingworth v. Chambers*" ([1896] 1 Ch., 685) the matter was fully discussed by Lord Justices Lindley and Kay and himself, and he would only refer to one passage in his own judgment (at p. 707):—"As between two trustees who are *in pari delicto*, the one who has made good a loss occasioned by a breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other." The case cited in support of that proposition was "*Lingard v. Bromley*" (1 V. and B., 114) (see p. 710 of the report). In the present case the defendant took his portion of the £719 2s. 6d. with notice that it formed part of the capital of the company. He became a constructive trustee, and must recoup his co-trustees, who had been compelled to pay it back, the amount so received by him. Upon that ground the judgment of the Divisional Court was right. His Lordship also thought that the doctrine laid down in "*Bonner v. Tottenham Building Society*" ([1899] 1 Q.B., 161) applied. He desired to add that the passage in "*Lindley on Companies*" (5th ed., pp. 389, 390) did not apply where the shareholders took the money with notice, as here, nor where one person had been compelled by process of law to pay in relief of another.

LORD JUSTICE COLLINS concurred. When the circumstances of the case were understood, it was clear that the liquidator could have enforced against each shareholder repayment of the moneys received by each. That he could enforce repayment against the directors to whom the whole fund had originally passed lay at the root of the matter. Therefore they began the discussion with these facts. The directors, being the persons who had collected and distributed the fund, were liable to repay it to the liquidator, and the persons to whom it was distributed were also liable to the liquidator, and the directors were compelled to pay the whole sum distributed. Further, that payment had necessarily gone in relief of the shareholders. Upon those facts—namely, a payment by compulsion by one of a sum for which another was liable to the same person—there arose by implication of law a right in the person paying to be recouped by the person relieved. Having got those facts, which entitled a person so paying to indemnity or contribution, what was the answer attempted to be set up? The only possible answer was that these persons were joint tortfeasors, and that there was no right of indemnity or contribution. Lord Denman, in "*Betts v. Gibbins*" (2 A. and E., 57, at p. 74), in dealing with "*Merryweather v. Nixon*" (8 T.R., 186), said that that case "seems to me to have been strained beyond what the decision will bear. The present case is an

exception to the general rule. The general rule is that between wrongdoers there is neither indemnity nor contribution; the exception is where the act is not clearly illegal in itself." He (the Lord Justice) did not suppose that any of those who dealt with this money thought that there was any illegality in doing what was done. The only illegality was a technical one; it was an *ultra vires* act. It had been held over and over again that money paid in breach of trust to persons who took it knowing the payment to be a breach of trust did not constitute those persons joint tortfeasors. Mr. Justice Channell dealt with that point and with the line of authorities relating to it; and Vice-Chancellor Bacon, in *Flitcroft's* case (21 Ch.D., 519, at p. 527), also so held. That disposed of the case. But he (the Lord Justice) would deal with the argument whether or not there was a trust. The only bearing this had lay in establishing that the person who received the money received it in such circumstances as made it capable of being recovered back. If the money was paid to the shareholder unarmarked, so that the liquidator could not claim it as money had and received to his use, the chain of consecution out of which the right to indemnity arose was broken. Unless the payment was made in relief of the person against whom the indemnity was claimed, the claim for indemnity was gone. Therefore, it must be shown that the liquidator would be entitled to sue the shareholder. That was established if the liquidator could follow the money, and that was so in the present case, because the shareholder received it with notice, from which, if he knew his law, he must have known that the directors had no right to pay it to him. The whole chain therefore was established. The payment by the directors to the liquidator was in relief of an existing liability of the shareholders, and was a payment which they were compelled to make. Therefore there arose upon common law principles a right of indemnity. There was also the same right on the general rules of equity, and this right was not affected by any question of the parties being joint tortfeasors.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Spencer Chapman and Co., for J. R. Richards, Swansea, for the plaintiffs; F. Du Bois, for the defendant.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Nov. 15.

THE BRUNEL.*

Ship—Collision—Limitation of liability—Exemption from registry—Merchant Shipping Act, 1894, sec. 3.

The words "15 tons burden" in sec. 3 of the Merchant Shipping Act, 1894, mean net register tonnage, not gross tonnage.

Decision of Gorell Barnes, J. (15 *The Times* L.R., 92), affirmed.

This was an appeal from a judgment of Mr. Justice Gorell Barnes, reported in 15 *The Times* L.R., 92. The action was brought by the mayor, aldermen, and burgesses of the city of Bristol, the owners of the steam tug Brunel, to limit their liability for damages occasioned by their tug to the defendants' steamship Glanmire, on October 27, 1897. The Brunel was a vessel not registered in accordance with the provisions of the Merchant Shipping Act, 1894, and was of the gross tonnage of 35.99 tons, ascertained by measurement in accordance with the Act, her engine-room space being

*Reported by F. G. BUCKER, Esq., Barrister-at-Law

17·8 tons and her crew space 6·73 tons. The plaintiffs claimed to be entitled to limit their liability to the amount of £8 for every ton of the ship's tonnage. They contended that the Brunel was exempted from registry under section 3 of the Merchant Shipping Act, as she was employed solely in the manner mentioned in that section, and, if measured in accordance with the Act, she did not exceed 15 tons burden. The defendants contended that the Brunel was not exempt from registry, as she was a vessel of more than 15 tons burden, and that the owners were therefore not entitled to limit their liability. Mr. Justice Gorell Barnes held that the Brunel was exempt from registry, and that the plaintiffs were entitled to limit their liability to £8 for each ton of her gross tonnage ascertained by measuring her according to the Act. The defendants appealed.

Mr. Joseph Walton, Q.C., and Mr. Butler Aspinall, Q.C., appeared for the defendants; Mr. Robson, Q.C., and Mr. Lauriston Batten for the plaintiffs.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in this case the owners of the Brunel had taken proceedings for limitation of liability under section 503 of the Merchant Shipping Act, 1894, and the point taken against them was that, as they had not registered their ship, they were not entitled to a limitation of liability. Mr. Justice Barnes held otherwise, because the Brunel was a ship not exceeding 15 tons burden, and therefore by section 3 of the Merchant Shipping Act was exempted from registry. The question was, What was the meaning of "15 tons burden" in that section? Did it mean gross tonnage or register tonnage? In the Court below counsel for the defendants had argued that "burden" in that section meant carrying capacity. But in the face of the judgment of Mr. Justice Barnes they had given up that contention, and they now said that it meant gross tonnage, at least that was the effect of their argument. The word "tonnage" was used many times throughout the Act, and the Act consisted of a number of groups of sections dealing with various matters. But in his opinion, on the true construction of this particular section, the words "tons burden" there used meant register net tonnage, and not gross tonnage. The vessel therefore did not require to be registered, and the judgment of Mr. Justice Barnes was right.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS delivered judgments in which they arrived at the same conclusion.

[Solicitors—Robins, Hay, Waters, and Hay, for D. Travers Burges, Bristol, for the plaintiffs; Thomas Cooper and Co., for the defendants.]

Chanc. Div. } 1899.
(Cozens-Hardy, J.) } Nov. 16.

RICE V. NOAKES AND CO. (LIMITED).*

Mortgage—Redemption—Restrictive covenant—
"Tied" publichouse.

Mortgagor held entitled to redeem free from the
"tie."

This case raised an important question as to the rights of mortgagors and mortgagees of tied publichouses. The plaintiff, a licensed victualler, in October, 1897, became the purchaser of property at Camberwell, including a publichouse known as the King's Arms, held upon lease for a term expiring at Christmas, 1923. Prior to his purchase the defendants, Noakes and Co. (Limited), brewers, had a mortgage on the property, the terms of which were practically identical with those of the mort-

gage of 1897 mentioned below. The defendants were not the vendors, but they released their security in order to enable Messrs. Nicholson, the second mortgagees, to sell to the plaintiff for £6,800. As is usual, the plaintiff only found a small portion of the cash, the defendants, the brewers, advancing £4,850 on a first mortgage. This mortgage was dated October 7, 1897. It recited that the defendants had agreed to lend to the plaintiff the sum of £4,850 upon having the repayment thereof and of such other moneys as were thereafter mentioned secured in manner thereafter appearing; and it was witnessed that, in consideration of £4,850 then lent to the plaintiff by the defendants and for securing the payment to the defendants of the said principal sum and all such further sums as thereafter mentioned, the plaintiff demised and conveyed to the defendants the leasehold premises, and all trade and tenant's fixtures, and the goodwill of the business of a licensed victualler or other business carried on upon the said premises, and the full benefit and advantage of all certificates and the magistrates' and Excise licences for carrying on such business or relating to the said premises, to hold to the defendants subject to a power of redemption therein contained. By this proviso it was declared that, if the plaintiff should, either on demand by the defendants left at the demised messuage, or without such demand, pay to them all such principal moneys and interest as were respectively mentioned in the covenant for payment thereafter contained, and as should then be due on that security, then the defendants would, at the request and cost of the plaintiff, surrender or reconvey the premises to the plaintiff or as he should direct, and (after attorning tenant at a peppercorn rent if demanded) the plaintiff covenanted with the defendants that he would on demand pay to them the said principal sum and interest at 5 per cent. until payment, and all such further sums as should be due from the plaintiff, as well for money advanced to or for the use of the plaintiff, or paid on his behalf as therein mentioned, or on any other account or otherwise howsoever, with interest at the rate aforesaid, as also for goods sold and delivered by the defendants to the plaintiff. After other provisions the deed continued as follows:—"And for the considerations aforesaid the mortgagor, so as to charge the premises. . . hereby demised into whosoever possession the same may come, whether by act of the party or by operation of law or by any other ways or means however, and to the further intent that the obligation of this covenant may run with the land, doth hereby covenant with the company that the mortgagor shall not, nor will at any time during the continuance of the term aforesaid, and whether any principal moneys or interest shall or shall not be owing upon the security of these presents, use or sell, or permit to be used or sold, in, upon, or about the said demised premises any malt liquors except such as shall be bona fide purchased by the mortgagor of the company. And, further, that, if and whenever there shall be a breach of the said covenant, he, the mortgagor, shall and will pay to the company the sum of £1,000 as and for ascertained liquidated damages for each such breach, and will sell all such malt liquors pure, unadulterated, and unmixed, and of the like strength, character, and quality in all respects as the same shall be supplied to him." The deed also declared that the words "the mortgagor" and "the company," except when otherwise controlled by the context, should, throughout the deed, include all persons deriving title under them respectively. The plaintiff was willing to pay off all money due to the defendants under the mortgage, and required them, on payment being made, to reconvey the leasehold property to him, and to release him from the covenant by which the house purported to be "tied" to the defendants during the

*Reported by F. EVANS, Esq., Barrister-at-Law.

whole currency of the lease, or to transfer the mortgage to him and assign the benefit of the covenant. The defendants were willing to reconvey or transfer, but not to release or assign the covenant, and the present action was brought to obtain a declaration that the plaintiff was entitled, not only to reconveyance or transfer, but also to a release or assignment of the covenant.

Mr. Astbury, Q.C., and Mr. Edward Beaumont were for the plaintiff; and Mr. Eve, Q.C., and Mr. Stanley Fisher for the defendants.

MR. JUSTICE COZENS-HARDY, in delivering judgment, after stating the facts, proceeded as follows:—The question which I have to decide is whether the "tie" can be retained by the defendants. If this case had arisen for decision a few years ago, I think no Judge of first instance would have hesitated to hold that the "tie" could not be enforced after the discharge of the security. It would have been regarded as a plain case of "clogging" the equity of redemption. But the supposed ancient doctrine of the Courts has been so treasured upon in recent years that it is very difficult to say what part (if any) of it still remains. It has been held that a mortgagor may be precluded from redeeming for a fixed period, such as five or seven years, *Teevan v. Smith* (L.R. 20, Ch.D., 724, 729). It has been held that, during the full period in which a mortgagor is precluded from redeeming, he may be bound by covenant to buy his beer only from the mortgagee, *Biggs v. Hoddinott* (L.R. [1898], 2 Ch., 307). In that case, the "tie" was objected to, not on the ground of its being a clog on the equity of redemption, but on the ground that it conferred on the mortgagee a collateral advantage which he was not entitled to retain. The objection, however, did not prevail. It has been held that a mortgagee of a leasehold theatre may, in consideration of a cash advance, take a covenant to repay the sum advanced with interest by quarterly instalments extending over five years, and to pay a share of the net profits of the theatre during the whole residue of the lease extending beyond the five years, and that a proviso for redemption on payment of all moneys covenanted to be paid, including the share of profits, is not invalid, *Santley v. Wilde* (L.R. [1899], 2 Ch., 474). It will be observed that in that case the proviso for redemption was nugatory, because it only came into operation on the expiration of the lease, at which date, *ex hypothesi*, there would be nothing upon which the proviso could operate. If I rightly understand the judgment of the Court of Appeal, it established that a mortgage of leasehold property expressed to be a security for the due discharge of future recurring obligations cannot be redeemed before those obligations have matured, even though the period covered by the obligations may or must exceed the duration of the lease. I do not think any other or larger principle can be extracted from that case. On the other hand, "once a mortgage, always a mortgage," is still a sound legal maxim. Anything which is comprised in a mortgage security must, when the debt is paid or the obligation is discharged, be returned to the mortgagor. It must be returned in its entirety. No part of it can be retained by the mortgagee. A remarkable instance of this doctrine is to be found in *Salt v. Marquis of Northampton* (L.R. [1892], A.C., 1). This doctrine is not questioned, and indeed is expressly admitted by the Court of Appeal in *Santley v. Wilde*. It remains to apply to the present case, as best I can, the principles to be gathered from the authorities both ancient and modern. In the first place, the mortgage is in terms a security only for the moneys covenanted to be paid—i.e., principal and interest, and the price of goods sold and delivered. All these moneys the plaintiff offers to pay. It does not

profess to be a security for the performance of the negative covenant which is commonly called a tie. In the second place, on payment of that which the plaintiff offers to pay, the event will happen upon which, by the terms of the deed, the defendants are bound to "surrender or reconvey the premises." In the third place, such a surrender or reconveyance is inconsistent with the retention of any charge on or interest in the premises. In the fourth place, the negative covenant or "tie" is expressed to be a "charge" on the premises. I doubt whether this phrase is strictly accurate. The precise operation of such a covenant has been described in different ways. Lord Cottenham in *Tulk v. Moxhay* (2 Ph., 774) calls it an "equity attached to the property by the owner." Sir George Jessel in *L. and S.-W.R.Co. v. Gomm* (L.R., 20 Ch.D., 583) calls it an "equitable burden." This much at least is clear, that, in the hands of the plaintiff and of any person taking with notice, this covenant imposes a fetter upon the enjoyment of the property and materially lessens its value. And in the present case no purchaser of the lease could escape being affected with notice. Upon the whole, I think the "tie," though perfectly valid during the continuance of the security, cannot be maintained when all moneys due upon the security have been paid off. It seems to me to be involved in the very idea of a mortgage that a mortgagee, when paid off, shall have no estate or interest in the mortgaged premises, and no right to interfere with the mortgagor in his enjoyment or user of the premises. I must therefore declare that, on payment off of all moneys due, the plaintiff is entitled to have a reconveyance of the property, or at his option a transfer of the security, free in either case from the tie. The defendants must pay the costs of the action.

[Solicitors—Sandilands and Co.; Fishers.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.JJ.) } Nov. 17.

VOGAN AND CO. V. OULTON.*

Contract—Hiring—Warranty—Damages—Remoteness.

Decision of Wright, J. (15 *The Times* L.R., affirmed.

This was an appeal by the defendant from the judgment of Mr. Justice Wright at the trial of the action without a jury, reported in 15 *The Times* L.R., 33. The action was brought to recover damages for breach of an implied warranty that certain sacks hired from the defendant by the plaintiffs to be used for the purpose of unloading a cargo of peas from the steamship *Norlands*, lying in the Surrey Commercial Docks, were reasonably fit for that purpose. The plaintiffs hired a large number of sacks, amounting to about 3,800, from the defendant, who was in the habit of letting out sacks on hire. The plaintiffs were the consignees of a cargo of peas which arrived in London by the steamship *Norlands*, and which was discharged by the dock company, as was usual, in the dock; but in accordance with the rules of the dock company the sacks had to be supplied by the consignees. The plaintiffs accordingly hired the sacks from the defendant, who knew the purpose for which the sacks were to be used. As one of the sacks, filled with peas, was being hoisted out of the hold it broke off at the neck and fell upon a man named Batt, who was engaged in the work of unloading. Batt brought an action in the County Court against the present plaintiffs for damages for the injury sustained by him in consequence of the negligence of the plaintiffs

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

in using a sack which was unfit for the work, and recovered £25. The plaintiffs now claimed from the defendant the £25 and costs which they had to pay to Batt, on the ground that there was an implied warranty that the sack in question was fit for the purpose for which it was supplied. Mr. Justice Wright held that there was an implied warranty as contended, and that the sack in question was at time of hiring unfit for the purpose for which it was supplied, and that the defendant contemplated that it would be used in the manner in which it was used. He accordingly gave judgment for the plaintiffs for the damages and costs in the County Court, which they had to pay to Batt.

Mr. W. F. Taylor, Q.C., and Mr. W. H. S. Oulton appeared for the defendant; Mr. Carver, Q.C., and Mr. E. P. Hewitt for the plaintiffs were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the defendant, when he let the sacks out to the plaintiffs, knew that they were to be used for the purpose of unloading peas from the hold of the ship. While one of the sacks was being so used the neck of the sack gave way, and the sack fell upon a man named Batt, who was engaged in the hold in the work of unloading, and injured him. Batt sued the present plaintiffs in the County Court and recovered £25 damages and costs. The plaintiffs then brought this action against the defendant to recover the damages and costs so paid to Batt, and their cause of action was for breach of warranty in supplying them with an article which was at the time of the hiring unfit for the purpose for which the defendant knew that the plaintiffs wanted it. Mr. Justice Wright found that the sack was at the time of the hiring not fit for the purpose for which it was to be used. They could not possibly interfere with that finding of fact. It was then said that the damages were too remote, because the parties could not have contemplated that it might fall upon a person in the hold. He (the Lord Justice) could not accept that. It was a matter of fact. The defendant knew that the sacks would be used in hoisting peas out of the hold. The case, therefore, was on all fours with "*Mowbray v. Merryweather*" ([1895] 2 Q.B., 640). He could not see any distinction between the two cases, and every point taken on behalf of the defendant was answered in the judgment of Lord Esher in that case.

LORD JUSTICE COLLINS agreed. When the facts of the case were once understood, the case did not raise any question of law. Mr. Justice Wright had found that the particular class of user to which the sack was applied was an ordinary user for such a sack, and that therefore the defendant must be taken to have contemplated the use to which it would be put. That was a question of fact, and, having once got those facts, the case was covered by "*Mowbray v. Merryweather*."

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Nov. 17.

IN RE AN ARBITRATION BETWEEN THE SOUTHAMPTON TRAMWAYS COMPANY AND THE MAYOR, &C., OF SOUTHAMPTON.*

Tramway Company—Purchase of undertaking—Determining the price—Tramways Act, 1870, sec. 43.

Decision of the Divisional Court (15 *The Times* L.R., 217) affirmed.

This was an appeal by the Southampton Tramways

Company from the judgment of the Divisional Court (Mr. Justice Bruce and Mr. Justice Ridley) upon a case stated by Sir Henry Oakley, the umpire appointed under the Southampton Corporation Tramways Act, 1897, to decide certain disputes between the Southampton Tramways Company and the Southampton Corporation as to the price at which the corporation should take over the undertaking of the Tramways Company in accordance with the Act of 1897. The case is reported in 15 *The Times* L.R., 217. The questions for the opinion of the Court were (1) whether, in determining the price to be paid under the Act of 1897, the arbitrators and umpire should treat the undertaking of the company, as defined by that Act, as an undertaking which the company only enjoyed subject to the contingency of being compelled to part therewith under the terms of section 43 of the Tramways Act, 1870; or (2) whether, in determining the price to be paid as aforesaid, the arbitrators and umpire should treat the undertaking as an undertaking which the company enjoyed free from all obligation to part therewith otherwise than under the terms of the Act of 1897 itself. If the first question was answered in the affirmative, the umpire fixed the price at £51,505; and, if the first question was answered in the negative and the second in the affirmative, the price fixed was £109,963. The material statutes were shortly as follows:—By the Southampton Street Tramways Act, 1877 (40 and 41 Vict., c. cxxi.), the Southampton Tramways Company was formed for the purpose of making and maintaining tramways, and the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, and parts 2 and 3 of the Tramways Act, 1870 (which included section 43), were expressed to be incorporated with the Act and to form part thereof except where expressly varied by the Act. By section 48 of the Act, in case the corporation should at any time after 11 years from the completion of any portion of the tramways within the borough of Southampton, but not later than 21 years after the passing of the Act, desire to purchase the tramways, and the works, material, and equipment connected therewith, and any lands or buildings acquired for the purposes of such tramways, and should apply to Parliament for powers to do so, and to enable the company to sell the same, the company should not oppose such application, and in the event of such powers being obtained should accordingly sell the tramways and premises to the corporation, and the terms of such purchase should, failing agreement, be determined by arbitration in manner provided by the Lands Clauses Act, 1845, for the settlement by arbitration of questions of disputed compensation. The Act received the Royal assent on August 10, 1877, so that the 21 years would expire on August 10, 1898. Section 43 of the Tramways Act, 1870, which was incorporated with the Southampton Street Tramways Act, 1877, empowered the local authority within six months after a period of 21 years from the time when the company were empowered to construct the tramway, and within six months after the expiration of every subsequent seven years, to require the company to sell their undertaking upon the terms therein mentioned. In 1894 the House of Lords, in "*Edinburgh Street Tramways Co. v. Lord Provost of Edinburgh*" and "*London Street Tramways Co. v. London County Council*" ([1894] A.C., 456), decided that section 43 of the Tramways Act, 1870, empowered the local authority to buy the tramway upon the terms of paying only for the value of the structure and plant. In 1897 the Southampton Corporation Tramways Act, 1897 (60 and 61 Vict., c. xxvi.), was passed to enable the corporation to purchase the tramways. Section 1 of that Act defined "the undertaking" as meaning "the undertaking, works, lands, easements, plant, fixed and movable stock-in-trade, buildings, equipment, rights,

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

powers, privileges, and authorities of the company, including the right to demand and take and recover tolls, rents, and charges." Section 3 provided that "the corporation shall purchase and the company shall sell the undertaking of the company" for such price as might be agreed on or settled by arbitration under the Lands Clauses Acts, and the purchase was to be completed on June 30, 1898. By section 4:—"The undertaking of the company shall by virtue of this Act become, and shall on and as from the transfer day be transferred to and vested in the corporation, subject to and according to the provisions of this Act, and free, as between the company and corporation, from the mortgage debt of the company, and all current debts and pecuniary liabilities of the company at the transfer day, and from that day the corporation shall hold the undertaking subject to and shall take over, perform, and satisfy all duties, contracts, engagements, obligations, and liabilities of the company in relation to the undertaking transferred other than and except the debts and liabilities aforesaid." On June 30, 1898, the undertaking was, by virtue of the Act, transferred to and vested in the corporation. It was contended on behalf of the Tramways Company that the price to be paid should be calculated as if the company enjoyed the rights and privileges of the undertaking free from all obligation to part therewith other than the obligation created by the Act of 1897; in other words, that the company were entitled to be paid as though they were selling a concession of their privileges in perpetuity. It was contended on behalf of the corporation that the company had a concession liable to be determined under section 43 of the Tramways Act, 1870, at the end of 21 years, and after that at the end of each subsequent seventh year, and that that was all the company had to sell, and that therefore the smaller figure—£51,505—was the proper amount of the purchase money. The Divisional Court adopted the contention of the corporation. The Tramways Company appealed.

Mr. Asquith, Q.C., Mr. J. D. Fitzgerald, Q.C., Mr. G. M. Freeman, Q.C., and Mr. A. Lyttelton appeared for the Tramways Company; Sir Edward Clarke, Q.C., Mr. Cripps, Q.C., and Mr. Haldane, Q.C., appeared for the corporation.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the case was a plain one. There were two contentions put before the umpire, and he found two figures according as the Court thought which was the right contention. It was clear that the Tramways Company held their property fettered with the condition contained in section 43 of the Tramways Act, 1870—namely, that they might be called upon to sell their undertaking at the end of 21 years, or at the end of each subsequent seven years, for a price fixed in accordance with the decision of the House of Lords in the Edinburgh and London tramway cases ([1894] A.C., 456). Prior to the Southampton Corporation Tramways Act, 1897, all that the company had to sell was its undertaking clogged with that condition. The undertaking of the company was defined in section 1 of the Act of 1897, and it seemed clear to him that when that Act empowered the corporation to buy the undertaking, it was an undertaking fettered with the condition contained in section 43 of the Tramways Act, 1870. There was nothing in the Act of 1897 to show that the undertaking to be sold was to be free from the fetter.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Peacock and Goddard, for Sharp, Harrison, Turner, and Turner, Southampton, for the Tramway Company; Robbins, Billing, and Co., for G. B. Nalder, Southampton, for the Corporation.]

Chan. Div. }
(North, J.)

1899.
Nov. 17.

DE BRAAM V. FORD.*

Bill of Sale—Validity—Form in schedule of Act—Non-compliance with—Stipulated time for payment—Payment "on or before" 1st November.

This was a motion raising an extremely narrow point on the Bills of Sale Act, 1882, which provides section 9) that bills of sale must be in accordance with the form given in the schedule to the Act. The form provides for payment of the debt secured by instalments "at stipulated times or time." In this case the plaintiff, Jean André de Braam, had borrowed money from the defendant, a money-lender, of Cork-street. The borrower and his wife gave a bill of sale to the lender over certain furniture. It was agreed that payment of the principal sums secured should be made "on or before the first day of November, 1899." The money purported to be secured was not paid, and the defendant was taking steps to realize. The plaintiff issued a writ claiming a declaration that the bill of sale was void, and an injunction to restrain the defendant from removing or seizing the furniture. This motion was made on the part of the plaintiff for an interim injunction.

Mr. Macnaghten, Q.C., and Mr. Stewart Smith were for the plaintiff; Mr. Herbert Reed, Q.C., and Mr. Thorn Drury for the defendant.

MR. JUSTICE NORTH said that there was here a question of pure law—on the construction of two documents the form given in the schedule to the Bills of Sale Act, 1882, and the bill of sale given by the plaintiff. It had been urged that the Court could not decide the question for trial on an interlocutory injunction, but there were cases in which the Court must, to deal with an application for an interlocutory order, decide the question in the action. Here there could be no evidence, and the whole materials were before the Court. His Lordship referred to the cases "Hetherington v. Grooms" (13 Q.B.D., 789) and "Sibley v. Higgs" (15 Q.B.D., 619), where it had been held in one case that an agreement to pay "on demand," in the other case that an agreement to pay "seven days after demand," was not an agreement to pay at a stipulated time. He said that an agreement to pay on or before a named day was equally an agreement to pay at an uncertain time, and therefore not in accordance with the form in the schedule to the Act. The present variation from the form might be in favour of the borrower. If the instrument did not accord with the statutory form it was void, whether the variation was in favour of the one party or the other. His Lordship therefore granted an injunction.

[Solicitors—G. J. Fowler; Emery Davies.]

Court of Appeal (Lord Russell of Killowen, C.J., A. L. Smith and Vaughan Williams, L.JJ.) } 1899.
Nov. 18.

ELLIS (APPELLANT) V. CAMBERWELL ASSESSMENT COMMITTEE (RESPONDENTS).†

Poor Rate—Assessment—Publichouse—Increase of value—Premium paid for lease—Valuation (Metropolis) Act, 1869, secs. 46 and 47.

An increase in value arising merely from general prosperity is not an alteration in value within the meaning of sec. 46, subs. 1, of the Valuation (Metropolis) Act, 1869.

*Reported by D. FITCAIRN, Esq., Barrister-at Law.
†Reported by W. F. BARRY, Esq., Barrister-at Law.

The amount of the premium paid for the lease of a publichouse is admissible in evidence on the question of alteration in value.

Decision of the Divisional Court (15 *The Times* L.R., 149) reversed.

This was an appeal from a decision of the Divisional Court (Mr. Justice Lawrance and Mr. Justice Channell), upon a case stated by the London Quarter Sessions upon an appeal against the supplemental valuation list for the parish of Camberwell for the year 1897. The case is reported in 15 *The Times* L.R., 149, and it raised important questions as to the valuation of houses (in the present case a publichouse) in the metropolis. The facts were as follows:—The appellant is, and has been since October, 1896, the occupier of a publichouse known as the Adam and Eve, High-street, Peckham, in the parish of Camberwell. At the quinquennial valuation in 1895 the gross and rateable values of the publichouse were fixed at £485 and £405 respectively, which values were duly entered in the quinquennial valuation list made in that year. By a provisional list made in December, 1896, the assessment of the publichouse was increased by the overseers to £600 gross and £500 rateable value, and objection was made by the appellant to the increased assessment on the ground that the said publichouse had not in the course of the year in which the provisional list was made increased in value by the addition thereto or erection thereon of any building, nor had there been any increase of value from any cause within the meaning of section 47 of the Valuation (Metropolis) Act, 1869. At the hearing of the objection the assessment committee endeavoured to get from the appellant information as to the premium given by him for the lease of the publichouse. This information the appellant refused to give, and the assessment committee, after hearing the objection and viewing the publichouse, reduced the assessment to £575 gross and £485 rateable value. In the supplemental valuation list made in 1897 the appellant's publichouse was again valued and assessed at £575 gross and £485 rateable value. The appellant objected to the valuation, and, on appearing before the assessment committee, contended *inter alia* (1) that the publichouse had been improperly included in the provisional list and therefore ought not to be included in the supplemental list, and that it was therein too highly rated; (2) that no alteration in the value of the publichouse had taken place during the 12 months preceding the making of the supplemental list within the meaning of section 46, subsection 1, of the Valuation (Metropolis) Act, 1869; (3) that the overseers were not in law entitled to consider, or in any way to act on, any sum of money paid or supposed to have been paid for the publichouse either since the date of the valuation list in force at the time of the making of the provisional list or at all. The assessment committee, after hearing the objections, refused to give the appellant any relief, and he appealed to the London Quarter Sessions. At the hearing of the appeal counsel for the appellant objected to any questions being asked or any evidence being given about the premium paid by the appellant. The Court, however, overruled the objection and the fact was elicited by the respondents on cross-examination that the appellant had paid £16,400 as the consideration for his lease. No evidence was given as to the precise amount of the premium paid in 1895 or any time previously, but it was admitted by one of the appellant's witnesses that assuming the valuation appearing in the quinquennial list made in 1895 to have been calculated according to the method usually adopted in the parish of Camberwell the valuation must have been based on a supposed payment of a premium of about £6,400. The assessment

committee, however, at the time of the revision of the quinquennial valuation list did not in fact know the precise amount of the premium which had been paid by the then occupier. Evidence was given by a valuer on behalf of the respondents that there had been since the date of the quinquennial valuation list a general appreciation of licensed premises throughout the metropolis, and that, in his opinion, the annual value of the said publichouse had between April and October, 1896, increased by about £100. It was, however, admitted that there had been no structural alteration to the publichouse. No evidence was given of any circumstances specially affecting the annual value of the publichouse. The respondents contended that they were not bound to give any such evidence, but that it was enough for them to show that the value had in fact increased. It was further admitted that no publichouses had been placed in the provisional or supplemental lists except such as had in fact been sold since the date of the quinquennial valuation thereof, although publichouses in the neighbourhood had generally increased in value. For the assessment committee it was contended that it was not necessary that there should be a structural alteration of the rated premises in order to warrant their insertion in a supplemental list; that the facts mentioned as to the premium given for the lease of the publichouse were evidence of an alteration in matters stated in the quinquennial valuation list during the 12 months preceding the making of the supplemental list under section 46 of the Valuation (Metropolis) Act, 1869; and that the payment of such premium showed that there had been such a material and unforeseen alteration of the value of the publichouse as to warrant its insertion in the supplemental list. For the appellant it was contended that the facts above mentioned were not in law any evidence of an alteration within the meaning of section 46, subsection 1, of the Valuation (Metropolis) Act, 1869, and that all evidence as to the amount of premium paid by the appellant for the publichouse in October, 1896, was irrelevant and inadmissible, and that the amount of such premium in the absence of any evidence, save as hereinbefore stated as to the premiums previously paid, would not afford any indication of an alteration in the value of the publichouse. The Court of quarter sessions gave judgment in the following terms:—"We find that although there had been no structural alteration in the appellant's premises between 1896 and April, 1897, there has been alteration in value in these premises by way of increase in that period. The appellant has failed to establish in our opinion that the alteration in gross and rateable values made by the assessment committee in the supplemental list is in excess of the actual increased value within the statutory period, and we confirm the alteration of the list made by the assessment committee with costs." The values in the supplemental list were, therefore, ordered to remain as assessed by the assessment committee. The questions for the opinion of the Court were:—(1) Whether the alteration in value which took place during the 12 months preceding the making of the supplemental valuation list was in law an alteration within the meaning of section 46, subsection 1, of the Valuation (Metropolis) Act, 1869; (2) whether the amount of premium paid by the appellant in October, 1896, for the said premises ought to have been received in evidence; (3) whether the amount of such premium was in law any evidence of an alteration within the meaning of that subsection. If the Court should answer all the foregoing questions in the affirmative the order of sessions was to be affirmed, and if the Court should answer all or any of the questions in the negative the order of sessions was to be quashed and the gross and rateable values of the publichouse were to be reduced to £485 and £405 respectively, or the premises were to be

struck out of the valuation list, or the Court was to make such other or further order as to the Court should seem fit. The Divisional Court answered all the questions in the affirmative, and affirmed the order of quarter sessions.

Mr. Littler, Q.C., Mr. Page, Q.C., and Mr. William Russell appeared for the appellant; and Mr. Macmorran, Q.C., and Mr. Ryde for the respondents.

The COURT, having taken time to consider, delivered judgment, allowing the appeal.

LORD JUSTICE VAUGHAN WILLIAMS read the judgment of the Court as follows:—The 43rd section of the Valuation (Metropolis) Act, 1869, which, as the preamble states, was passed to secure uniformity in the assessment of rateable property in the metropolis, provides that the valuation list shall last for five years "subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned." Now alteration is provided for in section 46 and section 47. The former provides for supplemental valuation, the latter for provisional valuation. Supplemental valuation takes place at the end of each year. The old list is then to be supplemented by making a new list of all the alterations which have taken place within the last 12 months. If there are no such alterations which make a supplemental list necessary in any of the matters in the valuation list (which, of course, includes gross and rateable value) the overseers are to send to the assessment committee a certificate to that effect. Provisional valuation deals with the alteration by increase or decrease in value of a particular hereditament "from any cause" during the 12 months. The provisional valuation takes effect immediately and remains in force till the making of the supplemental or other valuation list at the end of the year. The alterations in the supplemental list seem to be the confirmed provisional valuations. It seems to follow that whether one is dealing with the supplemental list or with the provisional list the question whether there has been such an alteration in the value of the premises as to justify an alteration in the valuation seems to be the same in either case. Now what are the conditions of such an alteration? It seems to us they are these:—(1) The alteration in value must be such that, if the fact relied on as constituting the alteration had been present at the time of the original valuation, it could properly have been taken into consideration in arriving at the assessment; (2) that the fact constituting the alteration in value should affect the hereditament in question in particular. We do not think that a general rise in values would be a fact constituting such an alteration. This, it seems to us, would be inconsistent with the expressed intention of the Act that the valuation list should remain in force for five years. Moreover, we do not think that the mere proof of a rise in value of a class of hereditaments including the one sought to be dealt with by the provisional or supplemental valuation would of itself justify a new valuation under sections 46 and 47, because such a rise in no way negatives a general rise in the values of hereditaments of all classes. After all, the rise in the value of licensed houses generally depends on a general cause, such as prosperous times, which give the mass of the people more money to spend in the luxuries of life, whether drink, or bread, or meat, or clothing, or sight-seeing, or houses, or anything else. The licensed victualler will obtain a better price if he sells his publichouse; the butcher or the baker will obtain a better price if he sells his business. Theatres and music-halls will be easy to sell. Houses and leases will command good prices to let and to sell. All this flows from one cause, the prosperity of the people. We do not think sections 46 and 47 apply in such a case to any class of hereditaments increased in value as a class

by a cause affecting all classes, such as general prosperity. The fact, however, that the increase in value affects a class as a whole will not exclude the increase from the operation of these sections, provided it is shown that the increase of value arises from some cause affecting merely the class, and not from the cause of general prosperity affecting all classes of the community—*e.g.*, if the taste for cycling makes factories which are conveniently situated for this manufacture command higher prices to sell or to let, this is a cause affecting a class—*viz.*, premises suitable for cycle manufacturing which go up in value by reason of a new fashionable taste; but the cause is independent of the general prosperity of the community, and such an increase in value would justify an alteration under sections 46 and 47 during the currency of the quinquennial period of the assessment. The same would be true if war sent up the value of premises licensed for the purpose of carrying on the manufacture of gunpowder, the cause of increase of value being independent of general prosperity. But in each case it is for those who alter the assessment to prove the nature and cause of the alteration in value. It is easy to do this where the increase of value arises from some local cause affecting a class or some hereditaments in a class—for instance, when the building of a bridge sends up the value of the houses of a street thus made more accessible, or the removal of a cul-de-sac makes the houses in a street of shops more valuable from an increased traffic through the street, or the houses in a residential street less valuable from the increase of noise. Betterment or depreciation of such a character affecting all or some of the houses in a street is clearly within sections 46 and 47, and the cause of the increase in value is easy of proof. The proof is more difficult where the cause of the increase in value is not a local physical cause, but in our judgment the onus of proving that the cause of the alteration in the value of the hereditament in the preceding 12 months is a cause which does not affect all classes is clearly on those who seek to have a provisional or supplemental list made. These being the conditions for the application of sections 46 and 47, let us see how far the facts stated in the special case show that there has been within the 12 months an alteration in the value of this publichouse. Two sorts of alteration are alleged. First, a witness says in his opinion the value of the particular publichouse increased by £100 a year in the 12 months in question, and he attributes this to the rise in value of licensed houses throughout the metropolis. For the reasons which we have given we do not think that the onus on those who seek to say that there has been an alteration in value within the meaning of these sections is satisfied by proof of a rise in value which is consistent with a general rise resulting from general prosperity. Secondly, it is said that the fact that this publichouse has just been sold for £16,400 is evidence of an alteration in value within the 12 months. We think not. It may be that £16,400 was the very sum the vendor paid on going into possession in or prior to 1895. It is said not so, because in such a case the valuation in 1895 would have been higher than it in fact was. That, however, depends upon how much of that £16,400 the assessment committee apportioned to personal goodwill or other matters not affecting the letting value of the publichouse; see "*Bradford-on-Avon Assessment Committee v. White*" ([1898] 2 Q.B., 680). The questions at the end of the special case we answer as follows:—The answer to question 1 is No; there is nothing in the facts stated in the case nor in the evidence stated to have been adduced sufficient to justify the conclusion that the alteration which took place during the 12 months preceding the making of the supplemental list was in law an alteration within the meaning of section 46. It is

quite consistent with such facts and evidence that the alteration in value resulted from general prosperity. The answer to question 2 is Yes, and to question 3 No; for although evidence of the amount of the premium is admissible, the amount of the premium was not in law any evidence of an alteration within section 46, unless some evidence was given of the premium previously paid beyond that which appears by the case to have been given.

[Solicitors—Maitlands, Peckham, and Co., for the appellant; Marsden and Son, for the respondents.]

Court of Appeal (A. L. Smith, Collins, } 1899,
and Vaughan Williams, L.J.) } Nov. 18.

WILLIAMS V. POULSON.*

Master and Servant—Master's liability to servant
—Workmen's Compensation Act, 1897, Sched. 1,
clause 1 (b)—Intermittent employment—Basis
for calculating compensation.

This was an appeal from an award of the Judge of the Liverpool County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant was a casual labourer, and at the time of the accidental injury for which he claimed compensation was in the employment of the respondent, who was a stevedore. The County Court Judge made an award in favour of the applicant for a weekly payment of 7s. 6d. during his incapacity for work. The applicant appealed.

Mr. RUEGG, Q.C., and Mr. SEGAR appeared for the applicant, and said the only question in the appeal was as to the proper basis for calculating the compensation to which the applicant was entitled under schedule 1, clause 1 (b), of the Workmen's Compensation Act, 1897. The applicant was a casual dock labourer, and was not in any permanent employment, but worked sometimes for one stevedore and sometimes for another. At the time of the accident he had been working for the respondent for three days and a half. During the previous year he had been engaged to work for a great number of stevedores at different times, and he had worked many times for the respondent. From March 5, 1898, to January 25, 1899, when the accident happened, he had worked for the respondent in each week except four, though sometimes he only worked for one day in the week. There was, however, no continuous employment, the applicant being taken on when wanted. The County Court Judge had taken together all the periods during which the applicant had worked for the respondent, and found that the applicant's total wages during those periods amounted to £38 13s. 6d. He divided that sum by the number of weeks, and calculated the applicant's average weekly earnings to be about 15s., and made an award for a weekly payment of half that sum. That, however, was not the proper method of assessing the compensation in this case under the schedule to the Act. By Clause 1 (b) of the schedule the Court had to consider the average weekly earnings for the period during which the workman had been continuously employed under the same employer—“*Jones v. Ocean Coal Company*” ([1899] 2 Q.B., 124); “*Price v. Marsden and Sons*” ([1899] 1 Q.B., 493). The applicant had been employed at the time of the accident for three days and a half, and during that time his earnings were 5s. a day, which gave an average weekly earnings of 30s. The County Court Judge ought to have made an award for a weekly payment of half that sum—viz., 15s. They also referred to “*Small v. McCormick*” (36 Sc., L.R., 700).

Mr. CARVER, Q.C., and Mr. HORRIDGE (Mr. D. H. Crompton with them), for the respondent, contended,

first, that the applicant was not entitled to recover any compensation at all, because the Act did not apply. The Act only applied where there was continuous employment under the same employer for at least two weeks before the accident. There was no mode provided by the Act of assessing compensation where the employment was for a shorter period. [LORD JUSTICE COLLINS.—You have no cross-appeal. You cannot, therefore, take that point now.] It could be taken for the purpose of defeating the appeal, not for the purpose of reducing the amount awarded. Secondly, if the Act did apply, the County Court Judge was right in awarding 7s. 6d. a week. He must be taken to have found continuous employment with the respondent during the whole period from March 5, 1898, to January 25, 1899.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the sole question before them was, What was the amount of compensation payable to the applicant? Between March 5, 1898, and January 25, 1899, the applicant had been working for the respondent during a portion of each week, except on four occasions when he did not work for the respondent for some reason not appearing. There was no pretence for saying that there had been any break in the continuity of the employment. It had been decided in this Court in “*Price v. Marsden and Sons*,” and in Scotland in “*Small v. McCormick*,” that the workman must be in the employment of the same employer during the period in question, and other employments could not be taken into consideration in calculating the compensation. Now it seemed to him that the County Court Judge had found in this case that the employment by the respondent continued without any break. In “*Keast v. Barrow Hematite Company*” (15 *The Times* L.R., 141) this Court held that if a man went away on a holiday, that was not a break in his employment. The County Court Judge seemed to have found that the applicant had been in the employment of the respondent during the period mentioned. The Judge then found that during that period the applicant had earned £38 13s. 6d., and he divided that sum by the number of weeks during which the employment lasted, and he took one-half of the sum so found. That seemed to him to be right. It was not necessary to decide the very important point whether the Act applied at all where the employment continued for less than two weeks. It was enough to say that in this case the applicant had been awarded as much as he was entitled to.

LORD JUSTICE COLLINS concurred. The appeal must fail unless the applicant could show that the County Court Judge gave him less than he was entitled to. The Judge treated him as in the employment of the same employer during a number of weeks short of a year, and on that basis he had assessed the compensation. Clause 1 (b) of schedule 1 of the Workmen's Compensation Act, 1897, provided that in such a case the workman was to receive a weekly payment amounting to 50 per cent. of his average weekly earnings during the period in which he had been in the employment of the same employer. Mr. Ruegg's contention came to this, that where the workman had been employed only for a period less than a week by the employer the amount of compensation should be calculated as if he had been employed by the same employer for at least two weeks at the same rate of daily wages that he was earning at the time of the accident; and he got that out of the words in clause 1 (b) of schedule 1. It was not for them to say whether in point of fact there was during the period over which the County Court Judge had calculated the weekly wages such a continuous employment by the same employer as would justify the award. That was a question of fact, and he (the Lord Justice) rather thought that the County Court Judge

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

had found that there was a continuous employment by the same employer, though there might have been temporary gaps in the employment. But whether the Judge had so found as a fact or not, there was no appeal brought by the respondent, and therefore the question whether the employment was for less than two weeks and whether in such a case the Act applied at all was not open. The Court had, he assumed, to support the decision of the County Court Judge by all necessary conclusions of fact.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Lynsky, Liverpool, for the applicant; Morris, Allens, and Chapman, for Quiggin and Brothers, Liverpool, for the respondent.]

House of Lords (Lord Halsbury, L.C.,
Lords Macnaghten, Morris, Shand,
and Brampton) } 1899.
Nov. 20.

GREVILLE-NUGENT AND ANOTHER V. MUIR MACKENZIE
AND OTHERS.*

Settlement—Marriage—Rents and royalties—
Mines Right of tenant for life to income of.
Decision of the Court of Session reversed.

This was an appeal against the opinion and judgment of the First Division of the Court of Session (the Lord President, Lord Adam, Lord McLaren, and Lord Kinnear), dated January 25, 1898, and given on a special case which raised the question whether certain rents and royalties payable under a lease and received by the marriage settlement trustees of Mr. and Mrs. Greville-Nugent, in respect of stone quarries on the estate of Cove, were to be treated as capital or income. The facts were thus stated by Lord Adam in the course of his judgment:—The questions in this case arise upon the construction of a deed of settlement on the marriage of Mr. and Mrs. Greville-Nugent, dated June 3, 1882, and which we should call an ante-nuptial marriage-contract. At that date Mrs. Greville-Nugent, then Miss Ogilvie, was proprietrix of the estate of Cove, in Dumfriesshire, and by the contract she bound herself to convey that estate to the trustees therein named, upon trust, at the request of her husband and herself during their joint lives, or of the survivor of them, and after the death of both, at the discretion of the trustees, to sell the same, and all necessary powers of sale were given them for that purpose. Power was also given to them in the meantime to lease the unsold parts of the lands, and they were directed to hold the proceeds of the sale and the net rents and profits of the Cove estate until sale upon the trusts therein declared. These were that they should hold certain investments, including the net moneys to arise from the sale of the estate, but not including the rents and profits of the estate until sold, in trust to pay the annual income thereof to Mrs. Greville-Nugent for her sole and separate use, and after her death to her husband under certain conditions which need not be mentioned, and after their death for the children of the intended marriage. As regards the rents and profits of the estate until sold, or of so much thereof as should not have been sold, the trustees were directed to pay and apply them to the person or persons for the purposes and in the manner in which the annual income of the residue or net money to arise from such sales would be payable or applicable if the sale and investment thereof were then actually made. Mrs. Greville-Nugent is the person who would at present be entitled to the annual income of the moneys arising from the sale of the estate. These being the provisions of the trust-settlement, the facts which raise the present questions are

that, the estate not having yet been sold, the trustees on June 11, 1895, let certain quarries in the estate to tenants who pay therefor a fixed yearly rent of £100 and a royalty of one-twelfth of all stone quarried. These yielded in the year ending July, 1896, a rent or profit of £225 19s. There is only one child of the marriage, Miss Greville-Nugent, who is the party of the second part, and the question is whether Mrs. Greville-Nugent is entitled to receive the rent and royalties received in respect of the quarries so let, or whether the rent and royalties are to be regarded as capital, of which she is only entitled to the income.

The Court of Session adopted the view that the rent and royalties were capital, of which the life renter was only to receive the interest. Lord Adam relied on words of Lord Cairns in "*Gowans v. Christie*" (11 Macph., H.L., 1), who, speaking of mineral leases, said:—"There is no fruit, that is to say there is no increase, there is no sowing and reaping on the ordinary terms, and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual for a specific length of time to go into and under the land, and to get certain things there, if he can find them, and to take them away just as if he had bought so much of the soil."

The Lord Advocate (Mr. Graham Murray, O.C.), Mr. Elgood, of the English, and Mr. A. S. D. Thomson, of the Scottish Bar, appeared for the appellants; Mr. Guthrie, Q.C., and Mr. Taylor Cameron, both of the Scottish Bar, for the respondent Miss Nugent, and Mr. Methold for the respondents the trustees.

The LORD CHANCELLOR, in moving that the interlocutor appealed from should be reversed, said that the learned Lord President appeared to have been misled by the forms of English conveyancing. It was familiar machinery in English conveyancing to create a trust for sale and subsequent trusts for the application of the income of the property sold, with provisions for the payment of income until sale. The learned Judge had, from the form of settlement adopted, erroneously assumed that the main purpose of the settlement was a sale, and that the other provisions were intended to be only temporary. Counsel for the respondents had not dealt with that aspect of the question at all. Their Lordships had, therefore, only to look and see what was the intention of the parties apart from any consideration of the power of sale. In that view the question was governed by authority. There was included in the settlement a mineral estate as well as another estate, and the point was, what was conveyed by the words. He was not prepared to defend the logic of some of the earlier decisions. The case of coals and minerals was absolutely different from that of the products of the soil, and strictly speaking the term "rent" was inapplicable to coal and other minerals, though in fact we habitually spoke of the rent and royalties of coal and other mines. The coal or other mineral was really a part of the soil itself and not a return from the soil. But it was useless to argue on the matter, though if it were *res integra* there might be much to say in favour of the view taken by the Court of Session, inasmuch as a long course of decisions had established that open mines were part of that which might be given to the tenant for life, and that he was entitled to take the mineral therefrom as though it were the recurrent produce of the soil. The respondents had sought to limit the application of the rule to mines opened by the settlor or testator. The suggestion was an absolute novelty, because in all the cases the question had been simply "what is the thing bequeathed or settled?" No case had been cited in support of any such distinction.

LORD MACNAGHTEN was of the same opinion, and said that the Lord Advocate was perfectly justified in saying

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

that the Lord President had been misled by the terms of conveyancing used, which were really only in common form. The tenant for life was entitled to the income of the settled property, part of which was open mines. The words clearly included the income derived from these mines.

LORD MANSFIELD concurred.

LORD BRANSTON, in expressing himself to be of the same mind as the other noble and learned Lords, said these quarries had been worked for more than a century, but for some years they were not worked. In that case they might be termed "discontinued," but for the purpose of this settlement they must be regarded as open mines.

LORD BRANSTON concurred.

[Solicitors: C. A. Kignood, for the appellants; Foxton, Ellison, and Co., for the respondents.]

Court of Appeal (Lindley, M.R., Sir J. F. Johns, and Bowen, L.J.) } 1899,
Nov. 20.

LITTLEDALE V. LIVERPOOL COLLEGE.*

Limitations, Statute of.—Land.—Possessory title
—*Animus possideandi*.

This was an appeal by the plaintiffs from a judgment of Mr. Justice Fry dismissing the action. The action was one of trespass and was brought for the purpose of establishing the title of the plaintiffs to a small strip of land near Toxteth-park, Liverpool. The land in dispute was a narrow strip open at both ends, situate between two fields belonging to a Dr. Solomon, the defendants' predecessor in title, and having hedges the whole length of the strip. The strip led from a public road called Penny-lane to a piece of land belonging to a person named Minelair and adjoining the two fields above referred to, but separated by them from Penny-lane. In 1848 this piece of land, which was then pasture, was conveyed to the plaintiffs or their predecessor, and it is hereinafter referred to as the plaintiffs' field. The strip of land was grass and was the means of access to the plaintiffs' field from Penny-lane. Formerly there did not appear to be any other access to the plaintiffs' field except along this strip; but before 1848 other roads leading to the field from other places were laid out and the strip in question became comparatively unimportant as a road to the field. It was admitted that the conveyance of 1848 did not include this strip of land, and that so far as the title thereto was shown by the documents it belonged to the defendants and not to the plaintiffs. On the other hand, it was conceded that the plaintiffs were entitled to a right of way along the strip of land. The plaintiffs, however, claimed to make a title to the land in dispute under the Statute of Limitations. They relied upon several acts of user referred to by the Master of the Rolls in his judgment and particularly upon the fact that they had erected two gates, one at each end of the strip of land, and had subsequently kept the gates locked. The appeal was heard on November 13.

Mr. Hughes, Q.C., and Mr. Briscoe were for the plaintiffs; Mr. McCall, Q.C., and Mr. Cochran were for the defendants.

The Court dismissed the appeal.

The Master of the Rolls (after stating the facts as above) said: In order to acquire by the Statute of Limitations a title to land which has a known owner, that owner must have lost his right to the land by being dispossessed of it or by having discontinued his possession of it. See 3 and 4 William IV., c. 27, s. 3. I will consider discontinuance by the defendants first. About 13 or 14 years ago, when one Lewis was Solomon's tenant, Solomon told him to pull down part of the fence

between the strip and his own field, asserting, as the truth was, that the strip was his. Lewis made openings in the fence accordingly. This was long after the gates were put up. The incident disproves discontinuance of possession by Solomon at the time in question. It is true that the defendants have done nothing on the strip since this time, but they had no occasion to do so. I cannot infer from the evidence any discontinuance of possession by the defendants or their predecessors either before or after this act of ownership. If the defendants have lost their right to the strip it must be not by reason of any withdrawal or discontinuance of possession on their part, but by reason of their being dispossessed by the plaintiffs or their predecessors. I turn then to what the plaintiffs have done. Many years ago the plaintiffs or their predecessors put up two gates, one at each end of the strip of land in question, and they put locks on these gates, and they were kept locked until recently, when disputes arose. The plaintiffs or their tenants have kept the keys. If the plaintiffs had been strangers, having no right to or over the strip in question, the natural inference would be that they put up these gates in order to exclude every one, and that every one was in fact excluded. But the erection of the gates and the fact that they were locked is in this case open to a very different explanation. Let us take the gates separately. The plaintiffs had a right to put up a gate in their own field, and if they put it up there and not actually in the strip of land, they in no way dispossessed the defendants of any land of theirs nor interfered with any right of theirs, for the defendants had no right to go from the strip of land on to the plaintiffs' field. The evidence does not show where exactly this gate was. If it was in the strip of land its erection was a trespass and so far an invasion of the defendants' rights, but far short of an eviction from the strip. The gate at the Penny-lane end of the strip may well have been put up to protect the strip and the plaintiffs' right of way over it from invasion by the public, and not to dispossess the defendants. There is evidence to show that rubbish was thrown on the strip at the Penny-lane end; but there is no evidence to show that the gate was put up with the intention of dispossessing Solomon, the defendants' predecessor in title. The gate was in fact a protection to his property as well as to the plaintiffs' rights. Nor is it, I think, true to say that whatever the plaintiffs' intentions may have been the defendants or Solomon were in fact dispossessed of the land by the erection of these two gates. They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an *animus possideandi*—i.e., occupation with the intention of excluding the owner as well as other people. The evidence that the plaintiffs never had any such intention is extremely strong. The correspondence shows that until quite recently they only claimed a right of way. Even when they commenced this action they claimed a right of way and no more. It was only at a later stage that they claimed the ownership of the strip. When possession or dispossession has to be inferred from equivocal acts the intention with which they are done is all-important. See "*Leigh v. Jack*" (5 Ex. D., 264). I am myself convinced that the gates were put up, not to exclude the defendants, but to protect the plaintiffs' right of way and to prevent the public from going along the strip of land now claimed by the plaintiffs. The other acts of ownership relied upon by the plaintiffs are far less important. The fact that horses or cattle lawfully on the strip grazed more or less in it does not in my opinion assist the plaintiffs. It is too insignificant. So is the leave given to put up a telegraph pole on the edge of the strip some three or four years ago. So is clipping the fences on the strip sides.

* Reported by H. R. MUMFORD, Esq., Barrister-at-Law.

The fact that one of the plaintiffs' tenants—viz., Peacop—let the pasturage of the strip to Carruthers some 15 years ago, and afterwards to Boote, who was a tenant of the defendants, is more important. This, however, was an arrangement between two tenants. The reason for it as regards Carruthers is not explained. As regards Boote, he tells us he paid Peacop 5s. a year for three or four years for convenience and grazing. He wanted to go along the strip to some buildings on his land and his cattle got through the fence where Lewis had cut it down, and Peacop complained of this. There is no evidence to show that the plaintiffs knew anything about either of these arrangements. There is no evidence to show that the plaintiffs or their predecessors ever themselves let the strip of land or dealt with it as their own otherwise than by shutting it in by the two gates already mentioned and by giving leave to put up a telegraph pole. I have looked at all the decisions I can find which throw any light on this subject. "Leigh v. Jack" is the nearest and most instructive. "Rains v. Burton" (14 Ch. D., 537) (the underground cellar case) presented no difficulty except on the point of concealed fraud. The owner of the cellar was there plainly dispossessed by the plaintiff, who took and kept possession of the cellar intending to acquire it for himself. In "Seddon v. Smith" (36 L.T., 168), and "Norton v. L. and N.W. Ry. Co." (13 Ch. D., 268) the acts of ownership were unequivocal—there was ploughing up and cultivation of a strip of land. Combining all the evidence adduced by the plaintiffs, I think Mr. Justice Bigham was quite right in holding that the plaintiffs had failed to prove the acquisition of a title to the strip of land in dispute. The evidence is not enough to prove that the defendants or their predecessors have been dispossessed for the statutory period of the strip which unquestionably was theirs. The appeal fails, and ought to be dismissed with costs.

The PRESIDENT of the PROBATE DIVISION arrived at the same conclusion, but with great hesitation. The facts of possession appeared to him to be extremely strong, and where all the acts of user relied on were on one side and none or practically none on the other he was very much inclined to say that there was proof of dispossession. But on the whole he was not prepared to differ from the learned Judge below, since the plaintiffs' right of way was undoubted, and it was difficult to distinguish acts done for the protection of that right and acts constituting possession.

LORD JUSTICE ROMER concurred.

Q.B. Div. } 1899.
(Bigham, J.) } Nov. 20.

CROSHAW V. FRITCHARD AND RENWICK.*

Contract—Offer and acceptance—Estimate—Construction—Custom of trade.

An offer is no less binding because in the form of an estimate, and headed "Estimate."

This was an action to recover damages for breach of contract. The plaintiff was the owner of certain freehold premises in Bermondsey, and the defendants were builders. In August of the present year the plaintiff was desirous of having certain building work done on his premises, and on August 22 the following letter was written by the plaintiff's architects to the defendants:—

"Our client, Mr. Croshaw, of No. 116, Fenchurch-street, the freeholder of premises in the occupation of Messrs. Roberts, Adlard, and Co., as above, is about to make additions to the property, and we should be glad to know whether you would be willing to give us a

tender in competition for the work. No quantities will be supplied, and our client does not bind himself to accept the lowest or any tender."

Subsequently the specification was sent to the defendants, and on September 14 the defendants wrote to the plaintiff the following letter, which was headed "Estimate":—"Our estimate to carry out the sundry alterations to the above premises according to the drawings and specification amounts to the sum of £1,230." On the next day the plaintiff wrote that he accepted the defendants' offer to execute for the sum of £1,230 the work in question. At a later date the defendants wrote that they had made an error in their figures, and that under the circumstances they must withdraw their estimate. The plaintiff had the work done by another builder at a price higher than that given by the defendants, and he now brought this action to recover the difference in price as damages for breach of contract. The question was whether there was a complete contract binding on the defendants. Their contention was that their letter of September 14 was not a binding tender; that the word "estimate" was advisedly used by them in order to avoid a final and binding agreement, which would have resulted from the use of words such as "we offer to execute the work." Evidence was given by several builders to show that this distinction is always observed in the trade.

Mr. Herbert Reed, Q.C., and Mr. T. E. Scrutton appeared for plaintiff; Mr. English Harrison, Q.C., and Mr. Acland for the defendants.

The cases of "Lewis v. Braas" (3 Q.B.D., 667) and "Harvey v. Facey" ([1893] A.C., 552) were referred to.

MR. JUSTICE BIGHAM said that the plaintiff's letter of August 22 was an invitation to the defendants to send in a tender in competition for the work. That meant that they were to state the price at which they would do the work, and the specification was sent in order that they might have the necessary materials upon which to tender. Then, on September 14, the defendants sent the letter headed "Estimate," and the question was whether that letter was an offer to do the work at the price mentioned. His Lordship was clearly of opinion that it was. It had been suggested that there was some custom or well-known understanding that a letter in this form was not to be treated as an offer. There was no such custom, and if there was it was contrary to the law. Both the plaintiff and the defendants, in his Lordship's opinion, intended these letters to constitute a complete contract. It was said that there was no complete contract, because in the specification there was a blank left as to the time within which the work was to be completed. In the ordinary course a subsequent agreement would be come to as to the time, but if there was no subsequent agreement then the work would have to be done in a reasonable time, but the absence of any such subsequent agreement would not have the effect of setting aside the already existing contract. The question for decision did not in fact depend upon any supposed custom of the trade, but on the language of the letters which had passed between the two parties. The defendants had made a mistake, and they must abide by the consequences of it. There would be judgment for the plaintiff for £250, with costs.

[Solicitors—Mackrell and Co.; Parker, Garrett, and Holman.]

Chan. Div. } 1899.
(Stirling, J.) } Nov. 21.

IN RE TURNBULL—TURNBULL V. NICHOLAS.*
Married Woman—Writ of attachment—Non-compliance with order of Court—Jurisdiction.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

The Court has jurisdiction to issue a writ of attachment against a married woman who, as the legal personal representative of a deceased intestate, fails to comply with an order for payment into Court of a sum of money forming part of the personal estate of the intestate.

This case raised an important question as to the liability of a married woman to have a writ of attachment issued against her in respect of her non-compliance with an order made upon her to pay money into Court. The question arose under the following circumstances. The defendant, Agnes Nicholas, a married woman, was the legal personal representative of Catherine Turnbull, a deceased intestate, and was by two orders, dated respectively May 8, 1899, and July 10, 1899, ordered to deliver an account of the personal estate of the intestate coming to her hands. In pursuance of such orders she on July 22, 1899, made an affidavit exhibiting an account, whereby it appeared that the sum of £277 18s. 7d., forming part of the personal estate of the intestate, was in her hands. By an order dated August 10, 1899, she was ordered to pay the amount into Court within four days after service. The defendant failed to comply with this order and a motion was made for leave to issue a writ of attachment against her. Upon that motion coming on before the Court, counsel for the defendant raised the objection that the defendant being a married woman was not liable to attachment. It was also suggested that the order of August 10, 1899, was wrong in form and ought to have been made in the form settled by the Court of Appeal in the case of "Mott v. Morley" (20 Q.B.D., 120). It was agreed that this point should be disposed of on the hearing of the motion as if the defendant had given a notice of motion to discharge or vary the order of August 10, 1899.

Mr. H. Henderson appeared for the plaintiff in support of the motion and Mr. H. L. Fraser for the defendant.

Mr. Justice Mellish, in giving judgment, after stating the facts, said that by order 42, rules 4 and 24 of the Rules of the Supreme Court, 1883, an order for payment of money into Court might be enforced by writ of attachment or, in cases in which attachment was authorized by law, by attachment. As was pointed out by Mr. Justice Chitty in the case of "In re Green" ([1895] 2 Ch., 217), attachment there meant attachment of the person. By virtue of the third exception contained in sec. 4 of the Debtors Act, 1869, such attachment was authorized by law in the case of default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control. If the defendant were not a married woman there would clearly be jurisdiction to order the issue of the writ. What was decided in "Scott v. Morley" (20 Q.B.D., 120) was that there was no power under sec. 8 of the Debtors Act to commit to prison a married woman for her default in paying a sum for which judgment had been recovered against her in a Court of law, and which under sec. 1, subsec. 2, of the Married Women's Property Act, 1882, was payable out of her separate property and not otherwise. His Lordship then referred to the form of judgment as settled by the Court of Appeal in that case as given at p. 132 of the report, and, continuing, said that the decision plainly did not govern the present case; but it was necessary to consider the reasons on which it was based, and to ascertain how far they applied. Put shortly, the ratio decidendi appeared to be this: Sec. 1, subsec. 2 of the Act conferred on a married woman the capacity of entering into and rendering herself liable on any contract in respect of and to the extent of her separate estate,

and of suing and being sued either in contract or tort as if she were a *feme sole*, but the damages and costs recovered against her in any action or proceeding against her were to be payable out of her separate estate and not otherwise; and this enactment (in the words of Lord Justice Bowen) created only a proprietary and not a personal liability. On the other hand, sec. 5 of the Debtors Act, 1869, only authorized a committal where there was a "debt due from" the defendant; and a debt payable out of the separate property of a married woman was not a debt due from her. The order in the present case was not an order for payment of a sum to a person, but for payment of a sum into Court. The distinction between the two was pointed out and explained in "In re Green." The present order did not create a debt, and the provisions of sec. 5 of the Debtors Act, 1869, had no application. The material sections of the Married Women's Property Act, 1882, were sec. 1 subsec. 2 (which was dealt with in "Scott v. Morley", secs. 18 and 24. These enactments introduced very considerable changes in the law. They enabled a married woman to accept the office of a trustee, executrix, or administratrix without the consent of her husband, which she could not previously do; they made her separate estate liable for her breaches of trust and devastavit which it previously was not (see "Wainford v. Heyl," 20 Eq., 321), and they relieved her husband from liability and from being sued in respect of her acts. If the object of the order of August 10, 1899, was to compel the defendant to make good a loss occasioned by some act of hers amounting to a devastavit or breach of trust, his Lordship would be of the opinion that much of the reasoning in "Scott v. Morley" as to the nature of the liability applied to the case before him, and that the order was wrong in form and ought to be discharged, or varied so as to make it accord with the form settled by the Court in "Scott v. Morley." He thought, however, that such was not the object of the order. So far as appeared from the evidence on which the order was made no breach of trust or devastavit had been committed, nor any liability by reason thereof incurred by the defendant. What did appear was that the defendant had in her hands a sum of money forming part of the intestate's estate. That sum of money ought not to have been mixed up with the defendant's separate estate, but ought, if the defendant had performed her duty, to be standing to a separate account in her name as administratrix with some bank; and the object of the order was to get that sum, for greater security, transferred from the bank into Court. It seemed to his Lordship that an order for payment of the sum by the defendant out of her separate estate would not be appropriate to such a state of facts, and that the order was properly made in the present form. That being so the case fell within the third exception in sec. 4 of the Debtors Act, 1869; and an order for attachment might be made if there was jurisdiction to make such an order previously to the passing of that Act. Upon that, authority was very scanty; for previously to the passing of the Married Women's Property Act, 1882, the husband was liable, and orders would be naturally sought for and made against him, and not against the wife. The cases of "Bell v. Hyde" (Proc. in Ch., 328) and "Otway v. Wing" (12 Sim., 90) appeared to show that attachment might in a proper case issue against a married woman, and his Lordship was of opinion that, so far as at present appeared, this would be a proper case. His Lordship must, however, take into consideration the provisions of the Debtors Act, 1878. Upon the motion for the attachment

an affidavit had been made by the defendant's present solicitor to the effect that she had applied the sum appearing by the account to be in her hands, or part of it, in payment of the intestate's debts. The affidavit was, however, insufficient to enable his Lordship to exercise the powers conferred by the Debtors Act, 1878, or to ascertain how the money which came to her hands had been disposed of. It seemed to him that the order for the issue of the writ ought to go, but that the writ ought to lie in the office for a fortnight or three weeks to enable the defendant to make a proper affidavit showing what had become of the money traced to her hands.

[Solicitors—Johnson, Weatherall, and Sturt, for J. G. and T. Marshall, Durham, for the plaintiffs; John Greenfield, for the defendant.]

Chan. Div.
(Farwell, J.) }

1899.
Nov. 21.

ATTORNEY-GENERAL V. SIMPSON.*

River—Public navigable river—Liability to maintain and repair locks.

The facts of this case are sufficiently set out in the judgment.

Mr. Upjohn, Q.C., Mr. N. Tebbutt, and Mr. Brooke Little appeared for the plaintiffs; Mr. Neville, Q.C., and Mr. R. J. Parker for the defendant.

MR. JUSTICE FARWELL, in delivering judgment, said:—The Attorney-General (on the relation of the County Council of Huntingdon) and the County Council of Huntingdon seek to establish against the defendant a public right of navigation over the river Ouse from St. Neots to St. Ives, coupled with a liability on the defendant to maintain and work certain locks and a stanch. The distance between St. Neots and St. Ives is about 16 miles, and there is a fall in that distance of about 28ft. The plaintiffs assert that the river is and has been time out of mind a public navigable river, and on this basis they also assert that the defendant is liable by reason of certain patent grants and an Act of Parliament to maintain the six locks—namely, St. Neots, Offord, Brampton, Godmanchester, Houghton, and Hemingford—which all stand on practically the same footing, and a stanch at St. Ives to which different considerations apply. The first issue that I have to determine is whether the river is and has been from the earliest times, or at any rate anterior to the grant of the patent rights, a public navigable river. The question whether a non-tidal river is navigable or not depends not on the question of possibility of navigation, but on the proof of the fact of navigation. If the fact be proved, then the channel of the river is the King's highway and as such is open to the free passage of all the King's subjects. See "*Williams v. Wilcock*" (8 A. and E., 329); "*Mayor of Nottingham v. Lambert*" (Willes Rep., 111 and 114); and Hale, "*De Jure Maris*," 374. A quantity of evidence has been adduced on this issue, and it is impossible for me to dissect and comment on it in detail. I can only deal with it generally. The earliest document put in was the Domesday Book, and there can be no doubt that there were mills upon the river in the time of Domesday, and that such mills were water mills, because as a matter of history windmills were not introduced into England before the 12th century. It is also plain that all such mills must have had dams in order to be worked. There is, however, nothing to show where such mills were situate, and I therefore get very little assistance from this document. The plaintiffs rely on the statements contained in certain inquisitions appearing on the Hundred Rolls made in

the time of Edward I. These inquisitions were held with the object of ascertaining whether any wrong had been done to the King or to his subjects during his absence in the Holy Land. They were made by special commissioners appointed for the purpose upon the oath of a jury of every hundred and town affected by the inquisition—that is to say, by men who may be deemed to have had a special local knowledge. It is obvious that the inquisitions *quo warranto* do not amount to any decision; but they are admissible as reputation in a question of public right such as the present, and are entitled to consideration from the local knowledge of the deponents. The short effect of the presentments is that the jurors assert that ships and boats were wont to come up the river and that their passage had been obstructed by the mills, stanches, and weirs of Reginald de Grey and the Abbot of Ramsey and the Prior of Huntingdon. But there the matter ends; no judgment appears to have been taken in any of these cases, and although I think it plain that there was public navigation between mill-dam and mill-dam, so far as a free passage throughout from St. Neots to St. Ives is concerned, the conclusion is, to my mind, against the plaintiffs. It is plain that the question was raised and the claim was made, but that the obstructions nevertheless remained and were not in fact removed. This conclusion is fortified by a deed in 1467 between the Abbot of Ramsey of the one part and the townships of Godmanchester and Huntingdon of the other part, and sealed with the seal of the Duchy of Lancaster. This deed gives a graphic picture of this part of the river in the 15th century. There was a dam, and ships were drawn over at a place which had been long used for that purpose and which was known as the "drawing place." There was no general right to the public, and the grant of this limited right is wholly inconsistent with the evidence of a general public right. Further, in the reign of Henry VII. it appears, from a decree made by the County Palatine Court at the suit of the Abbot of Ramsey, that the inhabitants of Godmanchester had broken the flood-gates of the mills at Houghton and afterwards submitted to restore them and make their peace with the Abbot; and further orders were made in the same Court in the seventh year of Henry VIII. If these flood-gates had been obstructions in a public navigable river, the inhabitants would have been justified in abating them. In the sixth year of James I. an inquisition was taken at Huntingdon which contains various allegations which point to the existence of an ancient right of passage; but little reliance can be placed upon this, for not only was no action taken to give effect to such representation, but the patent grants were shortly afterwards granted in order to make the river navigable. The result is I find as a fact that down to the year 1618, which has been treated by counsel as the first period for consideration, the river Ouse was not navigable in its entirety from St. Ives to St. Neots, but was navigable in sections. Having regard to the fall of the river, I think it would have been impossible to navigate between St. Neots and St. Ives if there had been no dams at all; the effect of damming back the water by the various locks was to make a succession of reaches navigable, with the right, in some places, at any rate, if not in all, of "drawing over" in order to continue the transit. This conclusion is adverse to the plaintiffs, because the public way ceases in each instance at the spot at which they claim their right. But the view that I have expressed appears to me to be consistent with all the documents and to be in accordance with what one would expect in days when each town had its own separate government, and public rights in the modern sense were little understood; and in this connexion I would refer to Hale, "*De Jure Maris*," 374, who in speaking of public rivers describes them as common highways

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

for men or goods or both "from one inland town to another." I have now to consider the effect of three grants by letters patent, dated respectively 1618, 1628, and 1638, having regard to the fact that I have already found that down to 1618 the river Ouse was not a public navigable river throughout, but only by sections—i.e., from mill-dam to mill-dam. The patent of 1618 purports to grant a monopoly to one Gason as the inventor of improvements in locks and the like for 21 years from its date. No sum is mentioned as the remuneration to be collected by the patentee, and he is left to make his own bargain in each case after he has erected his locks, which the letters patent assume will be erected on land to be acquired by him for that purpose. In my opinion this patent operated solely as an inventor's patent, and created no toll of any sort or description. It appears from the Privy Council's registers of December 5, 1625, that, under this patent, sluices had been erected from St. Ives to St. Neots by Arnold Spencer and John Jackson, and that unreasonable tolls were complained of as being taken in respect of them by John Gason and his assignees of his said patent. Various inquiries and proceedings ensued, and the important point relied upon by the plaintiffs is that the sluices appear to have been made and the river therefore to have become navigable throughout before 1625. By the patent of 1638 it is stated that Arnold Spencer informed the King that, by his "directions, inventions, pains, and exceeding great charge, the river of Ouse had been made navigable from St. Ives to St. Neots, to the great benefit of the inhabitants residing thereabouts," and that he proposed to do similar works in other rivers in the kingdom. The King granted him the right to make all manner of locks, sluices, bridges, cuts, dams, and other inventions for making rivers and streams navigable and passable, and, the same being so made navigable, to pass and row upon them with boats and other vessels. Then follows a prohibition restraining all persons from interfering with Spencer in the exercise of his rights, and a grant to Arnold Spencer of full power to take all profits, &c., accruing from any vessel passing, anchoring, or sailing in or over any of the rivers, cuts, passages, streams, or sluices to be so cut, made navigable, or perfected. These profits were limited to 3d. a ton per lock. The patents contemplate the purchase by Spencer of land for the purpose of making locks, and proceeds to state that the King is informed that Spencer had already made navigable the Ouse from St. Neots to St. Ives. The King grants to Spencer all the benefit to be received in respect of the river so made navigable; the term for which the said profits were granted was 11 years from the date and 80 years further. The second patent was granted, it will be observed, during the continuance of the first, and it is not easy to understand how this came about, but the inference I draw is that the second patent is in aid of the first. The second patent differs from the first inasmuch as it creates a toll. It first creates, in my opinion, a monopoly analogous to a modern patent for invention for 11 years, and then proceeds to grant a toll for the term of 11 years and 80 years further. In effect, the inventor is repaid by the creation by the Crown of a toll, and that this is the true construction of the patent is, I think, borne out by the consideration that the Statute of Monopolies (21 James I., c. 3) had been passed only five years before, under which the Crown could not grant a monopoly for a new invention for more than 14 years. The question that has been argued on this patent is whether a toll has been thereby created, and, if so, whether it is toll thorough or toll traverse. Toll thorough is toll for passing over the King's highway and cannot be lawfully granted without consideration to the public. The power of the Crown to grant such a toll is limited ("Attorney-General v.

Parmeter," 10 Price, 378). The Crown cannot grant a toll passing over a public highway without consideration, or so as to extend or be taken beyond the place where such consideration arises ("Brecon Market Case," 7 C.P., 566). Such consideration need not be expressed, but has often been implied; for example, the grant of a ferry implies the liability to maintain the ferry. The implication is necessary to support the validity of the grant. See "Huzzey v. Field" (2 Cr. M. and R., 432). A toll traverse, on the other hand, is toll taken for passing over the land of the grantee of the toll; the use of such land is sufficient consideration and no other consideration need be implied. I use the term "toll traverse" with regard to a toll the title to which is severed from the ownership of the land over which the road in respect of which it is charged passes. A landowner can, of course, make what bargain he pleases with persons who desire to cross his land; but he cannot create and reserve to himself a legal toll on land which he dedicates to the public. I think the statement in "Hale," p. 376, is correct—that "no man can take a settled or constant toll even on his own private land for a common passage without the King's licence." It is essential to toll traverse that the reservation of the toll should be contemporaneous with the dedication to the public. It appears that the lands on which the locks were made were acquired by the patentees for the purpose; the evidence on this head is meagre, but I prefer that of Mr. Thornter to that of Mr. Wheeler, and I am confirmed in this by the consideration that it would have been practically impossible to cut through the dams, which would have been the only other way of making the locks. I am asked to infer from the statement in the petition of 1625 and in the patent of 1638 that Gason or Jackson or Spencer had already made the Ouse navigable, and had, therefore, dedicated the river to the public before the date of the second patent. I cannot so hold. If this had been done, I cannot see how he could afterwards have had any benefit of the first patent. That patent granted no toll, and if an inventor chooses to put the subject matter of his invention on a public highway he has no means by which he can afterwards compel the public to pay him for it. The case of "Jackson v. Thornhill" corroborates this; for the objection was there raised on this very patent that the Ouse was a common river and the Court decided in the plaintiff's favour on the ground that the locks were on his own land. The expression that the patentees had made the Ouse navigable is ambiguous; it may well, and I think it does, mean "capable of navigation" only, as distinct from "dedicated to the public for the purpose of navigation." But the patent of 1638 does not merely grant the ordinary inventor's rights, but creates a toll for a period far exceeding the legal term under the Statute of Monopolies. This, coupled with the fact that the water of the Ouse had been diverted in some measure to give effect to the patent, leads me to infer that the locks were dedicated to the public contemporaneously with the grant of the toll. It has been argued that there can be no dedication of a highway subject to a toll, and this may well be in the case of an individual attempting to create a toll for himself as against public bodies having the care of highways. See "Austerbury v. Oldham Corporation" (29 Ch. Div., 750). In addition to the difficulty that a subject cannot create toll traverse properly so-called without a grant from the Crown or an Act of Parliament, dedication requires not merely the intention to dedicate by the grantor, but an acceptance by the public authority, because the latter by acceptance comes under a liability to keep in repair, for a river differs in this respect from a public road. The further difficulty that an individual cannot create a toll traverse does not apply to the present case,

and, if authority is needed, in my opinion the legal possibility of the creation of a toll traverse by the Crown and a contemporaneous dedication by the owner of the land subject to the toll to the public is shown by Mr. Justice Willes's judgment in the Brecon case (*supra*) and the earlier authorities therein referred to. I, therefore, hold that under the second patent the locks were dedicated to the public for ever, and that a toll traverse was granted by the Crown to Spencer. Mr. Parker suggested that no dedication could be implied for a longer term than the term of the toll traverse, and quoted "*Rex v. Miller* (1 B. and Ad., 32). But that was a case of an Act of Parliament granting terminable turnpike annuities and turned on the construction of the particular Act, and the Court was influenced in their conclusion that there had been no dedication in perpetuity by the consideration that the acceptance of the road would have implied the acceptance of liability to repair it. This, as I have already shown, does not apply to the case of a river. Even if I came to the conclusion that the toll created by the second patent was "toll thorough," such toll, with its corresponding liability came to an end in 1718, and unless I could adopt the plaintiffs' contention as to a lost grant the plaintiffs would gain nothing by my holding that the toll was toll thorough. I now come to the third patent—that of 1638. By that patent King Charles I. purports to grant to Arnold Spencer and his heirs the sole and exclusive passage and transit for boats, barges, and other vessels laden with corn, coal, and all other goods, through the Ouse from St. Ives to St. Neots, and also in perpetuity the sole and exclusive licence for carrying and transporting in the river from St. Ives to St. Neots and thence to within four miles of Bedford, and so much further as Spencer should make navigable, and the sole and exclusive government and disposition of vessels sailing on the river and all profits in carrying on the river at a yearly rent of £6 13s. 4d. The patent proceeds to forbid all other persons to navigate the river to the injury or prejudice of Spencer. In my opinion, this patent is clearly void. The river had from time immemorial been navigable in sections, and had been made navigable throughout at that date from St. Ives to St. Neots, and King Charles had no more power to exclude the public from the Ouse than from the Thames. It was suggested that the King was the riparian owner, and as such could make this grant. It is enough for me to say that this contention was not supported by evidence. I also find from the evidence in the suits of "*Jemmatt v. Ashley*" that down to 1696 no one had ever attempted to put the patent in force, that all persons used the river on payment of the 3d. toll granted by the patent of 1628, and that Ashley as part owner of the rights under the patent and a predecessor in title of the defendant in his answer in the second suit deposed that he had never known the patent to be put in execution, and that all traders and others had enjoyed free passage from St. Ives to St. Neots on payment of the 3d. toll. It was contended for the defendant that the decree of July, 1696, in the second suit of "*Jemmatt v. Ashley*" amounted to a decision of the validity of the patent. I do not so read the decree so far as the plaintiff and the defendant Ashley were concerned, both suits were between the co-owners of whatever patent rights there were, and the validity of the patent of 1638 never came in issue. Ashley, by his answer, says that if he could support the patent he would be glad to do so. The other defendant in the second suit, Wilkes, was sued for an account as a trader using the navigation, but the only account directed against him was an account of the 3d. toll. The existence of this 3d. toll under the patent of 1628 is wholly inconsistent with the supposed title to the river itself alleged to have been granted by the patent of 1638.

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The only item of evidence in the defendant's favour on this head is the payment of £6 13s. 4d. rent under the patent of 1638 to the Crown. The difference between this and the £5 per river reserved by the patent of 1628 is small, and I infer that the larger sum was paid *per incuriam* down to 1718, and that payment was then continued because no one took the trouble to ascertain why or in what respect it was paid. The result is, I find, that the river was dedicated in perpetuity to the public in 1628 in consideration of a toll traverse created by the King contemporaneously, and that such toll expired in 1718. It has been proved that the toll of 3d. has been paid by all barges, &c., laden with goods down to 1851. In that year, in consequence of the competition of railways, the amount allowed to be carried for the 3d. was increased, with the result of diminishing the toll. No toll was ever paid for empty barges or for pleasure boats before 1868, in which year, in consequence of drought, the water was low, and the defendant's predecessor, at the request of the millers and for their benefit, attempted to impose a 5s. toll on pleasure boats with a view to stopping the traffic. The toll was paid in very few instances, and when paid was appropriated by the millers. About 1892, a 6d. toll on pleasure boats was imposed by the predecessors in title of the defendant, and has been usually paid. The defendant claims, as owner, to be entitled to charge what he pleases. His title arises under a conveyance of February 3, 1893, which contains no reference to the patent of 1638, or to any exclusive right of navigation, or to the charge of £6 13s. 4d., but is really appropriate to a conveyance of the tolls as tolls. I understand the defendant has no such title to the river or locks as would enable him to impose any charges, arbitrary or otherwise. But the plaintiffs ask me also to presume a lost grant in or subsequent to the year 1718, a "toll thorough" of 3d. a lock per ton to the plaintiffs' predecessors in title and to infer from that a corresponding liability on the defendant to repair and maintain the locks and employ men to work them. No doubt the Courts have in many cases made strong presumptions in order to give validity to ancient titles—"*Saltau v. Goodman*" (7 App. Cas., 633). But I am unable to make any such presumption in the present case. The result is that the plaintiffs have succeeded in establishing that the river is a public navigable river, but have failed in establishing that the defendant is liable to maintain and repair the locks, and the defendant has failed in his contention that the locks were his private property. There remains only the question of the St. Ives staunch. This depends on the Act of 1719. The rights and duties of an individual or corporation under an Act of Parliament differ materially from their rights and duties under a Royal grant. There is no constitutional limit to the powers of the Legislature, and there is therefore no necessity to imply any consideration for legislative interference with public or private rights. The rights and duties under the Act are to be found within the four corners of the Act. A railway company which is empowered by permissive words to make and maintain its line and works is under no obligation to make or maintain or reinstate such line and works, although the Acts were passed on the usual evidence of public benefit, and with the usual powers of compulsory purchase, interference with highways, &c. (see "*R. v. York and North Midland Railway Company*" (1 E. and B., 178, 858), and "*R. v. Great Western Railway Company*" (62 L.J., Q.B. 572). In this case, the Act is clearly permissive, and imposes no duties of repair or maintenance on the defendant. It contains a provision authorizing the appointment of commissioners, with powers to make orders and decrees for the due regulation and government of the staunch and the preserva-

tion of the river, and Mr. Upjohn invited me to make a declaration that the defendant is bound to obey such regulations. No such commissioners have ever been appointed, and I see no ground for making any such hypothetical declaration. I propose to declare that the six locks and the stanch at St. Ives, with their appurtenances, form part of the river Ouse, and that the Ouse from St. Neots to St. Ives is a public navigable river. As the defendant has interfered with the locks by fastening back some of the gates and the like, I propose to grant an injunction restraining him from interfering with the river in general terms. With regard to the costs of the action, the plaintiffs have succeeded in establishing the public rights over the river, including the locks, against the contention of the defendant, that the locks were his private property, but have failed to fix the defendant with the liability to maintain, repair, and work them for the public benefit, and I therefore make no order as to costs.

Court of Appeal (Lord Russell of Killowen, C.J., A. L. Smith and Vaughan Williams, L.J.J.) 1899.
Oct. 31.

NEELD V. HENDON URBAN DISTRICT COUNCIL.*

Highway—Roadside waste—Dedication—Presumption—Evidence of user and acts of ownership.

This was an appeal by the defendants from the judgment of Mr. Justice Channell at the trial of the action without a jury. The action was one of trespass, and the question was whether a small piece of land, now enclosed, formed part of a highway, called Butcher's-lane, in the Hendon Urban District. The piece of land was of an irregular triangular shape, and was portion of a strip of greensward lying between the metalled part of the road and an ancient hedge. In 1874 it was enclosed by the erection of posts and rails which separated it from the metalled part of the road. It appeared that the old hedge was on the top of a slope, and that at the bottom of the slope there was a ditch, and that there was another ditch between the posts and rails and the metalled part of the road. The plaintiff's case was that the margin of greensward by the side of the road was part of the waste of the manor, and he relied on certain acts of ownership exercised on the land in question, such as the taking of a quantity of soil from the surface under a licence from the lord of the manor. The defendants alleged that the place in question was always used by the public as a highway until it was enclosed in 1874. The learned Judge gave judgment for the plaintiff. The defendants appealed.

Mr. Cripps, Q.C., Mr. Macmorran, Q.C., and Mr. J. P. Oliver appeared for the defendants; Mr. Asquith, Q.C., and Mr. J. E. Bankes for the plaintiff.

The COURT, without calling upon counsel for the plaintiff, dismissed the appeal.

The LORD CHIEF JUSTICE said that the burden lay on the defendants to show that the piece of land in question had been dedicated to the public as part of the highway. The defendants had cited the case of "Regina v. The United Kingdom Electric Telegraph Company" (31 L.J., M.C., 166), and they relied on the presumption that, where there is a highway with adjacent hedges on each side, all the space between the hedges is *prima facie* dedicated to the public. It seemed to him to be difficult to assent to the proposition that in all circumstances and under all conditions, if there was a metalled high road and a

margin of green on each side and hedges beyond, the general presumption, apart from the conditions of the thing itself, was that all between the hedges was part of the highway. He thought that something must depend on whether the district in which margins were so left was an enclosed district or not, on the regularity or irregularity of the fences, and on the relative levels of the various parts of the strips of land adjoining the metalled road. But the question now to be considered was whether, assuming that presumption to exist, it had not in this case been rebutted. It was impossible to tell the circumstances under which the land through which this highway ran was originally enclosed. The owners may have refrained from enclosing the whole of their land up to the beaten track for various reasons, possibly in order to avoid liability to repair *ratione clausurae*, possibly in order to leave strips of land capable of being used for deviation. He doubted whether it could be right to say that, where an owner left margins outside his fences, he necessarily intended to dedicate them for all time and for all purposes. His Lordship then described the *locus in quo*, and said that as far back as the year 1872 permission was asked by a tenant of the lord of the manor to make the enclosure, and the posts and rails were erected in 1874. This must have been done openly, and it was done some few years after the passing of an Act which cast on public bodies the duty of regulating the use of highways. In 1885 the posts and rails were re-erected. He thought these facts were strong to rebut the presumption of dedication. Further, the facts connected with the removal of soil were evidence of acts of ownership amply sufficient to rebut the presumption that the *locus in quo* was to be regarded as part of the highway. He wished not to be understood as meaning that in his opinion the rights of the public over a highway were confined to the metalled part of the road. In his judgment the decision of Mr. Justice Channell was right, and the appeal must be dismissed.

The LORDS JUSTICES delivered judgments to the same effect.

Q.B. Div. } 1899.
(Bigbam, J.) } Nov. 22.

THE VESTRY OF ST. MARYLEBONE, LONDON, V. THE SHERIFF OF LONDON.*

Sheriff—Rates—Seizure of goods of a person from whom rates due—Liability of sheriff to pay rates on demand—Local Act, 35 Geo. III., c. 73.

This was an action to recover money under the provisions of section 195 of a local Act applicable to the parish of St. Marylebone (35 Geo. III., c. 73) in respect of parochial rates due to the plaintiff vestry from one Bush, whose goods had been seized under a writ of *fi. fa.* by the defendant. By section 195, it is enacted that when the goods of any person liable to pay any rate by virtue of the Act "shall be taken in execution" by the sheriff before the rate has been paid, then the sheriff, on demand being made by the rate-collector, shall, in the first place, pay such rate, provided that the sheriff shall not be charged with the payment of more than one year's rate or of a larger sum than the value of the goods taken in execution. The facts were as follows:—The defendant being in possession of the goods of Bush under a *fi. fa.*, a demand was made on November 24, 1898, on the defendant by the rate-collector for the payment of rates

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

owing by Bush. The amount demanded was less than the value of the goods and of the judgment debt. The defendant did not pay the rates. On November 25 the defendant received the amount of the judgment debt, which he paid to the execution creditor, and then went out of possession.

Mr. H. F. MANISTY, for the plaintiffs, argued that, in the circumstances of the case, the goods of Bush had been taken in execution within the meaning of section 195 just as much as if there had been a sale of the goods by the sheriff. He cited, in support of this contention, the judgment of Lord Esher in "*Smith v. Critchfield*" (14 Q.B.D., 873).

Mr. P. ROSE-INNES, for the defendant, contended that the goods had not been taken in execution. On the question of the construction of the section, he referred, by way of illustration, to the language of the Statute 8 Anne, c. 4, and he cited "*In re Mackenzie*" (15 *The Times* L.R., 526) and other cases decided under that Act. He also contended that this local Act had been repealed, by implication, by the Metropolis Management Act, 1855, and that the rates in question were not rates made by virtue of the local Act, but under the Act of 1855.

MR. JUSTICE BIGHAM, in giving judgment, having stated the facts and referred to the section in question, said that before the sheriff could be called upon to perform the obligations of the section two conditions must be fulfilled. First, the sheriff must have taken in execution the goods of a person liable to pay a rate; secondly, the sheriff must have been served with a demand for the payment of the rate. If those two conditions were fulfilled, it was clearly the duty of the sheriff under the statute to pay the rate. In his Lordship's opinion, the rate having been made, the liability to pay it attached at once, and the fact, if it was a fact, that the demand note required payment at a later date than November 24 was of no significance. The goods which had been seized were therefore the goods of a person liable to pay a rate. Then, had the goods been taken in execution? His Lordship was of opinion that they had. In ordinary language the sheriff was said to have taken goods in execution when he had seized them. It was said that words in the statute of Anne similar to those in question had received a different interpretation. The words there, however, were different from these and of different signification. The language of the statute of Anne pointed to a removal of the goods. The goods in this case had been taken in execution just as much as if there had been a sale, in which case it could not be doubted that the sheriff would have been liable to pay the rate out of the proceeds of the sale. There was no ground for saying that the local Act had been repealed by the Metropolis Management Act, 1855, nor was there anything in the suggestion that the sheriff was not liable because some of the rates in question had been levied under the Act of 1855. For the recovery of rates levied under that Act the vestry retained the powers and remedies of the local Act. There would be judgment for the plaintiffs for the amount claimed, with costs.

[Solicitors—Clarkson, Greenwell, and Co. ; William and T. Burchell.]

Court of Appeal (Lindley, M.R.,) 1899.
Jeune, P., and Romer, L.J.) Nov. 23,

THE ATTORNEY-GENERAL V. CLARKSON.*

Revenue—Estate duty—Settlement—Contingent settlement—Finance Act, 1894, sec. 5, subs. 1
(a)—Finance Act, 1896, sec. 14.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

This appeal against a decision of a Divisional Court (Mr. Justice Wills and Mr. Justice Bruce) raised a question upon the construction of section 5 of the Finance Act, 1894—viz., whether property contingently settled by a will or other instrument is liable to "settlement estate duty" under that section—whether, as the Master of the Rolls expressed it, that section applies not only to property actually settled, but also to property "liable to become settled." In the present case the question arose with reference to the estate of the late Mr. Peter Robinson, who died in October, 1895, leaving property worth more than a million. By his will he bequeathed the sum of £30,000 to each of three of his sons "to be paid to them respectively if and when they respectively shall attain the age of 25 years," with interest in the meantime. In case either of the sons should die under 25 leaving issue, his legacy was to be held in trust for his children. But in case either of the sons should die under 25 without leaving issue, his legacy was to fall into the testator's residuary personal estate. And he gave the residue of his estate on trust for such of his seven other children—four of whom were daughters and three sons—"as, being male, attain the age of 25 years, or, being female, attain that age or marry, in equal shares as tenants in common." The share of any of the children who was a daughter was not to vest absolutely in her, but was to be retained by his trustees upon the usual trusts of a marriage settlement for the benefit of the daughter, her husband, and children. In case any of the daughters should die in the testator's lifetime leaving issue living at his death, the share thereinbefore directed to be held upon trusts for her and her issue, and the income thereof, should be held upon the same trusts as if the daughter had died immediately after the testator. If any of the three sons should die in the testator's lifetime leaving a child or children living at the testator's death, the share thereinbefore bequeathed in trust for him, and the income thereof, should be held in trust for his children or child who, being sons or a son, should attain 21, or, being daughters or a daughter, should attain that age or marry, and if more than one in equal shares, and if there should be no such child should go by way of addition to the share or shares of the others or other of the testator's children. Two of the three first-mentioned sons attained 25 before the death of the testator; the third attained 25 in August, 1897. One of the seven secondly-mentioned children died before the testator and under 25. The other six were living at the time of the testator's death, and were all unmarried. One of the daughters had since married, but all the six are still under 25. Under these circumstances, the Commissioners of Inland Revenue claimed the payment of settlement estate duty on the whole of the residue of the testator's estate, including the sum of £30,000 contingently bequeathed to the son who attained 25 in August, 1897. The trustees and executors of the will contended that no such duty was payable. By the Finance Act, 1894 (section 5, subsection 1), "Where property in respect of which estate duty is leviable is settled by the will of the deceased, or, having been settled by some other disposition, passes under that disposition on the death of the deceased to some person not competent to dispose of the property—(a) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased." By section 22, subsection 1, "(h) The expression 'settled property' means property comprised in a settlement. (i) The expression 'settlement' means any instrument, whether relating to real property or personal property, which is a settlement within the mean-

ing of section 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section." By the Settled Land Act, 1882, section 2, "Any deed, will, . . . or other instrument . . . under or by virtue of which instrument . . . any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement." (4) "The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect." By the Finance Act, 1898, section 14, "Where, in the case of a death occurring after the commencement of this Act, settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property shall be repaid." The Divisional Court, following a former decision of Mr. Justice Vaughan Williams and Mr. Justice Kennedy, in "The Attorney-General v. Fairley" ([1897] 1 Q.B. 698), held that the claim of the Commissioners was well founded. The trustees of the will appealed.

The appeal was heard in this Court because Lord Justice Vaughan Williams, from whose decision it was in substance brought, is now sitting in Court of Appeal No. I.

Mr. Haldane, Q.C., and Mr. Danckwerts were for the trustees; the Solicitor-General (Sir R. B. Finlay, Q.C.) and Mr. Vaughan Hawkins were for the Commissioners.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the question raised was one of some difficulty, but he thought that the argument on behalf of the appellants, ingenious as it was, was one to which the Court could not accede. The real question was whether the residuary estate of Mr. Peter Robinson was settled by his will. If it was, then "settlement estate duty" was, under section 5, subsection 1 (a), payable on the "principal value" of the settled property. Looking at the will his Lordship could not say that, in ordinary conveyancing language, this property was not settled by the will. It had been forcibly argued that the Court must see whether the property was settled on "persons by way of succession" regard being had to subsections 1 and 4 of section 2 of the Settled Land Act, 1882. His Lordship would admit that this argument raised a very nice question whether this property could be regarded as governed by subsection 4. In "The Attorney-General v. Fairley" the Divisional Court held that upon the true construction of section 5 of the Finance Act, 1894, settlement estate duty was payable in such a case as the present. This Court was now asked to overrule that decision. His Lordship was not prepared to say that the Court would have done so, but it was a very nice question. Since, however, that judgment was given, section 14 of the Act of 1898 had been passed. No doubt that section did not apply to the present case; it applied only "in the case of a death occurring after the commencement of the Act." But it appeared to his Lordship that section 14 had recognized the construction which had been put on the Act of 1894 in "The Attorney-General v. Fairley." The section adopted that decision, and said in effect that the duty must be paid whether the contingency on which the settlement was to take effect had or had not arrived, and if it did not and could not arrive, the duty was to be repaid. His Lordship thought that this amounted to a Legislative adoption of the construction which the Court had put upon the former Act. The Legislature

found that that construction might work oppressively, and so they provided that for the future if the contingency did not happen the duty which had been paid should be repaid. This settled the doubt which had been raised, but his Lordship did not say that he might not have arrived at the same conclusion independently of the Act of 1898.

The PRESIDENT of the PROBATE DIVISION agreed. But he should have felt great doubt but for the Act of 1898. He had been much impressed with the argument of Mr. Haldane, and especially with that of Mr. Danckwerts.

LORD JUSTICE ROMER would only say that he agreed with the judgment of the Master of the Rolls.

[Solicitors—Caprons, Dalton, Hitchin, and Brabant; The Solicitor to the Inland Revenue.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.JJ.) } Nov. 23.

YOUNG v. KERSHAW—BURTON v. KERSHAW.*

Practice—New trial—Fresh evidence—Rule as to granting new trial on the ground of new evidence.

The plaintiff in the first action was the Rev. Hamilton Young, the vicar of the parish of Alne, in the diocese of York. The plaintiff in the second action was Miss Mary Ann Burton, who resided with her mother at Alne. The defendant was Mr. Richard Kershaw, who was the owner of the advowson of Alne, and the father-in-law of the plaintiff Young. The alleged libel, which was the same in both actions, was contained in a letter written on behalf of the defendant to the secretary of the Archbishop of York, dated December 27, 1898. The letter contained a charge of improper intercourse between the plaintiff Young and the plaintiff Miss Burton in February, 1897, March, 1897, and from time to time from then until July, 1898, and that in this latter month the two plaintiffs stayed together for several days at Brussels at the house of Madame Dau Flouche, at 68, Rue de l'Aurore. In this letter the writer said that if the plaintiff Young chose to treat the letter as a libel upon him, and to bring an action for damages in respect thereof, he was authorized, on the defendant's behalf, to undertake that he would not claim any privilege for the letter, but would in any such action plead that the statements in the letter were true in substance and in fact, and if he (the defendant) should, which he did not anticipate, fail to prove his plea, he would be prepared to accept the consequences in damages and costs. The action was tried before Mr. Commissioner Bosanquet, Q.C., and a special jury at York, when the jury found verdicts for the plaintiffs, awarding £100 damages to the plaintiff Young, and £1,000 damages to the plaintiff Miss Burton. Judgment was given for the plaintiffs accordingly. The defendant applied for a new trial on the grounds (1) that the verdicts were against the weight of the evidence; (2) that there was misdirection; and (3) that the defendant discovered after the trial new evidence which he could not by reasonable diligence have discovered before the trial. The defendant further complained that the damages in the second action were excessive.

SIR EDWARD CLARKE, Q.C. (Mr. Tindal Atkinson, Q.C., and Mr. Beverley with him), for the defendant, said that in August, 1898, Mrs. Young left her husband and went with her children to live with her father. The learned counsel then read the letter upon which the action was based, and dealt with the evidence given at the trial as to the incidents alleged against the plaintiffs, and proceeded to state the nature of the new

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

evidence which was discovered since the trial. The new evidence, the learned counsel said, was evidence of an act of improper intercourse not gone into at the trial. [LORD JUSTICE A. L. SMITH.—Unless you can put it on the ground of surprise, how can you read the evidence?] It was sufficient to show that the new evidence, of which neither the defendant nor his advisers were aware at the trial, could not by reasonable diligence have been discovered before the trial. “Anderson v. Titmas” (36 L.T., 711). [LORD JUSTICE A. L. SMITH.—It was laid down in that case that the new evidence must be conclusive.] If it was merely a new witness discovered who could corroborate a witness called at the trial, that would be a different case. But here the new evidence was that of two proposed witnesses in respect of an incident in August 1897, not gone into at the trial. [LORD JUSTICE A. L. SMITH.—Surely it is in the public interest that there should be an end of litigation. When a person libels another he ought to have his materials ready at the trial.] A man was not confined to what he knew when he wrote the alleged libel. He could prove anything relevant that came to his knowledge before the trial. [LORD JUSTICE A. L. SMITH.—But the defendant must, as a general rule, be confined to what he knows at the trial.] That was the general rule, no doubt, but he was entitled to say that, though it was in the public interest that there should be an end of litigation, it was still more important in the public interest that justice should be done between the parties. If the new evidence showed that the verdict was wrong, the verdict ought not to stand. What was more, this evidence would be before the Divorce Court in the proceedings pending in that Court, and the question was whether this Court would run the risk of allowing a verdict to stand when the other Court might come to a different conclusion. Apart from the new evidence he did not ask for a new trial upon the ground that the verdict was against the weight of the evidence, or upon the other grounds. But he did say that the facts of the case were such that, if the new evidence had been given before the jury, it was reasonably probable that the jury would have come to a different conclusion. He also referred to “Broadhead v. Marshall” (2 W. Bl., 955.) The learned counsel then read the affidavits containing the proposed new evidence as to alleged impropriety, the witnesses being an engine cleaner in the employment of the North-Eastern Railway Company, 20 years of age, and a private in the 2nd Dragoon Guards, 19 years of age, who at the time of the incident spoken to was a labourer. The defendant’s solicitor a few days after the trial received a letter from one of these witnesses stating the incident, and saying that he had told Mr. Mintoft, who advised him to write to the defendant’s solicitor, and this was how it came to the knowledge of the defendant’s solicitor.

Mr. TINDAL ATKINSON, followed on the same side, and contended that it was not necessary that the evidence should be conclusive. He referred to “Shields v. Boucher” (1 De G. and Sm., 40); “Thurtell v. Beaumont” (12 Bing., 339).

Mr. SCOTT FOX, Q.C. (Mr. H. T. Kemp with him), for the plaintiffs, contended that upon any view of the law the proposed new evidence was not admissible. A great point at the trial was whether the charge brought by Mrs. Young against her husband was not an afterthought, made in consequence of a charge made by Mr. Young against his wife in relation to Mr. Mintoft. That was a charge made in December, 1895, and Mintoft had written a letter to the plaintiff Young in that month, in which he said that he was quite willing to leave the place as he, the plaintiff, desired to avoid a scandal, but not that he was guilty of what the plaintiff accused him of. From that time Mr. Young ceased to

cohabit with his wife. The basis upon which the action was fought was whether the attack upon Mr. Young was an honest attack upon him by Mrs. Young, the *bona fides* of the father, the defendant, not being questioned, as he believed in his daughter. This was a case in which the evidence produced through Mintoft should be looked upon with suspicion. Further, even if the evidence were of the strongest kind, the general rule was most strict in a libel action that the defendant must have his tackle ready at the trial. The present case was not one in which the rule should be relaxed. Again, the rule as to granting a new trial on the ground of new evidence was that the new evidence must be such that the Court was practically convinced of the truth of the story asked to be laid before the jury. The evidence proposed to be adduced in the present case was not of that character, and had already been contradicted at the trial. He referred to “Weak v. Calloway” (7 Price, 677).

SIR EDWARD CLARKE, in reply, said that until May, 1899, no proceedings were taken by the plaintiff Young against his wife in respect of her alleged impropriety with Mintoft in December, 1895. He agreed that at the trial an attack was made on Mrs. Young, and that was the reason why he asked the Court to postpone the hearing of the appeal until after the trial in the Divorce Court, where all the evidence would be before the Court, and where Mr. Mintoft could be called. The whole question would be raised in those proceedings, because Mrs. Young had a counter-claim, alleging adultery between her husband and Miss Burton, and claiming judicial separation. He would now ask the Court to postpone their judgment until the proceedings in the Divorce Court were over.

The COURT dismissed the application.

LORD JUSTICE A. L. SMITH said that the trial at York occupied four days, and in the result the jury found a verdict for the two plaintiffs. The sole defence was a justification, and indeed, when the letter was written, it was stated on behalf of the defendant that he would only plead that the statements were true in substance and in fact, and that if he failed, which he did not anticipate, he was prepared to accept the consequences in damages and costs. The action was for a libel upon a clergyman and upon a lady who, so far as he (the Lord Justice) knew, was a lady of unimpeached character. The libel was published to three or four other persons besides the secretary of the Archbishop of York. The application for a new trial was applied for on various grounds, but only one ground was pressed in argument—namely, that new evidence had been discovered since the trial. What was the rule which applied in such a case—when there had been a trial with a jury? It seemed to him that the authorities showed that a new trial might be ordered where the new evidence proposed to be adduced could not have been obtained by any reasonable diligence before the trial, and where the evidence, if admitted, would be conclusive to show that the verdict ought to have been the other way. Could it be said that the new evidence proposed to be adduced of two witnesses, one of 19 years of age and the other of 20 years, was conclusive of the matter? In the first place, one of the new witnesses wrote a few days after the trial to the defendant’s solicitor, at the instance of Mintoft, against whom it was alleged that he had been guilty of impropriety with Mrs. Young. The circumstances of the letter were suspicious. The statement by the proposed new witnesses was remarkably like the incidents deposed to by a witness at the trial, who was also obtained through the instrumentality of Mintoft. From that fact alone he (the Lord Justice) would say that the proposed new evidence was not conclusive at all, so that he could say that the jury would

act upon it. Again, it was oath against oath, the oaths of those two boys against the oaths of the two plaintiffs. How could the Court say that the evidence, if given, would be conclusive. The case did not come within the rule at all. It was then said that the Court ought not to give judgment until the trial in the Divorce Court was over. But why were not the plaintiffs entitled to the verdict, and to enter upon the proceedings in the Divorce Court with the benefit of that verdict? It was now admitted that there was no ground for impeaching the verdict on the evidence given at the time. For these reasons the application must be dismissed with costs.

LORD JUSTICE COLLINS concurred. It was of the highest importance that all the evidence which could be got together at the trial should be the only evidence admitted. It was obviously most undesirable that a party, after the ordeal of a trial had been gone through, and after he had found out the weak points in his adversary's armour, should come with fresh evidence to meet those weak points. In exceptional cases the Court had granted a new trial on the ground that new evidence had been discovered since the trial. But that had been fenced round with limitations. The party must show that the fact that he had not brought it forward before was not owing to any remissness on his part. Then as regards the class of the evidence, in his opinion the rule was that the evidence must be such that, if adduced, it would be practically conclusive. On looking at the new evidence it was obvious to him that it related to the same incident as that deposed to at the trial, and was merely throwing in a fresh piece of evidence to support a charge already contradicted at the trial and disposed of by the jury. Taking the rule in its widest possible view, how could the Court say that the new evidence would render it probable that the verdict would have been different? The evidence was open to criticism on many grounds. Why was not the evidence brought forward before? One of the witnesses professed to know about the parties and of the rumours that were about. The evidence itself was also subject to criticism as to the source from which it came. Taking it as a whole, in his judgment it was very far from being conclusive, and indeed he did not know whether the jury, if it were admitted, would attach much weight to it at all.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment arriving at the same conclusion.

[Solicitors—Leesmith and Munby, for Munby and Scott, for the plaintiffs; Jacques and Co., for Samuel Wright and Co., Bradford, for the defendant.]

Q.B. Div. } 1899.
(Bigham, J.) } Nov. 23.

THE OAKVILLE STEAMSHIP COMPANY V. HOLMES.*

Ship—Charter-party—Demurrage—Construction of charter-party—Option of averaging days for loading and discharge.

The facts of this case are fully stated in the judgment.

Mr. J. A. Hamilton appeared for the plaintiffs; Mr. Robson, Q.C., and Mr. T. E. Scrutton for the defendant.

MR. JUSTICE BIGHAM read the following judgment:—This action was brought to recover £216, being a sum alleged to be payable by the defendant in respect of nine days' demurrage of the plaintiffs' ship Oakville at the rate of £24 a day. The question is whether the defendant, who by agreement is taken to represent the charterer, is liable. The dispute arises (as usual in these

cases) by reason of the clumsy wording of the charter-party. If merchants and shipowners would take a little more care about settling the terms of such documents they would save themselves much loss of time and money. The charter-party was for the carriage of a cargo of 1,900 tons of iron ore from Cartagena in Spain to Maryport. The contract provided that the charterer should advance money for ship's disbursements at port of loading, the amount to be endorsed on the bills of lading and to be treated as an advance of freight. The charterer was to be credited with 3 per cent. on the amount of the advance, to cover his commission, interest, and insurance. The cargo was to be loaded at the rate of 200 tons per working day of 24 hours and to be discharged at the same rate. Then came two provisions (not in juxtaposition) which were as follows:—"Charterers have the option of averaging days for loading and discharging in order to avoid demurrage . . ."; "despatch money at the rate of 10s. per hour shall be paid for any time saved in loading or discharging to be settled in loading and discharging ports respectively." Demurrage was to be at the rate of £24 per day of 24 hours. What happened was this. The vessel was loaded much more rapidly than at the stipulated rate of 200 tons per day of 24 hours. Despatch money in respect of the time saved was claimed by the charterers. Thereupon an account was made out at Cartagena showing the amounts of the despatch money so claimed and also the amount of the ship's disbursements; and in this account there was a charge against the ship of 3 per cent. on the total sum. This account was presented to the captain for his signature and was signed by him, but with the following note:—"Loading charge and despatch money to be finally adjusted on quantity discharged at Maryport." This note, however, merely referred to a dispute as to the quantity put on board; a dispute which affected to some small extent the charge for loading, and possibly the amount of the allowance for despatch money. It had no other significance. The bill of lading was then endorsed as follows:—"Received on account of freight the sum of £257 7s. 3d., interest and insurance included." This amount of £257 7s. 3d. represented the disbursements, the despatch money, and the charge of 3 per cent. as shown in the account to which I have referred; and I find that the parties treated the whole sum as money paid in advance of freight. In due time the ship arrived at Maryport; but here the discharge was very slow, the laydays being exceeded by nine days. The plaintiffs thereupon made their present claim for demurrage. The question is, has the defendant any answer to it? He says he has; he contends that he may disregard the settlement made in Cartagena and forgo the despatch money which he claimed and which was allowed to him there, and may then average the loading and discharging days under his option in the charter-party. If he can do this, it is of course very much to his advantage, because the despatch money is credited to him at only £12 a day, whereas the demurrage is debited to him at £24 a day. On the other hand, the plaintiffs say that, as the despatch money at Cartagena has been settled in account by treating it as a payment by the defendant on account of freight, all question as to how the time saved at Cartagena shall be treated is at an end. I am of opinion that the plaintiffs' contention is the right one. I think that when the defendant asked for and obtained his despatch money at Cartagena, claiming and getting his 3 per cent. upon the amount of it, he exercised once for all his option as to averaging the loading and discharging days, that is to say, he elected not to average; and it was too late for him to change his mind after the discharge at Maryport. I have not overlooked the words in the charter-party which provide that the despatch money

*Reported by F. O. ROBSON, Esq., Barrister-at-Law.

is to be settled at the port of loading. This only means that the amount of the despatch money is to be settled there. The charterer is notwithstanding these words entitled to refuse to accept payment of despatch money, except on the terms of keeping alive his option as to averaging the loading and discharging days. But if he does what he did here, if he accepts once for all the despatch money, and treats it as paid to him, his option as to average is exercised and gone.

Judgment for the plaintiffs for £216 and costs.

[Solicitors—Downing, Bolam, and Co., for Downing and Hancock, Cardiff: Wood and Wootten, for Collin and Turney, Maryport.]

Q.B. Div. }
(Bigham, J.) }

1899.
Nov. 23.

SCOTT V. FOLEY, AIKMAN, AND CO.*

Contract—Hiring—Warranty as to fitness—Charter-party—Personal injuries through defective condition of vessel.

The charterer, having been compelled in an action to pay damages to a stevedore for personal injuries sustained by reason of the defective condition of the vessel, *held* entitled to recover such damages and all costs incurred from the persons from whom he chartered.

This was an action to recover damages for breach of warranty contained in a charter-party dated April 4, 1898, by which the plaintiff Scott chartered from the defendants for one voyage the ship *Senator*. The defendants had previously chartered the *Senator* from her owner. The facts of the case were as follows:—Under the charter-party the ship was to be placed at the disposal of Scott at the Hermitage Basin, London. Scott contracted with a master stevedore to load the vessel at the basin. In the course of the loading it became necessary for a man named Marney, who had been engaged by the master stevedore, to go down into the main hold. In order to do so it was necessary for him to descend a fixed iron ladder reaching from the train hatch down to the bottom of the hold. Marney put his foot on to the top rung of the ladder, when by reason of its insecure condition the rung came adrift, and Marney fell into the hold, and was seriously hurt. Marney brought an action against Scott claiming damages. The action was tried before Mr. Justice Bigham, and is reported in 15 *The Times* L.R., 320. The learned Judge gave judgment for Marney for £220 and costs, on the ground that Scott should have inspected the vessel before allowing the stevedore's men to go on board, and that the slightest inspection would have shown that the ladder was in a dangerous condition. Scott now brought this action against the defendants, alleging a breach of the warranty in the charter-party that the vessel was "tight, staunch, and strong, and in every way fitted for the voyage or service and to be so maintained by the owners"—i.e., the defendants. Scott claimed as damages for the breach of warranty the damages and costs recovered by Marney in his action against Scott, and also Scott's own costs in that action as between solicitor and client. The defendants pleaded that the damages claimed were too remote, and that Scott's liability to Marney was directly caused by Scott's own negligence.

Mr. RUFUS ISAACS, Q.C. (Dr. Arthur Lennard with him), for the plaintiff, contended that notwithstanding that the present plaintiff might have been guilty of negligence as towards Marney, he was nevertheless

entitled to recover the damages claimed from the defendants for the breach of warranty. The case of "*Mowbray v. Merryweather*" ([1895] 2 Q.B., 640) was on all fours with the present case, and was clear authority in the plaintiff's favour. That decision had recently been followed in the Court of Appeal in "*Vogan v. Oulton*," reported in *The Times* of November 18 last. With regard to the costs, both those paid to Marney and Scott's own costs were recoverable because it was a reasonable thing for Scott to defend that action: "*Hammond v. Bussey*" (20 Q.B.D., 79); "*Agins v. Great Western Railway Company*" ([1899] 1 Q.B., 413).

Mr. MCCALL, Q.C., and Mr. J. A. HAMILTON, for the defendants, submitted that at the most the plaintiff was only entitled to nominal damages for the breach of warranty. The damages recovered by Marney were not the immediate result of the defendants' breach of warranty, because, in order to enable Marney to recover, an intervening cause was necessary—viz., Scott's negligence. The question was what was in the contemplation of the parties at the time the charter-party was entered into, and it was material on that point to take into consideration that the defendants were not the real owners of the vessel in question. The cases cited turned on breaches of contract, and were, therefore, distinguishable from the present case, which turned on tort. As to the costs it was contended that the defendants were not liable to reimburse Scott for the costs of defending an action, which should not have been defended. It could not have been contemplated by the parties that the liability to pay these costs would result from a breach of the warranty.

MR. JUSTICE BIGHAM, in giving judgment, said that he was of opinion that the plaintiff had sustained the damages which he claimed in this action, by reason of the defendants' breach of the warranty in the charter-party. His Lordship was satisfied that Scott knew of that warranty when he signed the charter-party, and that, knowing of it, he relied upon it, and the omission of Scott to perform the duty which he owed to Marney arose from Scott's properly and justifiably relying on the defendants' warranty. It was said that there was no evidence to support this view; but the existence of the warranty in the charter-party was such evidence, and, speaking from his knowledge of business matters, his Lordship came to the conclusion that Scott dispensed with an examination of the ship's appliances because he knew that the defendants had undertaken that duty towards him and had warranted that the appliances were in a proper state. Both parties knew the purpose to which the ship would be put, and that Scott would have to employ men like Marney on the conditions on which Marney was employed. Therefore, the defendants must have contemplated that there might be claims for damages by persons like Marney if they (the defendants) did not perform their duty under the warranty of maintaining the ship in a fit condition. His Lordship therefore came to the conclusion that the plaintiff's claim as to the damages paid to Marney came within the authorities which had been cited, and that he was entitled to recover those damages from the defendants. There was a further question as to the costs which Scott had had to pay to Marney, and as to Scott's own costs of defending Marney's action. That action had been reasonably defended, and the conduct of the defence had also been reasonable. Could it be said that those costs were in the contemplation of the parties to the charter-party? His Lordship thought that it could be so said, and, further, he was not sure that the question as to costs was not absolutely covered by the cases of "*Hammond v. Bussey*" and "*Agins v. Great Western Railway Company*." The question was whether it had been reasonable to defend Marney's action. That was a question of fact, and, inasmuch as

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

that action was due entirely to the defendants' breach of warranty, it could not be said that the costs of defending the action were not damages within the contemplation of the parties. His Lordship further held that Scott's own costs should include solicitor and client costs, subject to taxation, because if it was reasonable for him to defend the action it was inevitable that he should incur those costs. It had been suggested that this case differed from those which had been cited because Scott's liability to Marney arose out of tort and not contract, but his Lordship was quite unable to see why, on principle, that distinction should make any difference.

Judgment for the plaintiff with costs.

[Solicitors—Downing, Bolam, and Co.; Keene, Marsland, Bryden, and Bessant.]

Court of Appeal (Lindley, M.R., } 1899.
Jeune, P., and Romer, L.J.) } Nov. 24.

PAYTON AND CO. (LIMITED) V. SELLING, LAMPARD,
AND CO. (LIMITED).*

Trader—Goods—"Get up" of goods—Distinctive "get up"—Features common to the trade—Injunction refused

This was an appeal from a decision of Mr. Justice Byrne. The action was brought by Messrs. Payton and Co., who were wholesale tea and coffee merchants, of Tower-hill, against Messrs. Snelling, Lampard, and Co., who carried on a similar wholesale business at St. George's-house, Eastcheap, for an injunction to restrain the defendants from selling their coffee in tins got up in such a way as to be calculated to lead to the belief that the coffee therein contained was the plaintiffs' coffee. In 1895 the plaintiffs began to sell a mixture of coffee and chicory (commonly called French coffee in the trade) of three different qualities in cylindrical tins of various sizes, having red, blue, and green labels upon them, the colour of the label denoting the quality of the coffee. In 1897 the plaintiffs began for the first time to use tins enamelled in colours. At this time the use of enamelled tins was a novelty in the trade. The plaintiffs' tins were enamelled in such a way as to reproduce the colour and design of their previously used labels. On the upper part of the tins there appeared the word "Royal" printed in very conspicuous letters, in the centre of the tin there was a design of a shield and a crown, and in the lower part there was printed the word "coffee" in somewhat smaller characters. The defendants had recently begun to sell "French coffee" of three different qualities in enamelled tins of the same colours and of the same shape and the same sizes, but the design and letterpress appearing upon the tins differed in many respects from the plaintiffs'. The upper part of the tin contained the word "Flag" very conspicuously printed, in the centre there was a design of a flag, and below this design there occurred the words "French coffee." The prices at which the defendants sold their coffee were also not the same as the plaintiffs' prices. Mr. Justice Byrne granted an injunction. The defendants appealed.

Mr. Swinfen Ealy, Q.C., Mr. Birrell, Q.C., and Mr. Micklem were for the defendants: Mr. Warrington, Q.C., Mr. Eve, Q.C., Mr. Astbury, Q.C., and Mr. Sebastian were for the plaintiffs.

The COURT allowed the appeal.

The MASTER of the ROLLS said that he was bound to differ from the conclusion at which the learned Judge below had arrived, but he was not differing from him

upon any point of evidence involving the credibility of the witnesses. In order to succeed it was necessary for the plaintiffs to make out that the defendants' goods were calculated to be mistaken for theirs (the plaintiffs'). In this case the goods of the plaintiffs and of the defendants unquestionably resembled each other, but the features in which they resembled each other were features which were common to the trade, and the plaintiffs must make out that the defendants' goods resembled theirs in features which distinguished their (the plaintiffs') goods from all other goods in the trade. When once the features which were common to the trade were eliminated it could not be said that there was any resemblance between the plaintiffs' and the defendants' goods. The defendants were not infringing the plaintiffs' rights by using a circular tin of a particular colour, and the distinctive designs of the plaintiffs and defendants were so utterly different that it was impossible to maintain this action. This point had been so fully dealt with in the recent case of "*Lever v. Beddingfield*" (16 P.R., 3) that it was unnecessary to dwell longer upon it. In his Lordship's opinion the defendants were honest traders and were being oppressed by the plaintiffs, who were really asking to obtain a monopoly in these enamelled tins.

The PRESIDENT of the PROBATE DIVISION gave judgment to the like effect.

LORD JUSTICE ROMER also agreed. It was too often supposed that if a trader adopted a novel get-up for his goods anybody else in the trade might be restrained from using that get-up. There was, however, no monopoly in the get-up of goods, though, no doubt, the imitation of the get-up was an element for consideration in determining the probability of deception. The notion that a trader who adopted a new get-up acquired any proprietary rights in that get-up was, of course, not well founded. It was further to be observed that in this case the plaintiffs' goods had not been long on the market, so that there was no ground for assuming that the get-up was necessarily connected with their goods. Then as to the colours of the tins, there was nothing peculiar in the colours adopted by the plaintiffs—they had adopted the brightest and best-known colours in the trade—nor was there any peculiarity in the shape of the tins. He agreed with the Master of the Rolls that the real object of the action was to establish some monopoly in the use of enamelled tins in the coffee trade.

[Solicitors—Flux and Leadbitter: J. S. Salaman.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Nov. 25.

HEWLETT V. HEPBURN AND CO.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—Amount of compensation—Employment, whether continuous or not.

This was an appeal from an award of the Dartford County Court Judge under the Workmen's Compensation Act, 1897. The only question raised was as to the amount of compensation payable. The respondent was a carpenter, who was in the employment of the appellants. On August 24, 1897, the respondent was first employed by the appellants, and he remained at work for them until February 17, 1898, being paid by the hour. His wages varied during that period. There was no agreement as to what notice was necessary to terminate the employment, but it was admitted that some

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

*Reported by F. G. ETCHER, Esq., Barrister-at-Law.

notice was usually necessary. From February 17 to May 12, 1898, he was absent through illness, and on the latter date he came back to work, and remained at work until August 18, when he was again absent, from ill-health, until September 3, 1898. He then came back and remained at work until February 6, 1899, when he met with the accident in question, which caused the loss of two of his fingers and the partial loss of a third. The question was whether the employment was continuous, notwithstanding the respondent's absence through illness, in which case the compensation payable would be 12s. 9d. a week, or whether the employment was determined when the respondent was absent through illness, in which case the period of employment to be considered in assessing compensation would be from September 3, 1898, to February 6, 1899, when the weekly compensation would be 17s. 9d. No notice to terminate the employment was given, and the respondent, when he went back to work after each illness, did not go in to re-engage himself. He left his tools when he was absent at the appellants' works. He did not receive any wages when absent, and it was stated in evidence to be the regular practice, when a man recovered from illness, for him to go back to work without any application unless notice to the contrary was given. It also appeared that the foreman on several occasions during the absence of the respondent through illness asked the respondent's brother when he was coming back to work. The County Court Judge found that the employment was by the hour, and in law came to an end on August 18, 1898. He accordingly assessed the compensation at 17s. 9d. a week.

Mr. G. F. HOHLER, for the appellants, contended that there was no evidence upon which the Judge could have found that the employment came to an end on August 18, 1898. It was common ground that notice was necessary to determine the employment, and none was given here. The evidence showed that the employment was not determined by absence caused by illness, though the payment of wages ceased. The respondent left his tools at the works and came back to work without being re-engaged. Moreover, the Judge did not find that the employment had terminated in fact, but he said that in law it had terminated. There was no rule of law that illness terminated an employment. He referred to "*Jones v. Ocean Coal Company*" ([1899] 2 Q.B., 124) and "*Appleby v. Horseley Company*" ([1899] 2 Q.B., 521).

Mr. A. J. TABSELL, for the respondent, contended that the case was very similar to "*Appleby v. Horseley Company*." Every test mentioned in "*Jones v. Ocean Coal Company*" for ascertaining whether the employment had not come to an end was applicable to this case. The question was really one of fact, though the County Court Judge had spoken of it as a question of law.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the only question in the case was whether there had, in fact, been a break in the employment of this workman. The employers said that there had been no break, their object being to get a larger divisor for calculating the workman's average weekly earnings. The workman said that there had been a break, and the County Court Judge took that view. The case was treated before the County Court Judge on the basis of the man having been absent from work through illness for 11 weeks. The only question they had to consider was whether there was evidence on which the County Court Judge could find that that absence constituted a break in the employment. In his opinion there clearly was evidence on which the County Court Judge could so find, though no doubt there was evidence the other way also. The appeal therefore failed.

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LORD JUSTICE COLLINS said he was of the same opinion.

LORD JUSTICE VAUGHAN WILLIAMS said he also was of the same opinion. He wished, however, to guard against seeming to hold that there could be no continuity of work unless there was continuity of the contractual engagement.

[Solicitors—Lewin and Birdseye, for the appellants; R. H. Bentley, agent for G. T. Baynes, Dartford, for the respondent.]

Court of Appeal (Lindley, M.R., } 1899.
Jeune, P., and Romer, L.J.) } Nov. 27.

FARLOW V. STEVENSON.*

Landlord and Tenant—Lease—Lessee's covenants.

—Covenant to pay all taxes, rates, duties, &c.
—Compulsory drainage expenses.

Decision of Byrne, J. (15 *The Times* L.R., 249), affirmed.

This was an appeal against a decision of Mr. Justice Byrne (reported in *The Times* of March 14 last, and in 15 *The Times* L.R., 249). The question raised was one of a kind which of late years has often arisen between landlords and tenants. The defendant is tenant to the plaintiffs, under a lease for seven, 14, or 21 years made in the year 1895, of a residence known as Berkeley-house, Clapham. The lease contained a clause specifying that the rent should be paid clear of all deductions except property tax, and also a covenant by the tenant "to pay and discharge all taxes, rates, duties, and assessments whatsoever which now are or hereafter may become payable for or in respect of the said premises, or any part thereof, whether Parliamentary, parochial, or otherwise (except landlord's property tax)." In November, 1897, the vestry served on the premises a notice, under section 85 of the Metropolis Management Act, 1855, requiring the owners to make certain structural alterations in the system of drainage. It was agreed between the parties that the work should be done by the plaintiffs without prejudice to their right (if any) under the covenant to throw the liability for its cost upon the defendant. The cost incurred was about £150. Mr. Justice Byrne said that he could not distinguish the case from "*Brett v. Rogers*" (13 *The Times* L.R., 175, and [1897] 1 Q.B., 525), and he held that the defendant had in effect covenanted to indemnify the plaintiffs, and that he must pay the £150. The defendant appealed.

Mr. Edgar Foa was for the defendant; Mr. Levett, Q.C., and Mr. Gatey, for the plaintiffs, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that if any one could persuade the Court that the decision of Mr. Justice Byrne was wrong Mr. Foa would have done so by his extremely able and clear argument. But the Court must have regard to the facts and the provisions of the Acts. His Lordship could not imagine wider language than that of the covenant in the present case. The words were not the same as those which occurred in some of the decided cases, or in some of the older forms. The words were "payable in respect of the premises," and his Lordship did not see how it was possible to employ larger language. The power of the vestry to require drains to be put in order by the owner or occupier of premises, and to do it themselves if it was not done and recover the expense from the owner or occupier of the premises, was conferred by section 85 of the Metropolis Local Management Act, 1855, as modi-

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

fixed by section 64 of the Metropolis Local Management Act, 1862. His Lordship agreed with the able argument of Mr. Foa that the word "duties" in the covenant referred to the payment of money. But he wanted to add to the word "payable" in the covenant the words "by the occupier." Apart from the authorities the language was perfectly clear, and it excluded the narrow construction which it was sought to put upon it. It was urged that the case was governed by "*Tidswell v. Whitworth*" (L.R., 2 C.P., 326). But the language of the covenant was much wider than it was there, and one could not help seeing that the intention was to make it wider. In every prior case in which the word "duties" had been used the decision had been against the tenant. In his Lordship's opinion the decision of Mr. Justice Byrne was quite right, and the Court would be splitting hairs if it differed from him.

The PRESIDENT of the PROBATE DIVISION agreed. He thought that "*Brett v. Rogers*," on which Mr. Justice Byrne had relied, was rightly decided.

LORD JUSTICE ROMER said that the covenant was peculiarly worded. The numerous cases were not easy to reconcile, and they gave rise to fine distinctions. He thought that this covenant was general and applied to taxes, &c., whether payable by the landlord or the tenant. And his Lordship thought that the word "duties" covered the sum payable in the present case.

[Solicitors—Rundle and Hobrow; Farlow and Fuller.]

House of Lords (Lord Halsbury, L.C., } 1899.
Lords Macnaghten, Brampton, and } Nov. 28.
Robertson)

NATIONAL TELEPHONE COMPANY (LIMITED) v.
COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamp duty—*Ad valorem* duty—Agreement for hire of chattel in consideration of annual payment—"Bond, covenant, or instrument of any kind whatsoever"—Stamp Act, 1891, Schedule I.

Decision of the Court of Appeal (15 *The Times* L.R., 98) affirmed.

This appeal raised the short question whether an agreement between the appellant company and one of their customers ought to be stamped with an ordinary sixpenny agreement stamp or, as the Commissioners insisted, with an *ad valorem* stamp of 7s. 6d., on the ground that the agreement came within the words "Bond, covenant, or instrument of any kind whatsoever" within the meaning of the First Schedule to the Stamp Act, 1891. The Divisional Court (Mr. Justice Grantham and Mr. Justice Channell), giving judgment on December 14, 1897, followed the decision, in favour of the Commissioners, of "*Jones v. Commissioners of Inland Revenue*" (11 *The Times* L.R., 78; [1895] 1 Q.B., 484). The Court of Appeal (Lords Justices A. L. Smith, Rigby, and Collins) affirmed this order on December 9, 1898 ([1899] 1 Q.B., 250; 68 L.J., Q.B., 222). The following are the main provisions of the case stated by the Commissioners in pursuance of the Stamp Act, 1891, section 13:—On the 10th of February, 1897, an instrument, of which a copy is hereinafter set out, was presented on behalf of the National Telephone Company (Limited) (hereinafter called the appellants) by Mr. William E. L.

Gaine, the company's solicitor, to the Commissioners of Inland Revenue under the provisions of the 12th section of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The following is a copy of the instrument which is upon paper headed "The South of England Telephone Company, Limited—Head Offices, 50, Old Broad-street, E.C. No. 900.

" March 9, 1886.

" The undersigned hereby agree with the South of England Telephone Company, Limited (subject to above conditions), to pay them the sum of £12 per annum yearly in advance, the first payment to be made on the first day of the month succeeding that in which the wire and apparatus are fixed on the premises of the undersigned and each subsequent payment to be made on the corresponding day in each and every following year for the use of a private wire between No. 155, North-street and the South of England Telephone Company's local exchange system in Brighton.

" Either the company or the lessee may put an end to this agreement by giving to the other three calendar months' notice in writing expiring on the day previous to the rent being due in any year. No verbal notice can be recognized.

" Signature of renter (Signed), SAMUEL RIDLEY.

" N.B.—All rentals are payable yearly in advance, and the first year's rent becomes due on the first day of the month succeeding that in which the wire and apparatus are fixed on the premises of the renter.

" Name : SAMUEL RIDLEY.

" Business or occupation : Auctioneer, valuer, and estate agent.

" Address : 155, North-street, Brighton.

" This is signed subject to an arrangement for putting a line on to the Club Middle-street."

There were 13 conditions by which the company were to maintain the wire and apparatus; the renter was to take reasonable care of the wire and was not to allow the wire to be used for money payment, and to give access to the company. The company were not to be liable for telephonic interruption, but were promptly to repair damage. There were also provisions for determining the agreement for non-payment of rent or on bankruptcy of the renter; for the surrender at the end of the agreement of the apparatus by the renter and for proper wayleaves and other matters.

Mr. ASQUITH, Q.C., and Mr. ROSKILL were for the appellants, and contended that a security must be something collateral to an agreement to come within the words "Bond, covenant, or instrument," otherwise any agreement, such as the hiring of a carriage for a month, might be chargeable with an *ad valorem* stamp.

The SOLICITOR-GENERAL (Sir R. B. Finlay, Q.C.), with whom was Mr. Danckwerts, was stopped by their Lordships.

The LORD CHANCELLOR moved that the appeal be dismissed with costs. It was true that this was a taxing Act and must be construed strictly. But the words had been made as comprehensive as possible and clearly included the present case. Otherwise, anybody who wished to escape taxation would choose a form of instrument by which they could do so; and could avoid executing a document under seal. But this was clearly an instrument of the character which the Legislature intended to tax on an *ad valorem* scale, and the judgment below must be affirmed.

The other noble and learned Lords concurred.

[Solicitors—W. E. L. Gaine, for the appellants; The Solicitor for Inland Revenue, for the respondents.]

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

Q.B. Div. } 1899.
(Bigham, J.) } Nov. 28.

SMITH AND ANOTHER V. MILLS AND OTHERS.*

Landlord and Tenant—Lease—Covenant to repair
—Building erected on demised land after date of lease.

The claim in this action was to recover possession of certain plots of lands and houses in Cross-road, Croydon, held under three leases, by reason of the breach of covenants to repair. One point of general interest was raised in the course of the case—viz., whether a covenant to repair contained in one of the leases applied to a building erected upon the demised land subsequently to the date of the lease. The facts material to this point were as follows:—By a lease dated September 30, 1857, the lessors demised for 99 years a piece of land "and all that messuage or tenement and garden erected and formed on the said piece of ground." A covenant (No. 1) provided that before certain dates the lessees should erect certain fences, a washhouse, and two "messuages or tenements" on the land. A covenant (No. 2) provided that the lessees "will at all times during the demise well and substantially repair, &c., . . . the said messuage or tenement and premises hereby demised and the said fences and new erections and new messuages or tenements to be erected as aforesaid, . . . and will at the expiration of this demise peaceably yield up . . . the said demised premises, fences, new erections, and new tenements . . . in good repair." A covenant (No. 3) provided:—"Further it shall be lawful for (the lessors) at all seasonable times to enter upon the said demised premises or any part thereof to examine the condition thereof and to give (the lessees) notice in writing of any defects and that (the lessees) will within three calendar months after the delivery of every such notice make good the defects specified therein." The lessees duly erected the new structures specified in covenant No. 1. At a subsequent date another building, lately used as a starch factory, which was not included in No. 1, was erected on the demised land. The landlords served notices, under covenant No. 3, to repair all the premises, including the starch factory. The question was whether the covenants to repair applied to the starch factory.

MR. ROBSON, Q.C. (Mr. Montague Lush with him), argued that even if covenant No. 2 did not apply to the factory, No. 3 must do so. The "demised premises" must mean buildings which the lessee might erect, as well as those he must erect under No. 1. The covenant to yield up in good repair would clearly apply. (He cited "*Brown v. Blunden*," Skinner, 121, and "*Sunderland v. Newton*," 3 Sim., 450.)

MR. BRAY, Q.C. (Mr. Lightwood with him), argued that both No. 2 and No. 3 applied only to the buildings contemplated by the lease—i.e., the original house and the erections to be made under No. 1. (He cited "*Cornish v. Cleife*," 3 H. and C., 446.)

MR. JUSTICE BIGHAM, after stating the facts, said that in his opinion the covenant No. 2 clearly referred to the house and premises on the land at the time of the demise, together with the specific erections to be made under No. 1. He had no doubt at all that the intention of the parties to the lease was to that effect. The covenant No. 3 did not carry the previous covenant any further, or throw light upon its construction. As to the undertaking to yield up the premises in good repair, whether that applied to the factory might be a question to be determined by a Judge some 50 years hence. He would give no opinion on it beyond saying

that it did not seem to modify the meaning of the covenants to repair. As to the authorities that had been cited, the rule laid down in them was that where there was a general covenant to repair that must refer both to buildings erected at the date of and subsequent to the demise; but where the covenant to repair in its terms applied to certain specified buildings, it must not be extended beyond those buildings.

[Solicitors—Arthur, for the plaintiffs; Lincoln, for the defendants.]

Court of Appeal (Lindley, M.R., } 1899.
Jeune, P., and Romer, L.J.) } Nov. 29.

IN RE THE NATIONAL STORES (LIMITED).*

Company—Winding up—Examination of promoters—Time within which application must be made to discharge order for examination—Delay.

Decision of Wright, J. (*ante*, p. 8), affirmed.

In this case there were two appeals against two orders of Mr. Justice Wright (reported in *The Times* of the 2nd inst., and *ante*, p. 8). This company being in liquidation an order was, on May 8, 1899, made by Mr. Justice Wright in Chambers, on the *ex parte* application and report of the Official Receiver, for the public examination of Mr. F. G. Willett, Mr. J. W. Taylor, and others. Notice of the order was given to Mr. Willett on May 17, and some of the persons named in the order were examined on June 13. Mr. Willett's counsel attended and cross-examined. On July 26 Mr. Willett took out a summons to discharge the order for the public examination of himself. A similar application was made by Mr. Taylor. The applications were adjourned to the Judge, when the preliminary objections were taken—(a) that the application ought to have been made within 14 days from the date, at any rate, of notice of the order in accordance with the practice of the Chancery Division as to moving to discharge the order of a Judge at Chambers; (b) that by taking part in the examination Mr. Willett had precluded himself from the right to have the order discharged. Mr. Justice Wright held that the applications had been made too late. Without laying down any rigid rule he thought that such an application ought to be made within a reasonable time. On this and other grounds he dismissed the applications. Mr. Willett and Mr. Taylor appealed.

MR. Muir Mackenzie was for Mr. Willett; Mr. John O'Connor was for Mr. Taylor; the Solicitor-General (Sir R. B. Finlay, Q.C.) and Mr. Ingle Joyce were for the Official Receiver.

The preliminary objection as to time was raised again, and on this ground

The COURT dismissed the appeals.

The MASTER of the ROLLS said that such an application ought to be made with reasonable diligence, and there being no explanation of the delay, the appeals ought not to be heard.

The PRESIDENT of the PROBATE DIVISION and LORD JUSTICE ROMER concurred.

[Solicitors—S. A. Clench and Co.; Tottenham and Co.; The Solicitor to the Board of Trade.]

House of Lords (Lord Halsbury, L.C., } 1899.
Lords Macnaghten and Robertson) } Nov. 30.

THE FOREST STEAMSHIP COMPANY (LIMITED) V. THE
IBERIAN ORE COMPANY.†

Ship—Charter-party—Construction—Demurrage
—"Working day of 24 hours"—Meaning of.

*Reported by W. L. CARELL, Esq., Barrister-at-Law.

†Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

Decision of the Court of Appeal (14 *The Times* L.R., 500) affirmed.

This was an appeal involving the construction of somewhat obscure words in a charter-party. The appeal was from a decision of Lords Justices A. L. Smith and Vaughan Williams from whom Lord Justice Rigny dissented, dated August 3, 1908, and affirming the judgment of Mr. Justice Bigham, dated June 17, 1908. The case below is reported in 14 *The Times* L.R., 500; 3 Com. Cases, 316. The facts are thus stated by Mr. Justice Bigham in his judgment:—"By a written contract, dated December 14, 1897, the plaintiffs undertook with the defendants to provide ships for the carriage of 50,000 tons of iron ore from Seville, in Spain, to ports in the United Kingdom, and elsewhere, over a period of 12 months. The contract was drawn up upon an ordinary printed charter-party form, as used for single voyages, alterations being introduced in writing for the purpose of adapting the form to the particular contract in question. Disputes have arisen as to the meaning of the provisions in this contract, as to demurrage. Those provisions are as follows:—"Charterers or their agents to be allowed 350 tons per working day of 24 hours, weather permitting (Sundays and holidays excepted), for loading and discharging, same to be reversible, and to be averaged voyage by voyage to avoid demurrage, and to count from 6 a.m. of the day following the day when steamer is reported as the Custom-house, unless she be reported before noon, and in which case time to count from notice of readiness, and in every respect ready to load or discharge immediately, and in free pratique. Steamer to work as much of night if required, also on Sundays and holidays, such time not to count as lay days unless used." The plaintiffs contend that those words mean that the defendants are to perform the loading and discharging at the rate of 350 tons per working day, such days to be made up of periods of 24 hours, reckoned from the hour when the vessel starts the one operation or the other. The defendants, on the other hand, say that the words mean that 24 working hours are to be allowed for loading or discharging each 350 tons. The learned Judge decided in favour of the defendants—respondents in the House of Lords.

Mr. Cohen, Q.C., and Mr. Montague Lush were for the appellants; Mr. Joseph Walton, Q.C., and Mr. Rufus Isaacs, Q.C., for the respondents.

The LORD CHANCELLOR, in moving that the appeal be dismissed with costs, said that his mind had not been free from doubt on the construction to be placed on these words, because the parties had clumsily expressed what might have been stated in precise language. But it was tolerably clear what was intended; and he thought the majority of the Judges in the Court of Appeal were right. Once the idea was realized that there was a conventional and artificial day to be manufactured out of a certain number of hours—and that there was such a day was common ground to both parties—there was an intelligible result. They wanted to keep a precise record of the time occupied. In effect, they counted a conventional day of 24 hours, which might be made up by broken portions of time in several days. Thus the number of days was to be calculated—each day being complete when 24 hours of the interrupted periods were made up. Mr. Cohen had admitted there was to be a debit and credit account in hours. His Lordship could not make out how that was to be arranged unless these broken periods were to be reckoned together. Mr. Cohen sought to confine the words to the exceptional case of night, Sundays, and holidays. But the interpretation of the Courts below was much more satisfactory. There was no such thing as an "ordinary work-

ing-day of 24 hours." The phrasing showed that the parties intended to put the periods together, and to ascertain the number of days by dividing the gross number of hours by 24. But he should be sorry to say that this instrument was a model of clearness.

LORD MACNAGHTEN was of the same opinion. This document was very awkwardly expressed; but, on the whole, he preferred the construction adopted by Mr. Justice Bigham. The difficulty seems to have arisen from the parties putting into their conventional day the same number of hours as in an ordinary day. If the working-day had been fixed at 12 hours there would have been no difficulty at all.

LORD ROBERTSON concurred.

(Solicitors—Bostrell and Roche, for the appellants; Cuthbert and De Veniss, for the respondents.)

House of Lords (Lord Halsbury, L.C.,) 1899.
Lords Macnaghten and Morris) Nov. 30.

THE HAMPTON URBAN DISTRICT COUNCIL v. THE SOUTHWARK AND VICTORIA WATER COMPANY.*

Rating—Rateable value—"Land covered with water"—Reservoir of water company—Public Health Act, 1875, sec. 211, sub-s. 1 (1).

Decision of the Court of Appeal (15 *The Times* L.R., 96) affirmed.

This was an appeal from a decision of the Court of Appeal, dated December 3, 1898, affirming a decision of Mr. Justice Wright and Mr. Justice Darling, sitting as a Divisional Court, dated March 15, 1898. The respondents were the occupiers of certain property—to wit, a reservoir—within the district of the appellants in respect of which certain general district rates have been levied on the respondents as the occupiers thereof, pursuant to section 211 of the Public Health Act, 1875, and the question was whether, according to the true construction of the section, the respondents, as such occupiers, were liable to be assessed on the full net annual value of the said reservoir, as ascertained by the valuation list for the time being in force, or to be assessed in respect of the sum in the proportion of one-fourth part only of such annual value. The Public Health Act, 1875, section 211, after providing for the making and levying of general district rates on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, enacted:—"(1) The . . . occupier of any land covered with water or used only as a canal or towing path for the same . . . shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof." The Court of Summary Jurisdiction ordered that the respondents should pay to the appellants the sums of £97 and £40 ss. 4½, as in respect of the full net annual value of that part of the said reservoir situate within the district of the appellants. The respondents applied to the said Court to state and sign a special case for the opinion thereon of a Divisional Court. The questions for the opinion of the Court were:—"(1) Whether the reservoir is or is not 'land covered with water' within the meaning of section 211, subsection 1 (1), of the Public Health Act, 1875." "(2) Whether the appellants (the now respondents) ought to be rated in respect thereof under the said section in proportion of one-fourth part only of the net annual value of the said reservoir or upon the full net annual value thereof." The Divisional Court, Mr. Justice Wright and Mr. Justice Darling, held themselves bound by the decision of the Court in the case of *Regina v. The Birmingham Water Works*

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

"Company" (1 Best and Smith, 84), and reversed the order of the Court of Summary Jurisdiction. This decision was affirmed by the Court of Appeal. The case is reported below in 68 L.J., Q.B., 207.

Sir Edward Clarke Q.C., and Mr. H. Courthorpe Munroe were for the appellants; Mr. Cripps, Q.C., and Mr. Walter C. Ryde, for the respondents, were not heard.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said that no argument had been adduced to show that the Legislature used the words "land covered with water" in any other than their natural sense, which had been attributed to them by the Courts for more than 30 years. Words would have to be added so as to make the statute run:—"land covered by water which is not made so by artificial construction." No such words had been added, and he could not understand the doubts expressed in the Divisional Court.

The other noble and learned Lords concurred.

[Solicitors—Kent and Son, for the appellants; Lanfear, Tanner, and Lanfear, for the respondents.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Nov. 30.
WOLFE V. DE BRAAM.*

Practice—Trial—Right to a jury—O. 36, r. 6.

This was an appeal from an order made by Mr. Justice Lawrance at Chambers. The action was brought by a money-lender to recover a sum of money lent with interest. On a summons taken out by the plaintiff under Order 14 for leave to sign final judgment, Mr. Justice Lawrance gave the defendant unconditional leave to defend, and directed that the case should be set down for trial in the short cause list. On a subsequent summons taken out by the defendant asking that the case might be tried by a jury, Mr. Justice Lawrance ordered that it should be tried without a jury. From this order the defendant appealed. It was stated that it was a common practice for cases in the short cause list to be tried before a jury. Reference was made to Order 36, rules 3, 4, 5, and 6, and Order 14, rules 6 and 8.

Mr. Foote, Q.C., and Mr. Scarlett appeared for the defendant; Mr. Hugo Young, Q.C., and Mr. Lowenthal for the plaintiff.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that, if Mr. Justice Lawrance meant that no case which was set down in the short cause list could be tried with a jury, in his opinion the learned Judge was wrong. He was not satisfied that the learned Judge had exercised his discretion and had come to the conclusion that this was not a fit case to be tried by a jury. He therefore thought, having regard to Order 36, rule 6, which said that in all causes or matters other than those specified in rules 3, 4, and 5, an order should be made on the application of either party for trial with a jury, that the appeal ought to be allowed and an order made for trial with a jury.

LORD JUSTICE COLLINS said he was of the same opinion. If Mr. Justice Lawrance, in making the order giving the defendant leave to defend, had made it one of the terms of the order that the trial should be without a jury he would not have ventured to interfere with such a direction. But the order for leave to defend did not contain any such condition. The order with regard to a jury was made on a separate summons. He did not think that the learned Judge intended to hold that in no case put into the short cause list could there be a trial with a jury.

*Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

LORD JUSTICE VAUGHAN WILLIAMS was of the same opinion.

[Solicitors—I. Goldman, for the plaintiff; G. J. Fowler, for the defendant.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Dec. 1.

J. BAVINS, JUN., AND SIMS V. LONDON AND SOUTH-WESTERN BANK.*

Bill of Exchange—Cheque, what is—"Unconditional order for payment of money"—Bills of Exchange Act, 1882, sec. 82—Revenue Act, 1883, sec. 17—Negligence.

Decision of Kennedy, J. (15 *The Times* L.R., 226), affirmed.

This was an appeal by the defendants from a judgment of Mr. Justice Kennedy at the trial of an action without a jury, reported in 15 *The Times* L.R., 226. The action was brought to recover the sum of £69 7s. as damages for the conversion of a certain order in writing, the property of the plaintiffs, or in the alternative, for money had and received. The facts were as follows. On July 7, 1898, the Great Northern Railway Company gave to the plaintiffs, in payment of a tradesman's account, the following order in writing:—"The Great Northern Railway Company, London, July 7, 1898. The Union Bank of London (Limited), No. 2, Prince's-street, Mansion-house, E.C. Pay to J. Bavins, jun., and Sims, the sum of £69 7s. Provided the receipt form at foot hereof is duly signed, stamped, and dated. £69 7s. (Signature of secretary.) (Signature of assistant-secretary.) Received from the Great Northern Railway Company the above-named sum as per particulars furnished. This receipt is not to be detached from the cheque. Signature Dated . . . , 189." The order was crossed generally. This document was stolen from the plaintiffs, neither the endorsement nor the receipt being signed by them. The document was, on July 15, 1898, brought to the defendants' Shoreditch branch by a man who was accompanied by the husband of one of the defendants' customers, the husband being in the habit of paying in cheques to his wife's account. At the request of the cashier the receipt form was then and there stamped, filled in, signed, and dated, and the order was received by the defendants for collection. The signature was badly written and misspelt, the signature in the receipt appearing to be "J. Bavins, Trench, and Sims." The document had previously been endorsed with a similar signature. Neither signature was, in fact, the plaintiff's signature. The defendants credited the amount to their customer. On July 16 the defendants received in good faith from the Union Bank of London payment of the order, and dealt with their customer upon the footing that the sum belonged to her before they had any notice that the signatures to the receipt and endorsement were forgeries. The defendants first knew on August 13 that the signatures had been forged. Between July 16 and August 13 the defendants' customer had drawn freely upon her account, and an amount exceeding £69 7s. was drawn out by her. The defendants at the trial relied upon section 82 of the Bills of Exchange Act, 1882, which is as follows:—"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." Mr. Justice Kennedy held that the order was not an

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

unconditional order for the payment of money within section 3 of the Bills of Exchange Act, 1882, and was, therefore, not a cheque within the meaning of sections 73 and 82, and that the defendants were not protected from liability to the plaintiffs. He further held that the plaintiffs were entitled to recover not merely the value of the piece of paper, but the amount which the defendants had collected on the order. He accordingly gave judgment for the plaintiffs for the amount claimed. The learned Judge further held that, if the order was a cheque, the defendants had not been guilty of negligence. Since the judgment in the Court below a section was discovered in the Revenue Act, 1883 (46 and 57 Vict., c. 55)—namely, section 17. That section made an important alteration in the law with regard to the protection of bankers as enacted in the Bills of Exchange Act, 1882, but in consequence of the alteration of the law being contained in a Revenue Act, where no one would in ordinary course look for it, the alteration, it was stated, had not been noticed in the text books upon the subject, and was not known to the plaintiffs or the defendants. That section enacts that "sections 76 to 82, both inclusive, of the Bills of Exchange Act, 1882 . . . shall extend to any document issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such chamber of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument." This section was now relied upon by the defendants as making this order a cheque and thus bringing the bank within the protection of section 82 of the Bills of Exchange Act, 1882.

Mr. Herbert Jacobs appeared for the defendants; Mr. J. F. P. Rawlinson, Q.C., and Mr. Denis O'Connor appeared for the plaintiffs.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the defendants could not bring themselves within the protection of section 82 of the Bills of Exchange Act, 1882. The document was not a cheque within the meaning of that Act, as it was a conditional order for the payment of money. Mr. Justice Kennedy, however, went on to decide that the defendants had received the payment for their customer without negligence. That was merely *obiter*. It was patent that the endorsement and the receipt were not signed in the same name as that of the payees. Upon the facts of this case there was clearly negligence in the defendants taking this document as they did. Since the trial a new section had been discovered—namely, section 17 of the Revenue Act, 1883, which for certain purposes must be read into section 82 of the Bills of Exchange Act, 1882. While enlarging the meaning of the word cheque in that section it left the condition as to negligence contained in section 82 applicable, and the defendants had still to show that they had received the document without negligence. Therefore the defendants were not protected under those sections. The matter stood thus. There had been a clear conversion of the document in getting the money from the Union Bank and placing it to the customer's credit. What damages were recoverable? Speaking for himself, he did not think it important whether the damages were in respect of trover, or whether the claim was for money had and received. The defendants had got a document by means of which they received from the Union Bank £69 7s., which otherwise they would not have received. Why should not the damages in trover be £69 7s. Clearly, however, the £69 7s. could be recovered as money had and received to the plaintiffs' use. The defendants received the money from the Union Bank, and in the following August they had

notice that the plaintiffs claimed it. From that date they knew that the money belonged to the plaintiffs, and in the circumstances it was money had and received to the plaintiffs' use and could be recovered as such. It was no answer to such an action to say that the defendants as agents had paid the money to their customer as principal. They had not done so. All they had done was to credit their customer with the amount, which was merely a conditional credit, and there was no reason why they should not now debit her account with the amount which they would have to repay. There was no settled account such as debarred them from recovering the money from the customer. The judgment was therefore right.

LORD JUSTICE COLLINS concurred. He said that it was not necessary to decide whether the £69 7s. could in this case be recovered as damages for the conversion, because the same end could be reached by another road, namely, by the claim for money had and received. He desired to express no opinion upon that point. Here the document was dealt with by the defendants in such a way that they received from the Union Bank its full face value, the result of their user of the document being that they received the money to the use of the plaintiffs. It was no answer that they had credited their customer with the amount, as that was only a conditional credit depending on whether the document turned out to be all right. There was no settled account between them and their customer, nor anything to debar them from recovering the sum from her.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—White and De Buriatte, for the plaintiffs; Hubbard, Son, and Eve, for the defendants.]

Chan. Div. } 1899.
(North, J.) } Dec. 1.
LONDON AND GLOBE FINANCE CORPORATION V.
KEMPMAN.*

Practice—Subpoena—Service—Abuse of the process of the Court—Serving subpoena prematurely.

This action was for the purpose of making an agent account for alleged secret profits. Two motions were this morning made on behalf of stockbrokers who had been subpoenaed as witnesses at the trial to discharge the writs of subpoena, on the ground that the subpoenas had been issued and served under circumstances that made the service an oppressive abuse of the process of the Court.

One motion was made on behalf of Mr. W. King Millar and his partner, Mr. Thomas Lloyd Mostyn Llewellyn, the other on behalf of Mr. Reitlinger. The applicants insisted that the subpoenas had been unreasonably served at an unreasonably early time and for a false date, and in such manner as to hamper them in their movements in an offensive way. The writs were taken out on the 12th ult. They required attendance on the 14th ult. and from day to day during the sittings. They were served on the 15th. At that date the plaintiff corporation had not only not delivered their reply, but on the 18th they obtained an order in Chambers giving them a month further time within which to deliver their reply. On the writ were endorsed the words:—"Notice will be given to you by letter or telegram when your attendance is required." Typewritten letters to the witnesses bearing the signature Slaughter and May, the plaintiffs' solicitors, were delivered with the subpoenas in the following terms:—"Referring to the subpoena which has been served upon you herein, you will of

*Reported by D. FITCATRN, Esq., Barrister-at Law.

course understand that, as is stated in the memorandum endorsed on the back of the writ of subpoena, your attendance in Court will not be required until you receive notice from us to that effect. The writ as a matter of form requires your attendance on the 14th inst., the above action being in the list of actions to be taken next, but we shall advise you in due course when your attendance is necessary." There was an affidavit by the secretary of the plaintiff company to the effect that the object of serving the subpoenas so early was to keep in touch with the witnesses. A managing clerk of Messrs. Slaughter and May also made an affidavit stating that the statement that the action was in the list of actions to be heard next was an error and that the general purport of the letters sent with the subpoenas was in common form. He deposed:—"There is no foundation so far as I know for the statement that service of the subpoena was made for any other purpose than for securing the attendance of the applicants at the trial; the reason for serving them at this early stage is to get into communication with them and to prevent them leaving the country or being out of the way without the plaintiff company having had an opportunity of taking their evidence on commission or otherwise and generally to get in touch with the witness."

Mr. Vernon Smith, Q.C., and Mr. Percy Wheeler were for Messrs. Millar and Llewellyn; Mr. Henry Terrell, Q.C., and Mr. Younger for Mr. Reitlinger; and Mr. Martelli for the plaintiff company.

MR. JUSTICE NORTH commented on the impossibility of the action being set down for trial this sitting, and the fact that the force of the subpoena expired at the end of the sitting; he read part of the evidence on the part of the plaintiffs, which he said plainly showed that the object of the plaintiffs in taking out and serving the writs at so early a time was to keep control over the witnesses, so that they should not go away without the leave of the plaintiffs, and if they wished to go away should only do so on terms. His Lordship did not intend to lay down an exact rule as to the earliest time at which a subpoena to attend can properly be served; but in his opinion in this case service had been made with a purpose and when the parties must have known perfectly well that the action could not possibly be tried during the present sittings. He must allow the motion with costs.

[Solicitors—Duffield and Bruty; Tatham and Lousada; Slaughter and May.]

Chan. Div. } 1899.
(Byrne, J.) } Dec. 1.

EARLE V. KINGSCOTE.*

Husband and Wife—Wife's torts—Husband's liability.

His Lordship delivered judgment in the above action, a report of which appeared in *The Times* of Monday, November 27. The plaintiff, a widow, living near Andover, at the request of the defendant, Mrs. Georgiana Howard Kingscote, had consented to find £2,000 to pay for certain shares to be bought by Mrs. Kingscote for the joint benefit of the plaintiff and herself. Subsequently, Mrs. Kingscote telegraphed to the plaintiff that she had bought the shares, and the plaintiff sent bills for the £2,000, which were discounted and the proceeds paid to Mrs. Kingscote. The present action having been brought by the plaintiff to protect her interests in the shares, Mrs. Kingscote, in opposition to a motion by the plaintiff for interim relief, swore an affidavit alleging that she had never purchased any shares with

the £2,000. The plaintiff stated that she had been induced by the false and fraudulent representations, that the shares had been purchased, to advance the £2,000. Whilst the motion was pending £500 had been paid to the plaintiff on account. It was at the trial of the action consented, on behalf of Mrs. Kingscote, that judgment should be given against her for £1,500 and costs. The plaintiff, however, also claimed to recover judgment against Mrs. Kingscote's husband, the defendant, Colonel Howard Kingscote, on the ground that a husband was by the common law answerable for the torts and frauds of his wife, notwithstanding the disabilities of coverture. It was argued on behalf of the husband that the cause of action was connected with and the means of "effecting a contract" and therefore that the husband was exempted from all liability—"Liverpool Adelphi Loan Association v. Fairhurst" (9 Exch., 422, p. 429).

Mr. Levett, Q.C., and Mr. W. Baker appeared for the plaintiff; Mr. Whately for Mrs. Howard Kingscote; and Mr. Latham, Q.C., and Mr. Elgood for Colonel Kingscote.

MR. JUSTICE BYRNE, after referring to the cases of "Liverpool Adelphi Loan Association v. Fairhurst" (9 Exch., 422, at p. 429) and "Wright v. Leonard" (11 C.B., N.S., 258), said that he was of opinion that the cases in which the husband was to be held exempt from his common law liability for his wife's torts must be limited to cases in which the fraud was not only directly connected with the contract and parcel of the same transaction, but was also the means of effecting (in the sense of obtaining) the contract, and that, without disregarding the observations of Chief Justice Erle in "Wright v. Leonard," he ought to follow the clearly expressed view of Mr. Justice Willes and Mr. Justice Williams, and avoid infringing further upon the general law than was justified by the authority of "The Liverpool Association v. Fairhurst." In the present case the contract was effected prior to, and independently of, the fraud complained of, and he found himself unable to say that such fraud was the means of "effecting the contract" in the sense in which that expression was, in his opinion, used in the judgment in the "Liverpool Association v. Fairhurst." It therefore followed that he considered that the defendant Colonel Howard Kingscote was liable in damages for the tort complained of. His Lordship therefore held that the plaintiff was entitled to judgment against Mrs. Howard Kingscote's husband for £1,500 and costs.

[Solicitors—Fraser and Christian; Powell and Burt.]

Q.B. Div. } 1899.
(Wright, J.) } Dec. 1.

RAMAGE V. WOMACK.*

Landlord and Tenant—Lease—Covenant to repair—Wife of deceased tenant—Liability.

In this case Mr. R. G. Glenn appeared for the plaintiff, and Mr. H. F. Manisty for the defendant.

This was an issue directed to be tried by the Master in Chambers, the following facts being admitted. The defendant, Mrs. Sarah Womack, was married before 1878. On April 17, 1878, the trustees of the will of Mary Murray leased to James S. Womack, the defendant's husband, Nos. 26 and 27, Portman-street for 21 years. The lease purported to be in consideration of £900 paid by the defendant out of moneys belonging to her for her separate estate and also of rent reserved, "and of the covenants and agreements hereinafter contained on the part of the said J. S. Womack (the husband), his executors, administrators, and assigns to be paid,

*Reported by R. B. SCHOMBERG, Esq., Barrister-at-Law.

*Reported by H. G. SNOWDEN, Esq., Barrister-at-Law.

observed, and performed." The final clause of the lease declared that J. S. Womack would hold the premises in trust for Sarah Womack as part of her separate estate. Mrs. Womack is described in the lease as a Court milliner and dressmaker, and intended to use the premises for business purposes, and it was admitted that she had, from the first, paid the rent and done the repairs. Mr. Womack died in 1893 intestate, and no letters of administration were ever taken out. Action was now being brought for damages for breach of covenant to repair, and the issue directed to be tried was whether Mrs. Womack was bound by the covenants in the lease. The question was argued on two occasions before Mr. Justice Wright.

His LORDSHIP, after stating the facts of the case, proceeded:—The only question which it is open for me now to decide is whether on these materials alone, including of course any necessary inferences from the admitted facts, it can be seen that the plaintiff is entitled to succeed. There is no allegation in the writ, nor any admission of fact, that a new contract of tenancy on the terms of the lease to Mr. Womack was made expressly or otherwise between the plaintiff and Mrs. Womack, or that she became executrix *de son tort* of her husband in respect of this lease or otherwise. In the absence of any such allegation or admission, I must consider that the plaintiff's claim is at present based simply on the ground that Mrs. Womack always had the beneficial interest in the lease and always occupied under it, as it was intended she should do, and paid the rent and performed the covenants which her husband or his estate was liable to pay and perform. In other words, I must take it that she neither was originally liable as lessee, unless the lease itself made her liable, nor after her husband's death became tenant on the terms of the lease. This being the case, there is no legal contract of tenancy shown between her and the plaintiff, nor any contract by which she became legally bound by the covenants in the lease. Her liability, if any, must be an equitable liability depending upon her beneficial interest alone or coupled with the fact of occupation. It seems to me to be settled by two decisions of an Appellate Court—"Walters v. Northern Coal Mining Co." [1855] (5 De G. M. and G., 629), and "Cox v. Bishop" [1857] (8 De G. M. and G., 815)—that there is no such equitable liability even where possession has been taken by an equitable assignee or by a *cestui que trust* who has agreed with his trustee to take over the lease and has entered under the agreement, and that the covenants of the trustee or assignor ordinarily bind the beneficiary or equitable assignee, so as to render him liable to an action on the covenants only when there is a privity of contract between him and the original lessor. Nor can the equitable assignee be compelled by the landlord to take a legal assignment of the lease although the assignee has entered and paid rent ("Moore v. Grey" [1848] 2 De G. and Sm. 304). In "Wright v. Pitt" [1870] (12 Eq., 408) Vice-Chancellor Malins indeed held that the equitable assignee of a mining lease must account for the royalty or share of the value of the minerals got by him, as if he had been tenant under the lease, but this decision cannot affect the decisions of the superior Court, and may be supported on grounds consistent with those decisions, the grant of the minerals being regarded as limited or conditional on the payment of the royalty. Nor does it appear to me to make any difference that in the lease itself the lessee declares himself to hold the lease as trustee for his wife. He does not purport to covenant for her, but for himself. If such a declaration has now the effect of making her liable to an action on his covenants, it must from the first have had that effect except for the fact of her

coverture. But it seems plain that the intention of the deed is that his covenant and his interest in the lease are accepted as the sole security for the repairs and this for the very reason that she could not be effectually made liable. Nor does the principle on which "Castellan v. Hodson" [1870] (10 Eq., 47) was decided appear to help the plaintiff's contention. None of the parties here stand in the same relation to each other as in that case, which was one of indemnity, not of covenant; and the husband in the present case could not have sued his wife. This very distinction is taken in "Cox v. Bishop," by Lord Justice Turner, who points out that the obligation as between the assignor and assignees to indemnify does not affect the relation between the lessor and the assignee. Moreover in "Castellan v. Hodson" that judgment turned on the consideration that the man of straw might be eliminated because he was a bare trustee. But in this case the husband was not a bare trustee, but was the party intended to be made liable on the covenants. The result is that on the allegations and materials before me I am not able to say that the action can be maintained. But upon further evidence and upon a proper claim the plaintiff may be able to show that the payments of rent by Mrs. Womack since her husband's death have been made and accepted under such circumstances that the proper inference is that she herself became tenant at law on the terms of the case. See "Buckworth v. Simpson" [1835] (1 C.M. and R., 834). Or it may appear that she paid the rent, or dealt with, or occupied under the lease, in such a way as to necessitate or justify the legal inference that she became executrix *de son tort*. In either of these cases she may be personally liable, though not necessarily to the same extent or in the same way. I am not at present in a position to find the facts or to draw the inference necessary for determining her position. I can only direct the mode in which the facts are to be ascertained. His Lordship then directed that the issues of facts should be tried with pleadings, without a jury, and that the costs of this argument should be defendant's costs in the cause.

[Solicitors—George Tilling, for the plaintiff; Maude and Tunnicliffe, agents for Henry Dacre, for the defendant.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Dec. 2.

HENSEY V. WHITE.*

Master and Servant—Master's liability to servant
—Workmen's Compensation Act, 1897—"Accident," what is—Death caused by disease.

This was an appeal from the decision of the County Court Judge of Bedford (Judge Bagshawe, Q.C.) in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The only question was whether the death of the workman was caused by an accident, the Act only applying where there was personal injury by accident to a workman. The appellant was the widow of a cabinetmaker named Charles Hensey, who at the time of his death was in the employment of the respondent. It appeared that the workmen had to begin their work in the morning by starting a gas engine. Upon the first day after the Christmas holidays, 1898, when the workmen resumed work, Hensey and three other men proceeded to light the gas in the engine and to start the engine. In order to start the engine it was necessary to turn a large wheel. Hensey proceeded to attempt to hoist the wheel, the three

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

other men pulling it down on the other side. Owing to the lapse of time since the engine was last used, air had got into the engine, and the wheel would not move at first. The men made a second attempt and they succeeded in moving the wheel, when Hensey suddenly put his hand to his stomach and left the place. He was found immediately afterwards vomiting blood, and he bled to death. Death was caused by rupture of the small blood vessels of the stomach and intestines. The deceased man had been employed on the work for several years. A *post-mortem* examination was made, and the medical evidence showed that the deceased man had been suffering from chronic indigestion, which had weakened the blood vessels of the stomach and intestines, and there was evidence of congestion and inflammation. Two of the doctors gave it as their opinion that the rupture of the blood vessels was caused by the strain, whereas another doctor stated his opinion that the strain apart from the disease did not cause the blood vessels to give way, and that, in his opinion, hæmorrhage of the stomach could not result from strain without disease. The County Court Judge found that to make it an accident there must be something happening beyond the mere fact of a disease suddenly taking a fatal turn—*e.g.*, some break in the machinery, some fall of the workman, or something else out of the ordinary and normal course of the workman's employment. It was not enough that ordinary hard work, carried on by the workman in the manner intended, had, as he worked, suddenly caused his disease to take a fatal form. He found as a fact that the deceased man had been long suffering from chronic inflammation of the internal coat of the stomach, caused or accompanied by congestion of the numerous small blood vessels in that coat, that there was an exudation of blood from the stomach which caused death, and that this was the result of the congestion and chronic inflammation of the stomach, and would not have happened without it. He accordingly decided in favour of the respondent.

Mr. MONTAGUE SHEARMAN, for the appellant, contended that the actual and immediate cause which produced death could alone be looked at. The predisposing cause of death could not be looked at. The County Court Judge really only found that without the disease the strain would not have caused death. That was not a finding that the disease was the proximate cause of the death. The strain was the proximate cause, and that was an accident. He referred to "*Winspear v. Accident Insurance Company*" (6 Q.B.D., 42); "*Lawrence v. Accidental Insurance Company*" (7 Q.B.D., 216); "*Hamlyn v. Crown Accidental Insurance Company*" ([1893] 1 Q.B., 750).

Mr. E. Morten, for the respondent, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether, upon the findings of the County Court Judge, the death of the workman was caused by accident. The man was at his ordinary work and the wheel of the gas engine had to be started. The wheel happened to be rather stiff, and there was some difficulty in starting it. When attempting to start the wheel the deceased man suddenly put his hand to his stomach and left the place, and he died from the bursting of blood vessels in his stomach. Upon the *post-mortem* examination it was found that the stomach was not at all in a sound condition. Medical evidence was given on both sides as to the man's condition, and the Judge upon the evidence found that the death was caused by disease, and that the rupture of the blood vessels was probably caused by the man's ordinary work, though upon the occasion in question the work was a little more arduous than usual. The Judge came to the conclusion that the disease and not an accident caused the

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death. They could not interfere with that finding of fact. The present case in no way infringed upon any of the cases cited. The appeal must therefore be dismissed.

LORD JUSTICE COLLINS concurred. It was clear on the findings of the County Court Judge that the element of accident was entirely wanting. The injury arose in the ordinary course of the deceased man's work, though there might have been a little more exertion used by him in that work on the occasion in question than was usual. In "*Pandorf v. Hamilton*" (12 App. Cas., 518, at p. 524) Lord Halsbury said that he thought that the idea of something fortuitous and unexpected was involved in the word "accident." That element was wanting in the present case. In the cases which had been cited a fortuitous and unexpected element existed which was the proximate and ultimate cause of death.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Purkis and Co., for the appellant; Hal-liley and Stimson, for the respondent.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) Dec. 2.

LLOYD V. SUGG AND CO. (LIMITED).*

Master and Servant—Master's liability to servant
—Workmen's Compensation Act, 1897—Acci-
dent.

This was an appeal from the decision of the Westminster County Court Judge (Judge Lumley Smith, Q.C.) in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, George Lloyd, was a smith in the employment of the appellants at their engineering works at Westminster. The respondent was at the time of the accident holding a flatter on the anvil for another workman, called a hammerer, to strike the flat end of the flatter, when the hammerer by accident struck the rod or round part of the flatter and jarred the respondent's hand. In consequence the hand became swollen, and gout in the hand was brought on. The doctor who attended the respondent, and who was called as a witness by the appellants, said that he had attended the respondent previously to the accident for gout in the hand and elbow, that the respondent had gouty diathesis, and that he thought the swollen hand was caused by gout brought on by the jar. The doctor's certificate stated that the respondent was suffering from a weak hand caused partially by the injury. The County Court Judge awarded the respondent 15s. a week, stating that the respondent came within the Act.

Mr. SPENCER BOWER, for the appellants, contended that the injury to the hand was not caused by the accident. There was no evidence that the injury was solely caused by the accident. The gout was the cause of the swollen hand.

Mr. Duckworth, for the respondent, was not called upon. The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that he desired to say that, as these appeals were solely upon questions of law and not upon questions of fact, it would be a great assistance to the Court if County Court Judges would certify particularly what their findings of fact were. In the present case the County Court Judge had only reported at the end of his notes that he awarded the respondent 15s. a week, but the Court were told that he further said that the respondent came within the Act. The point now taken was that there was no evidence that the injury was solely caused by the accident. The evidence showed that the mis-hit by the hammerer jarred the respondent's hand. That mis-hit was an accident, and if it had broken the hand the case

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

would have admittedly been within the Act. It was said that the injury to the hand was caused by the gout and not by the accident. The doctor's certificate stated that the respondent was suffering from a weak hand caused partially by the injury. Any one might have a weak hand. Was it to be said that in such a case as this only those with cast-iron hands came within the Act? The present case seemed to him to be a perfectly clear case. The injury to the hand was caused by an accident, and the Act applied.

LORD JUSTICE COLLINS concurred. The case was a clear one. There was a jar to the workman's hand brought about by the hammerer hitting the rod and not the flat end of the flatter. The essential element of an accident causing injury existed. The Court must assume that the County Court Judge decided every question of fact necessary to support his decision in favour of the workman. It was urged in effect that the injury supervening upon the jar would not have been nearly so great had it not been for the gout. That seemed to him to be immaterial. There was the accident and the consequent injury, and the extent of the injury must depend upon the condition or the constitution of the person injured at the time of the accident. The principle always followed in cases where compensation had to be assessed for personal injuries caused by negligence, so far as related to the causes contributing to the disability, must be applied in cases under the Act of 1897. Take, for instance, the case of a delicate lady receiving a shock in a railway accident. The injury would be much greater to her than in the case of a lady in perfect health. In each case the Court had to deal with the then existing condition of the injured person to arrive at the ultimate result.

LORD JUSTICE VAUGHAN WILLIAMS agreed.

[Solicitors—Wynne Baxter and Keeble, for the appellants; A. Slater, for the respondent.]

Q.B. Div. }
(Bigham, J.) }

1899.
Dec. 5.

LYLE SHIPPING COMPANY V. CORPORATION OF CARDIFF,
CHURCHILL AND SIM THIRD PARTIES.*

Shipping—Charter-party—Demurrage—Construction of charter-party—Ship to be discharged "with all despatch as customary"—Insufficient supply of railway trucks.

This was an action brought by the plaintiffs to recover from the defendants damages for the detention of the ship *Cape Wrath* during the discharge of a cargo of jarrah wood at Cardiff. The defendants were sued as endorsee of the bill of lading who had taken delivery of the cargo. The defendants, by a contract dated May 30, 1899, had bought a large quantity of jarrah wood from Churchill and Sim, the third parties, of which the *Cape Wrath's* cargo was an instalment: they claimed an indemnity from the third parties under a clause in the contract of sale, against the claims of the plaintiffs. The charter-party which was incorporated by the bill of lading contained the following clause:—"The ship to be discharged with all despatch as customary, weather permitting." There was, in fact, considerable delay in the discharge at Cardiff owing to an insufficient supply of railway trucks alongside the ship. The chief point of importance raised in the case was whether the defendants, who had contracted with the Great Western Railway Company for the supply of trucks for the discharge, were liable to the plaintiffs for the delay consequent upon the insufficient supply. The facts on which this point was decided appear sufficiently from

the judgment. The following cases, in addition to those cited in the judgment, were discussed:—"Castle-gate Company v. Dempsey" ([1892] 1 Q.B., 854); "Good v. Isaacs" ([1892] 2 Q.B., 555); "Kruuse v. Drynan" (18 Sess. Cas., 4th series 1,110); *Carver on Carriage by Sea*, sections 619, 619a.

Mr. Joseph Walton, Q.C., and Mr. D. C. Leck appeared for the plaintiffs; Mr. Rufus Isaacs, Q.C., and Mr. Bailhache for the defendants; Mr. Carver, Q.C., Mr. Scrutton, and Mr. Mackinnon for the third parties.

MR. JUSTICE BIGHAM said that the defendants were charged with a breach of their contract "to discharge the ship with all despatch as customary." The ship had loaded her cargo of jarrah wood at Fremantle. There was a considerable delay in loading, and there arose a large claim for demurrage upon that. She arrived at Cardiff on October 2, and the discharge began the next day. It did not finish until November 23—i.e., a lapse of 45 working days, and it was alleged that this delay was due to an insufficient supply, on the part of the defendants, of trucks to receive the cargo. He was satisfied that the defendants were not personally guilty of any neglect in the matter. By contracting with the Great Western Railway Company they had done their best to get trucks, and, so far as they were concerned, they had made the best use they could of the trucks so obtained. That there was, in fact, an insufficient supply of trucks alongside the ship was due to the great pressure of traffic at that time upon that railway company and all other railway companies. It was argued for the plaintiffs that, if the defendants by reason of this pressure of traffic could not get more wagons, that was a misfortune the result of which ought to fall upon the defendants rather than the plaintiffs. This involved the question of the true meaning of an undertaking to "discharge with all despatch as customary," and to arrive at that meaning a number of cases had been cited. In "*Wright v. New Zealand Shipping Company*" (4 Ex. D., 165) the obligation of the charterers was to discharge into lighters, and, though the charterers procured all the lighters they could, they were held liable for not supplying a sufficiency of lighters. That case had been explained by Lord Herschell in "*Hick v. Raymond*" ([1893] A.C., 22), on the ground that the charterers had not done their best. His Lordship did not agree with that explanation of Lord Herschell's. He thought that in "*Wright v. New Zealand Company*" the charterers did their best, but, having given an unqualified undertaking to provide lighters, they were bound to provide them. That was a sufficient ground for distinguishing "*Wright v. New Zealand Company*" from the later cases, such as "*Postlethwaite v. Freeland*" (5 App. Cas., 599). In those cases the words "as customary" were added, and those words made all the difference. They meant that attention must be paid to the rules of the port as to discharge, the practice of the port as to the appliances to be used, and also the practice as to the source from which such appliances are to be obtained. Applying those considerations to the present case, he found that the practice of the port of Cardiff was to discharge into railway wagons, and to procure such wagons from one railway company. The principle of "*Postlethwaite v. Freeland*" was directly applicable to the case. There was also a Scotch case—"Wyllie v. Harrison" (13 Sess. Cas., fourth series, p. 92)—which was almost exactly on all fours with the present case. Every word of the judgment of the Lord Justice Clerk would apply to this case; though it should be added that his Lordship appeared to consider, as several English Judges had done, that the addition of the words "as customary" did not distinguish the principle of "*Postlethwaite v. Freeland*" from that of "*Wright v. New Zealand Company*." In the present case the facts were that the defendants had done their

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

best to obtain the customary appliances for discharge, in the customary manner, and, having done their best to obtain those appliances, they had done their best to make use of them. Upon this point there must be judgment for the defendants. Upon another point—viz., whether the plaintiffs could recover damages for four days' detention, during which no work was done, because they (the plaintiffs) were exercising a lien under the charter-party for demurrage incurred during loading at Fremantle, N.Z.—there would be judgment for the plaintiffs against defendants for £70, and for defendants against the third parties for the same amount, all parties paying their own costs.

[Solicitors—Lowless and Co., for the plaintiffs; Riddell, Vaizey, and Co., for Wheatley, Town Clerk, for the defendants; Burn and Berridge, for third parties.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.JJ.) } Dec. 6.

SWAYNE V. COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamp duty—Conveyance on sale—Assignment of part of leasehold premises—Apportioned rent—Consideration—Stamp Act, 1891, sec. 57, Sched. I.

Decision of the Divisional Court (15 *The Times* L.R., 133) affirmed.

This was an appeal by the Commissioners of Inland Revenue from the judgment of the Divisional Court (Mr. Justice Wills and Mr. Justice Bruce) upon a case stated under section 13 of the Stamp Act, 1891, on appeal from the Commissioners' decision as to stamp duty on an instrument; reported in 15 *The Times* L.R., 133; [1899] 1 Q.B., 335. The question was whether upon the sale of one or more houses out of a larger number, for the whole of which one rent was payable under the original lease, the capitalized value of the apportioned part of the rent was to be added to the premium to make up the *ad valorem* duty payable. The facts as stated in the judgment of the Court below were as follows:—In this case one Rowell, by an indenture of lease bearing date October 16, 1893, demised to one Mills a parcel of ground and three dwelling-houses then in course of erection thereon for a term of 99 years at the yearly rent of £3 16s. 6d., and by the said indenture Mills covenanted to complete the three houses and expend on the building of each of such houses the sum of £100 at the least, and he also entered into numerous other stringent covenants such as are often inserted in what are known as building leases. The three houses were erected and were numbered 6, 7, and 8, Bowden-hill-terrace. Rowell, by another indenture of lease bearing date March 10, 1894, demised to Mills a parcel of ground and two dwelling-houses then in course of erection thereon for a term of 99 years at the yearly rent of £2 11s. The covenants in this indenture were similar to the covenants in the indenture of October 16, 1893. The two houses were erected and were numbered 9 and 10, Bowden-hill-terrace. By an indenture bearing date December 27, 1897, made between Mills of the one part and Annie Penelope Swayne (the present respondent) of the other part, Mills, in consideration of the sum of £503 paid to him by the said Annie Penelope Swayne, assigned and conveyed unto the said A. P. Swayne—first, the two houses 7 and 8, Bowden-hill-terrace, being two of the three houses demised by the indenture of October 16, 1893, and, secondly, the two houses 9 and 10, Bowden-hill-terrace, being the two houses demised by the indenture of March 10, 1894, to hold the same unto the said

A. P. Swayne for the residue then unexpired of the said several terms of 99 years, subject as to the hereditaments first thereinbefore described to the apportioned yearly rent of £2 11s., part of the yearly rent of £3 16s. 6d. reserved by the indenture of October 16, 1893, and to the observance and performance of the covenants and conditions therein contained, and subject as to the hereditaments secondly thereinbefore described to the payment of the yearly rent of £2 11s. reserved by the indenture of March 10, 1894, and to the observance and performance of the covenants and conditions therein contained. A. P. Swayne covenanted with Mills to pay the several sums of £2 11s., and to observe and perform the covenants and conditions in the said leases to Mills respectively contained and to keep Mills indemnified, and Mills covenanted with A. P. Swayne to pay the apportioned rent of £15s. 6d., the residue of the rent reserved by the indenture of October 16, 1893. The question was what was the amount of stamp duty to which the indenture of December 27, 1897, was subject. The Commissioners were of opinion that the instrument was chargeable under the head "Conveyance on Sale" in Schedule I. to the Stamp Act, 1891. In accordance with their practice they did not assess duty upon the capitalized value of the yearly rent of £2 11s. payable in respect of the houses numbered 9 and 10, Bowden-hill-terrace. They were of opinion, however, that duty was chargeable upon the rent of the same amount payable in respect of the houses 7 and 8, Bowden-hill-terrace, as it was part of the consideration for the conveyance, and they assessed duty upon the said sum multiplied by 20 under section 56, subsection 2, of the Stamp Act, 1891. They also assessed duty upon the sum of £503, the premium payable under the instrument, which was stamped in accordance with their assessment. The questions for the opinion of the Court were (1) whether the indenture of December 27, 1897, was chargeable with the duty in accordance with the assessment of the Commissioners; (2) if not, with what duty the indenture was chargeable. The Divisional Court held that, for the purpose of fixing the *ad valorem* duty, the payment of rent by the assignee was not part of the consideration for the assignment, and that duty was chargeable upon the £503 only. The Commissioners of Inland Revenue appealed. By section 57 of the Stamp Act, 1891, "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty."

The Solicitor-General (Sir R. B. Finlay, Q.C.) and Mr. Danckwerts appeared for the Commissioners.

Mr. Vaughan Hawkins, for the respondent, was not called upon.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the judgment appealed from was perfectly correct. The rent of 9 and 10, Bowden-hill-terrace was £2 11s., and the rent of 6, 7, and 8, Bowden-hill-terrace was £3 16s. 6d. By the indenture of December 27, 1897, two of these latter houses, Nos. 7 and 8, were assigned to the respondent subject to the yearly rent of £2 11s., and Nos. 9 and 10 were also assigned to her subject to the payment of £2 11s. rent. The £2 11s. rent in respect of Nos. 7 and 8 was a proper apportionment of the £3 16s. 6d. rent. What was the stamp duty payable? As to Nos. 9 and 10 the Commissioners, according to their practice, did not assess the duty upon the capitalized value of the yearly rent of £2 11s. payable in respect thereof. For the reasons given by Mr.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Justice Bruce in the Court below he agreed with that view. Then as to the apportioned rent of £2 11s. payable in respect of Nos. 7 and 8, once it was seen that the liability to pay rent was inherent in the thing demised, he could not see the difference between the case of Nos. 9 and 10 and the case of Nos. 7 and 8, where the rent was apportioned by the parties. He agreed entirely with the reasons given by Mr. Justice Bruce in the Court below.

LORD JUSTICE COLLINS said that he entirely agreed for the reasons so well stated in the Court below, which he could not improve upon.

LORD JUSTICE VAUGHAN WILLIAMS agreed.

[Solicitors—The Solicitor of Inland Revenue; Bridgeman and Willecks, for Baker, Watts, Alsop, and Woollcombe, Newton Abbot.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) Dec. 6.

KNIGHTS DEEP (LIMITED) V. COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamp duty—Debentures—Amount secured—"Marketable security"—Stamp Act, 1891, Sched. I.

A £100 debenture redeemable, at the company's option, on a future date at £103, held to be a security for the former sum only within the Stamp Act, 1891, Sched. I.

Decision of the Divisional Court (15 *The Times* L.R., 121) reversed.

This was an appeal from the judgment of the Divisional Court Mr. Justice Wills and Mr. Justice Bruce) on a case stated by the Commissioner of Inland Revenue under section 13 of the Stamp Act, 1891, as to the stamp to be placed on a debenture: reported in 13 *The Times* L.R., 121; [1899] 1 Q.B., 343. The debenture contained these particulars:—Share capital £350,000, divided into 350,000 shares of £1 each. Issue of 40,000 debentures of £100 each, carrying interest at the rate of £3 10s. per cent. per annum. The debenture contained a promise by the Knights Deep (Limited) to pay to the Simmer and Jack Proprietary Mines (Limited), or other the registered holder for the time being, subject to the conditions endorsed thereon, the sum of £100, and to pay interest thereon at the rate of £3 10s. per cent. per annum. The debenture was one of a series for securing £400,000. By Clause 3 of the conditions debentures of the nominal value of £36,600 would be redeemed by the company on July 1, 1902, and on each succeeding July 1 up to and including July 1, 1917, when the balance then outstanding would be redeemed. The important clause was Clause 17, which was as follows:—"The company may at any time after July 1, 1900, redeem this debenture at £103 on giving six calendar months' previous notice. . . . Upon the expiration of such notice the said sum of £103 shall become payable as if the same was the amount of the principal moneys hereby secured and shall thereupon cease to carry interest. Provided always that the company shall not be at liberty to give such notice unless concurrently it shall give due notice to redeem in like manner all the then outstanding debentures of the said series." The appellants were a foreign company, and the debenture was made and issued by them in the United Kingdom and was capable of being sold in a stock market in the United Kingdom. The debenture was chargeable under Schedule I, Division B, of the Stamp Act, 1891, as a "marketable security . . . (B) being a security not

transferable by delivery. . . . For or in respect of the money thereby secured: the same *ad valorem* duty according to the nature of the security as upon a mortgage." The Commissioners, being of opinion that the money secured was the sum of £103, assessed the document as liable to a duty of 3s. 9d., being the duty payable on a mortgage of that amount. The appellants contended that the money secured was £100 only, in which case the duty would be 2s. 6d. The Divisional Court held that the *ad valorem* duty was chargeable upon the full sum of £103, as being the money secured by the debenture. The company appealed.

MR. JOSEPH WALTON, Q.C., and MR. SCRUTTON, for the appellants, contended that the "money secured" by the debenture was £100 and no more. Until July, 1900, no more could possibly become payable. The premium of £3 which the company would have to pay if they exercised the option to redeem the debentures at £103 was a price paid for the privilege of redeeming. The dictum of Lord Justice (then Mr. Justice) Vaughan Williams in "*Rowell v. Inland Revenue Commissioners*" ([1897] 2 Q.B., 194, at p. 198) completely covered the present case. They also referred to "*Barker v. Smark*" (7 M. and W., 590).

THE SOLICITOR-GENERAL (Sir R. B. Finlay, Q.C., and Mr. DANCKWERTS, for the Commissioners of Inland Revenue, contended that by the terms of this debenture, in the event of the notice to redeem at £103 being given, the debenture gave a charge for that sum. It was not a mere option to redeem at a premium where no charge was given for the full sum, as was the case contemplated by Lord Justice Vaughan Williams in "*Rowell v. Inland Revenue Commissioners*." Money secured on a contingency was chargeable. "*Dixon v. Chas*" (1 B. and Ad., 343); "*Canning v. Raper*" (1 E. and B., 164); "*Maxwell's Case*" (4 Court of Sess. Chas., 3rd series, 1121).

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the sole point was whether or not this debenture was, within the meaning of the Stamp Act, 1891, a security for £103 or for £100. Upon the face of the document the debenture was for £100 and no more. Then by Clause 17 of the conditions endorsed on the debenture the company had the option, if they chose, of paying off the debentures at any time after July 1, 1900—that was to say, two years at least before the time stipulated in the debentures. In his opinion the debenture secured the sum of £100, not £103, because the obligors need never, except of their own will and pleasure, give notice to redeem the debentures at £103. In his opinion the decision of the Divisional Court in "*Rowell v. Inland Revenue Commissioners*" was right. There a company had issued debentures of £100 each, each debenture containing an undertaking by the company to pay to the holder upon a specified date the sum of £100, together with a premium of £7 10s. thereon. The Court held that each debenture was a security for £107 10s. In the present case Mr. Justice Wills said in the Court below [1899] 1 Q.B., at p. 351 that "if there were no absolute covenant to pay the £3 in a certain event, but only a stipulation that if the company chose to pay the £3 they were to have the privilege of paying off the principal should they be called upon to do so, the case would be different." With all respect to the learned Judge, that passage exactly described the present case. The sum secured was therefore £100, and the duty chargeable was only 2s. 6d.

LORD JUSTICE COLLINS concurred. Though they were differing from the result arrived at in the Court below, in his view they were really giving effect to the opinion of Mr. Justice Wills as expressed in the passage read from his judgment by Lord Justice A. L. Smith. Therefore he (the Lord Justice) claimed the authority

* Reported by W. F. KIRBY, Esq., Barrister at Law.

of Mr. Justice Wills in support of the judgment they were now pronouncing, because when the case was stripped of the fringe in the nature of machinery there was merely a stipulation that if the company chose to pay the £3 they were to have the privilege of paying off the principal at a certain date. It was true that before the company could exercise the option of redeeming the debentures at £103 they must conform to certain formalities. But whether they conformed to those formalities or not was in their exclusive option. Simply stated, the £3 was a liquidated sum which the company undertook to pay if they thought it worth their while to pay off the debentures before the due date, and thereby to deprive the debenture-holders of the right to receive the interest thereon up to that date. A bond could not be said to be a security for something which was only payable at the option of the obligor.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Julius and Thomas; The Solicitor of Inland Revenue.]

Court of Appeal (Lindley, M.R., } 1899.
Jeune, P., and Romer, L.J.) } Dec. 6.

DE BRAAM V. FORD.*

Bill of Sale—Validity—Form in schedule of Act
—Stipulated time for payment.

A bill of sale stipulated that the principal sum secured should be repaid "on or before 1st Nov., 1899"; held that it was substantially in accordance with the statutory form, and was valid.

Decision of North, J. (*ante*, p. 39), reversed.

This was an appeal against a decision of Mr. Justice North (reported *ante*, p. 39). The question raised was upon the construction of section 9 of the Bills of Sale Act, 1882, which provides that "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void, unless made in accordance with the form in the schedule to this Act annexed." The form given in the schedule contains (*inter alia*) the following clauses:—"And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £— on the — day of — [or whatever else may be the stipulated times or time of payment]. And the said A. B. doth also agree with the said C. D. that he will [here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security]." The plaintiff, Jean André de Braam, had borrowed money from the defendant, a money-lender, of Cork-street. The borrower and his wife gave to the lender a bill of sale of some furniture. It was thereby agreed that payment of the principal sum secured should be made "on or before the first day of November, 1899." The money secured was not paid, and the defendant was taking steps to realize. The plaintiff by this action claimed a declaration that the bill of sale was void, and an injunction to restrain the defendant from removing or seizing the furniture. The plaintiff applied for an interim injunction. Mr. Justice North was of opinion that an agreement to pay on or before a named day was an agreement to pay at an uncertain time, and consequently that the bill of sale was not in accordance with the statutory form and was void. He therefore granted an interlocutory injunction. The defendant appealed.

Mr. Herbert Reed, Q.C., and Mr. Thorn Drury were

for the defendant; Mr. E. C. Macnaghten, Q.C., and Mr. Stewart Smith were for the plaintiff.

The COURT allowed the appeal.

The MASTER of the ROLLS said that in this case the Court had to do that which they seldom did—viz., to attend to form, not to substance. They were driven to that by section 9 of the Act. It was plain enough that this bill of sale was not in the statutory form; the question was whether it was "in accordance" with that form. This was an old difficulty which had puzzled the Court before. What was meant by "in accordance" with? His Lordship could only take the meaning from what was said by the House of Lords in "Simmonds v. Woodward" ([1892] A.C., 100). There Lord Halsbury said, at p. 108, "If the bill of sale in substance performs the function which the statute intended to be performed by that form, it appears to me that it is complied with." It was obvious from the form that the time for the "payment" of the debt must be fixed. What was the meaning of "payment"? In his Lordship's opinion it meant the time at which payment was to become obligatory—the time at which the borrower must pay or he could be sued for the debt. The time at which the obligation to pay was to arise must be defined in the bill of sale. It had been decided in previous cases that if that time was not distinctly fixed—*e. g.*, if the money was made payable on demand, the bill of sale would be void. The Court were now asked to stretch those decisions, and to say that, although a time for payment was fixed, yet the bill of sale was void because the grantor had stipulated that he might pay off the money sooner. This was a rather startling proposition. But look at the matter a little more closely. Suppose there had been a covenant to pay the money on a fixed day, with an added proviso that the grantor should have an option to pay it sooner. That would have been, as a "defeasance of the security," perfectly in accordance with the statutory form. Could it be said that, because the bill of sale was not precisely in that form, it was not in accordance with the statutory form? His Lordship could not go that length. The learned Judge had lost sight of the fact that the time of payment was the time when payment was to become obligatory. The appeal must be allowed. The costs in both Courts must be the defendant's costs of the action.

The PRESIDENT of the PROBATE DIVISION said that two views of the construction of section 9 were obviously possible and two views had in fact been taken. But in "*Ex parte Stanford*" (17 Q.B.D., 259) the majority of the full Court of Appeal adopted the more liberal construction. Lord Justice Bowen, who delivered the judgment of the majority, said (17 Q.B.D., at p. 270):—"A bill of sale is surely in accordance with the prescribed form if it is substantially in accordance with it—if it does not depart from the prescribed form in any material respect. But divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect." That view commended itself to his Lordship rather than the narrower view which was taken by Lord Justice Fry. The majority of the Court there held that the bill of sale must be in substance in accordance with the statutory form. Here the effect of the bill of sale was to impose on the grantor an obligation to pay the money on a fixed day; but an option was given to him to pay it earlier. Was that in substance in accordance with the statutory form? There must, no doubt, be a stipulated time for payment—a stipulated time at which the grantor was bound to pay. The stipu-

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

lation in the present case was not at variance with the statutory form. When it came to the provision for defeasance of the security the statutory form was not so peremptory as in its earlier part. It left the terms and the language of the defeasance at the option of the parties. As to the payment of interest, though it was not so stated expressly in words, the effect of the deed was that, whenever the principal money was paid off, interest was to be paid up to the time of the payment of the principal.

LORD JUSTICE ROMER agreed. He would only add that you could not, under the guise of a defeasance, introduce a provision inconsistent with the prior part of the form. There was no such inconsistency in the present case.

[Solicitors—H. Emery Davies; G. J. Fowler.]

Chan. Div. } 1899.
(Byrne, J.) } Dec. 6.

IN RE OVERWEG'S ESTATE—HAAS V. DURANT.*

Stock Exchange—Carrying over—Broker—Authority—Death of customer—Determination of broker's authority.

This was an application by the plaintiff to be admitted as a creditor against the estate of the deceased in respect of certain Stock Exchange transactions under the following circumstances :—The plaintiff was a stock-broker and the deceased, Mr. Charles Overweg, was a client with whom he had had dealings for a number of years. Mr. Overweg died on March 24, 1898, having then open with the plaintiff accounts for certain stocks and shares, the most important of which was one for £10,000 Ecuador bonds. On hearing of Mr. Overweg's death the plaintiff endeavoured to obtain instructions as to what was to be done with the stocks open, but could not obtain any. The plaintiff thereupon carried over all the stocks for the Stock Exchange account for March 28, 1898, and he again carried them over for the first account in April. After this he received notice that a meeting of Mr. Overweg's creditors was to be held and that the estate was insolvent. The plaintiff then closed all the stocks except the Ecuador bonds, but was unable to get rid of them until April 29, 1898. This transaction resulted in a loss of £383 12s. 3d., and for this sum the plaintiff now claimed to be admitted as a creditor.

Mr. G. Cave appeared for the plaintiff; Mr. Levett, Q.C., and Mr. Danckwerts appeared for the defendant.

MR. JUSTICE BYRNE, in delivering judgment, said, —The plaintiff, Julius Haas, acted as broker for Charles Overweg, who died on March 24, 1898. On that day he was under contract, as a result of a continuation transaction, to take up and pay for on March 30 (amongst other securities) 10,000 New Ecuador bonds. The next settling day after the death was March 28. Upon the death of Overweg any authority, express or implied, to Haas as his broker to effect a continuation, determined (see "Phillips v. Jones," 4 *The Times* L.R., 401), and Haas was entitled immediately upon the death to sell. In fact, on the following settling day, March 28, he carried over, that is to say, he effected a fresh continuation, by entering into a contract for sale at 21½ and a contract for repurchase on the next settlement at 21½, plus 6 per cent. contango. This is the ordinary method of carrying over, and it was argued that the sale ought not to be regarded as a true sale, but as a nominal sale only, not involving accountability on the part of the broker unless upon the footing of accepting the contract for repurchase also, and that the

broker if liable at all ought only to be held answerable in damages for the loss which could be shown to have arisen by reason of the continuation and ultimate sale actually effected. But, as is shown by the case of "Bongiovanni v. Société Générale" (54 *L.T.*, 320), a continuation really is in form and in law a sale and repurchase, or purchase and resale, as the case may be, and, notwithstanding the fact that there is some evidence to show that upon a sale *simpliciter* a smaller amount would perhaps have been realized, I do not think that the broker can be heard to say that the sale ought not as between himself and his principal to be treated as a sale, because he without authority at the same time entered into a contract to purchase again at the next settlement. Under rule 70 of the Stock Exchange rules, all continuations shall be effected at the making up price, or at the then existing market price, and in the present case, as appears by the affidavit of Mr. Haas, the transaction was effected at the making up price, which I apprehend may be taken to represent as nearly as may be the market value of the securities. If he had been so minded, Mr. Haas could have closed the account on March 28 by selling in the market, relying upon his right to indemnity against the estate of his principal in respect of any loss, but he preferred to sell in a different way. I have not to consider the question whether or not the legal personal representative could have elected to adopt the continuations actually effected and the ultimate sale at a later date, had it been to his interests to do so, inasmuch as he elects to stand by the contract for sale entered into on March 28, 1898. It appears to me, therefore, that the plaintiff fails in his contention and he must pay the costs, except that I do not think he ought to pay any extra costs occasioned by the change in the form of proceedings, which was originally inconvenient, and which was changed, I believe, at the instance of the Court, both parties consenting. Such costs must be very trifling.

[Solicitors—L. S. Gregson; Goldberg, Langdon, Bennett, and Newall.]

Chan. Div. } 1899.
(Stirling, J.) } Dec. 6.

JOHNS V. PINK.*

Practice—Execution—Elegit—Tenant by elegit—Nature of interest.

This was a motion for an injunction to restrain the defendant from distraining on eight houses in Wearside-road, Lewisham, and arose under the following circumstances :—By eight indentures of lease dated July 30, 1897, the eight houses in question were respectively demised to a Mrs. Cole for the term of 99 years from September 29, 1896. By an indenture dated July 31, 1897, Mrs. Cole demised the eight houses to the plaintiffs for the term of 99 years granted by the respective leases thereof, except the last three days thereof, by way of mortgage, to secure the repayment of £1,800 and interest; and she entered into a covenant with the plaintiffs for the payment of the rents and performance of the covenants reserved by and contained in the leases. By an indenture also dated July 31, 1897, the eight houses were conveyed to the defendant in fee simple, subject to and with the benefit of the eight leases to Mrs. Cole. At Christmas, 1898, two quarters' rent were due under each of the leases from Mary Louisa Cole, and the defendant brought an action against her in the Queen's Bench Division for these arrears, and on February 9, 1899, recovered judgment for £20 and £5 5s. costs. On the same day

*Reported by R. B. SCHOMBERG, Esq., Barrister-at-Law.

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

the defendant issued a writ of *elegit* against Mrs. Cole under the judgment. On February 17, 1899, an inquisition was held under the writ, and by an instrument under the seals of the sheriff and the jurors it was stated that the jurors found that Mrs. Cole was possessed, as of her own lands and tenements, of the eight houses, which the jurors found to be of the annual value of £200; and that the sheriff on the day of taking the inquisition had caused these lands and tenements to be delivered to the defendant at reasonable price and extent in accordance with the writ. The writ and instrument were handed by the sheriff to the defendant's solicitors, but had not been filed in Court, nor had the defendant proceeded further under the writ. At the date of the inquisition Mrs. Cole was in receipt of the rents and profits of the property; but on March 28, 1899, the plaintiffs appointed a receiver of these rents and profits, who duly entered into receipt thereof. On June 24, 1899, a further half-year's rent became due, and on June 28 the defendant levied a distress on all the eight houses for the recovery thereof. The present action was then brought and notice of motion given. It was agreed that the hearing of the motion should be treated as the trial of the action. The questions of law arising upon the facts above stated appear from his Lordship's judgment.

Mr. Jenkins, Q.C., and Mr. Johnston Edwards were for the plaintiffs; and Mr. Upjohn, Q.C., and Mr. B. J. Parker for the defendant.

MR. JUSTICE STIRLING said that the grounds on which the plaintiffs' case was rested were—(1) that the defendant had become an assign of the term vested in Mrs. Cole, and was, as between her and himself, bound to indemnify her against the rent, while she was, by express contract contained in her mortgage deed, bound to indemnify the plaintiffs, and that the Court, to avoid circuity of action, would enforce directly against the defendant at the instance of the plaintiffs the right which Mrs. Cole herself had; (2) that the defendant, being an assign of the term vested in Mrs. Cole, would be liable to the reversioner for the rent, and being himself reversioner could not enforce by distress the payment of the rent which he was himself liable to pay as assign of the lease. As regarded the first of these points, assuming that the defendant had become an assign of the term vested in Mrs. Cole, his Lordship was unable to see that under the circumstances of the case the defendant had as between himself and Mrs. Cole become liable to indemnify her against the rent due to the judgment creditor. The primary relation between Mrs. Cole and himself was that of debtor and creditor, and not of assignor and assignee. He might have made himself liable to the lessor for the rent, and he might be unable to satisfy his judgment debt without payment of that rent, and, if so, the payment would be allowed upon a proper account being taken between himself and the judgment debtor; but if he could escape without paying the rent his Lordship saw no reason as between him and the judgment debtor why he should not. The case relied on for the plaintiff was "*Moule v. Garrett* (L.R., 5 Ex., 132; 7 *ib.*, 101), where it was held that an assignee of a lease is under an obligation to indemnify the original lessee, who has parted with all his interest, against the rent and covenants. The ground of the decision was thus stated by Channell, B.:—"It is only reasonable to hold . . . that the liability of the lessee is as a surety for the assignee, and that there is an implied promise on the part of the assignee to indemnify the lessee against liability for breach of covenant while he is assignee"; and by Willes, J.:—"Where a party is liable at law by immediate privity of contract, which contract also confers a benefit, and the obligation of the contract is common to him and the defendant, but the whole

benefit of the contract is taken by the defendant, the former is entitled to be indemnified by the latter in respect of the performance of the obligation." In this case the whole interest of the lessee was not taken by the judgment creditor; it was only taken by him for a limited purpose and for a limited time—viz., until he could, and in order that he might, obtain satisfaction of his debt. There was no authority for treating the judgment creditor under such circumstances as a surety for the lessee, and it did not seem to his Lordship to be reasonable. The second point raised a much more difficult question—viz., what was the nature of the interest of a tenant by *elegit* in a term delivered to him in execution of the writ? Where the land delivered was of freehold tenure it seemed clear that the judgment creditor had only a chattel interest, whose duration was measured by the satisfaction of the debt (see *Burton's Compendium*, p. 868), and the judgment debtor had remaining vested in him an interest which in the case of "*Dighton v. Grenville*" (2 Vent., 281) was held to be a reversion. It was contended for the defendant that this doctrine ought to apply equally to the respective interests of the judgment creditor and debtor where the land delivered was of leasehold tenure. The answer given on behalf of the plaintiffs was that there were authorities which showed this not to be so. In "*Spencer's Case*" (5 Rep., 16, see p. 17a) the law was thus laid down:—"If a man demises or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words (demise or grant) as on the express covenant. The same law is of tenant by statute merchant or statute staple or *elegit* of a term." That implied that the tenant by *elegit* had the whole term vested in him (see "*Platt on Leases*," 419). Again in "*Carter v. Hughes*" (2 H. and N., 714) Baron Martin said:—"In this case the execution debtor had only a term in the land, and upon the transfer of that the whole is spent, and what remains in him is not a reversion, but a right to the possession of the term after satisfaction of the first writ." Remembering that upon an alienation of a term by will or deed successive interests took effect, not by way of particular estate and remainder, but by way of executory interest (see *Manning's Case*, 8 Rep., 946; *Lampet's Case*, 10 Rep., 46; and "*Wright v. Cartwright*," 1 Burr., 282), his Lordship thought it might well be that the whole term was taken by a judgment creditor, but subject to a legal title in the nature of an executory interest in the judgment debtor, which, like other such interests, could not be defeated by the act of the first taker. This would explain, on the one hand, the authorities cited, and, on the other, why (as was admitted to be the law) the term did not merge in a reversion vested in the judgment creditor. Assuming that to be so, his Lordship had to consider, after all, what was delivered to the defendant. By the Statute 1 and 2 Vict., c. 110, s. 11, the sheriff was authorized to deliver execution of lands of which the judgment debtor "is seized or possessed." An estate in remainder or reversion expectant on an estate of freehold could not be delivered in execution—"Re *Smith*" (9 Ch. App., 369); "*Re Harrison and Bottomley*" ([1899] 1 Ch., 464). Under the law as it stood prior to the passing of the Act 1 and 2 Vict., c. 110, a moiety of the lands of the judgment debtor only could be extended; and it was held that if two writs were issued at the suit of different creditors, and a moiety of the freehold land of the debtor was extended under the first writ, the sheriff could not deliver a moiety of the entirety under the second writ, but only a moiety of the remaining moiety—"Hunt v. Cogan" (Cro.

Eliz. 483). It thus appeared that what was called in "Dighton v. Grenville" the reversion of the judgment debtor in the first moiety could not be delivered. Since 1 and 2 Vict., c. 110, it had been held in "Carter v. Hughes" (2 H. and N., 714) that where a judgment creditor issued three writs of elegit on successive judgments, and the sheriff delivered to him possession of land under the first writ, he had no power to extend the same land under the second and third writs. In the present case the inquisition found that Mrs. Cole was "possessed" of certain land of the annual value of £200. In point of fact she was so possessed; for though she had made a mortgage of the lands by way of sub-demise, the mortgagees had not taken possession at the date of the inquisition, and she was in receipt of the rents and profits, and was in that way entitled to the land for an interest which was valuable so long as it lasted, but which might be determined at any moment by the mortgagees. It appeared to his Lordship that the land must be taken to have been delivered to the defendant to the extent of that interest, and not in respect of the mere dry reversion expectant on the determination of the sub-demise, as to which the doctrine of "*Re Smith*" appeared to apply. The mortgagees had entered into possession; the determinable interest had been put an end to, and the right of the defendant as tenant by elegit had either been extinguished or was suspended. In either case it seemed to his Lordship that any liability on the part of the defendant to pay the rent reserved by the original lease had come to an end, and consequently he was entitled to distrain. The motion, therefore, failed, and the action would be dismissed with costs.

Having taken that view on the merits of the case, it was unnecessary for his Lordship to enter upon the consideration of a question which had been much argued—namely, whether or not the interest vested in the defendant until the inquisition had been filed in Court. But having regard to what had happened, his Lordship thought it right, having made some inquiries, to say a few words about it. The writ was expressly directed to the sheriff in these words:—"And in what manner you shall have executed this our writ make appear to us in our Court aforesaid immediately after the execution thereof under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ." The proper and regular practice was that the sheriff should return the writ and have the inquisition and writ filed in the central office, and the only way in which the possession of the writ and inquisition by the solicitor to the defendant could be explained was, so far as his Lordship could see, that he received it as agent for the sheriff with a view to filing. That practice had, his Lordship understood, sprung up very recently, and the explanation of it appeared to be that upon filing a charge or stamp duty of 2s. 6d. became payable, which as the law stood was thrown upon the sheriff. With a view of escaping that obligation, and in the hope that the plaintiff would see his way to discharge the duty to the Exchequer, it had become the practice of the sheriff to hand over the writ to the plaintiff. It was very essential that the document which his Lordship had before him should be filed in Court, and if the solicitors to the defendant were willing to undertake to discharge the duty of the sheriff and file it his Lordship had nothing more to say. But, if not, he thought it must remain in the custody of the Court, and he proposed to call upon the sheriff to show why the document which ought to be in his custody was not either in his possession or on the file of the Court.

The defendant's solicitors gave the required undertaking.

[Solicitors—W. P. Palmer; Arkcoll, Cockell, and Chadwick.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Dec. 7.

MULLER AND CO.'S MARGARINE (LIMITED) v. COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamp duty—Sale of foreign business—Goodwill—Property locally situate out of the United Kingdom—Exemption—Stamp Act, 1891, sec. 59.

Decision of the Divisional Court (15 *The Times* L.R., 399) reversed.

This was an appeal from the judgment (15 *The Times* L.R., 399) of a Divisional Court (Mr. Justice Day and Mr. Justice Lawrence), on a case stated by the Commissioners of Inland Revenue pursuant to the 13th section of the Stamp Act, 1891 (54 and 55 Vict., c. 39). On November 13, 1897, an instrument was presented on behalf of Muller and Co.'s Margarine (Limited), the appellants, to the Commissioners under section 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The instrument, which was made in England by the parties thereto other than Muller, Newman, and Wigley, purports to be an agreement under seal whereby the parties of the first four parts purport to sell to the appellants their respective interests in (*inter alia*) the following matters:—1. The goodwill of the business of Muller and Co., with the exclusive right to use the name of Muller and Co. as part of the name of the company, and to represent the company as carrying on the said business in continuation of the vendor. 2. The freehold premises mentioned in the schedule to the agreement. 3. Certain patents. 4. Plant, machinery. 5. Pending contracts. 6. Books of account, documents, papers. The agreement contained a covenant (clause 11) on the part of W. L. Muller not at any time thereafter to be engaged in any similar trade within 50 miles of the freehold premises except as in the agreement excepted. Muller and Co. at and for a long time prior to the date of sale carried on a wholesale business as manufacturers of margarine and other butter substitutes at Gildehaus in Germany. The apportioned price of the properties sold applicable to the subject-matters first and fifthly above described was £77,418. The Commissioners, being of opinion that the instrument was made in England and that that which was sold under the name of goodwill was the exclusive right to use the name of Muller and Co. as part of the name of the purchasing company to represent the company as carrying on the said business in continuation of the vendor as above-mentioned, and also the covenant (clause 11) above referred to, held that the first-described matters, as also the matters fifthly described, were property within the meaning of section 59 of the Stamp Act, 1891, that neither of such matters fell within any of the exceptions contained in that section, and that they were consequently liable to *ad valorem* conveyance duty. They assessed the duty accordingly at the rate of 10s. per cent. upon the said sum of £77,418—namely, £387 5s.—and also with a fixed duty of 10s. in respect of the other matters not chargeable with *ad valorem* duty. The appellants contended that no part of the goodwill was chargeable with *ad valorem* duty. The agreement was one made on October 4, 1897, between W. L. Muller, of Oldenzaal, Holland, called the vendor, of the first part; L. New-

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

man, of Notting-hill, of the second part; J. Wigley, of Stevenage, of the third part; the General Purposes Syndicate (No. 2) (Limited) of the fourth part; and Muller and Co.'s Margarine (Limited) of the fifth part. It recited that Newman had acquired from the vendor the right to purchase the business and hold the same in trust for Wigley, and that Newman had agreed to make over the rights to the syndicate for certain debentures, and that the company had been incorporated with the object, amongst others, of acquiring the business. It was agreed as follows:—That the vendor, by the direction of Newman and Wigley and the syndicate respectively, should sell and the syndicate should sell and the company should purchase the goodwill and the business, &c. The signatures of Muller, Wigley, and Newman were affixed to the document abroad. The points for the Crown were that the real contract was one for the sale by the Syndicate No. 2 to the company, and that Muller, Newman, and Wigley merely concurred therein, and it was therefore an English contract. In any event the contract was one for the sale of an interest in the goodwill and pending contracts, which were property of some kind, but not property locally situate out of the United Kingdom. It was not therefore exempt under section 59 of the Stamp Act, 1891, which provides that any contract or agreement made in England or Ireland, under seal, or under hand, only . . . for the sale of any equitable estate or interest in any property whatsoever, or the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares, or merchandise . . . shall be charged with the same *ad valorem* duty to be paid by the purchaser as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold. The Divisional Court gave judgment for the Crown.

Mr. A. T. Lawrence, Q.C., and Mr. Compton-Smith appeared for the appellants; Mr. Danckwerts (the Solicitor-General with him) for the Crown.

The Court allowed the appeal.

LORD JUSTICE A. L. SMITH said that three points had been raised in this case. The first point, raised by the appellants, was that this contract was not chargeable with duty under section 59 of the Stamp Act, 1891, inasmuch as it was a contract which was not made in England. It was an agreement for sale between W. L. Muller and a limited company and certain other parties whom he might call intermediate parties. W. L. Muller was the real vendor, and the company were the real vendees. The contract was signed by the vendor and two of the intermediaries at Amsterdam. It was not signed by the vendee company or by the other intermediary—viz., the syndicate—until it was brought to England for the purpose of being so signed. In his opinion section 59 of the Stamp Act, 1891, ought not to be construed as contended for by the appellants. He thought that where a contract was signed abroad by one party, and was then sent over to this country to be signed by another party to be bound thereby, the contract was not made within the meaning of this section until it was so signed by the second party in this country. This contract therefore was made in England. So far he thought the appellants were wrong, and the Crown was right. The second point was one raised by the Crown, and was this—that the contract was chargeable under the section as being a contract for the sale of an equitable estate or interest in property. This was based on the assumption that the syndicate was the vendor. In his opinion Muller was the vendor, and therefore he thought that this point did not avail the Crown. He next came to the third point, which was raised by the appellants, and was this—that this contract for the sale of the goodwill of

the vendor's business came within the exception contained in the section, as being a contract for the sale of property locally situate out of the United Kingdom. He was of opinion that this goodwill was something inherent to the business which was carried on in certain premises in Germany, and that therefore it might rightly be said to be property locally situate out of the United Kingdom. He referred on this point to "The Smelting Company of Australia v. the Commissioners of Inland Revenue," ([1897] 1 Q.B., 175). The Crown, therefore, was not entitled to duty, and the appeal must be allowed.

LORD JUSTICE COLLINS was of the same opinion. He thought that this instrument was not a complete document such as was intended to be dealt with by this section until it was sealed by the company in England. He also agreed that this was not the case of a sale of an equitable interest in property. On the other point the question arose whether a goodwill could be said to be locally situate anywhere. He referred to "The Smelting Company of Australia v. the Commissioners of Inland Revenue," and "The West London Syndicate (Limited) v. the Commissioners of Inland Revenue" ([1898], 2 Q.B., 507), and came to the conclusion that where a goodwill was annexed to particular premises, as seemed to be the case here, it could be said to be locally situate where the premises were.

LORD JUSTICE VAUGHAN WILLIAMS said he agreed. With regard to the first point, however, he did not assent to the argument put forward by counsel for the Crown, that this deed could have no obligatory effect on any one except the persons who executed it in Amsterdam until it was executed by the other parties in England. That might be so, but the question depended on the proper inference to be drawn from the circumstances. But he agreed that, under section 59, the question was, not when an obligation first existed, but when there first existed a document which came within the section. He thought that no such document existed until it was executed in England. On the other point he did not think the case of the Smelting Company of Australia was an authority for saying that nothing could be locally situate anywhere unless it was a physical tangible thing. Such a proposition would exclude an easement. He thought that a right annexed to something which had a local situation might itself be said also to have a local situation.

Chan. Div. } 1899.
(Stirling, J.) } Dec. 7.

IN RE MCMAHON—FULLER V. MC MAHON.*

Bankruptcy—Proof—Shares in company—Shares not fully paid—Calls.

Held, that a company (not in liquidation) was entitled to prove against the estate of a deceased insolvent shareholder in respect of the estimated future liability on partly-paid shares standing in his name.

This case raised the question whether a company (not in liquidation) was entitled to prove against the estate of a deceased insolvent shareholder in respect of the estimated future liability upon partly paid shares standing in his name. The question arose in a creditor's action for the administration of the estate of Mr. F. Y. McMahon, who died insolvent on July 6, 1897. At the time of his death he was the registered holder of 785 ordinary shares of £5 each in the Western Mortgage and Investment Company, on which £1 10s. per share only had been paid up. Three calls of 5s. each had

*Reported by G. A. STREETER, Esq., Barrister-at-Law.

since become due and payable, and there remained a liability of £2 15s. on each share. The company sought to prove in this action for the unpaid calls, and also for the estimated future liability upon the shares. The claim was admitted by the Master's certificate as regarded the unpaid calls, but was rejected as regarded the future liability. A summons was taken out by the company to vary the certificate in this respect. It appeared that the main object of the company was to invest money on mortgage of lands in the United States of America. The company had raised large sums by the creation and issue of debentures and debenture stock, and had invested the money so raised on such mortgages. These investments had not been fortunate, and for some time past the income thence derived had been insufficient to meet the debenture interest. In order to place matters on a better financial basis, the directors had made a series of calls of 5s. each at considerable intervals, and had applied the proceeds in paying off debentures and purchasing debenture stock at a discount; and it was hoped that, when three or four more calls had been made in this way, the debenture debt would be sufficiently reduced to permit of the interest then being paid out of the income of the company. At present the shares were unsaleable. For the purposes of proof, the value of the lien to which the company was entitled under the articles of association had been estimated at zero. The summons was heard on November 29 last when his Lordship, at the conclusion of the arguments, reserved his judgment.

Mr. Whinney appeared for the company in support of the summons; Mr. Upjohn, Q.C., and Mr. Lugden for the administrator of the deceased intestate; and Mr. Tallents for the plaintiff in the action.

MR. JUSTICE STIRLING, in giving judgment, after stating the facts, said,—By section 10 of the Judicature Act, 1875, the rules as to debts and liabilities provable which are in force under the law of bankruptcy with respect to the estates of persons adjudged bankrupt regulate the admissibility of the claim. The material bankruptcy rules are to be found in the Bankruptcy Act, 1883, section 37, subsections 3, 4, 6, 8. (His Lordship read the subsections.) The words of subsection 8 are extremely wide. They are derived from section 31 of the Bankruptcy Act, 1863, under which it was held in "*Hardy v. Fothergill*" (13 App. Cas., 351) that a claim by leasees against an assignee of a lease under a covenant for indemnity by the assignee against breaches of covenants in the lease was provable in the bankruptcy of the assignee. The present claim falls within the terms of section 37 of the Bankruptcy Act, 1883; and in "*Lindley on Companies*" (5 Ed., p. 556), it is said, "Under this Act, when a shareholder becomes bankrupt, all calls in arrear are provable as debts, and his liability to future calls may be estimated and proved as well when the company is being wound up as when it is not." This statement of the law, although not binding on me, is nevertheless a weighty authority in support of the claim. Various objections were however taken, based on the provisions of the statutes which govern joint stock companies. Proof in bankruptcy, it was said, is equivalent to payment; and this proposition was conceded by the learned counsel for the applicants. It was then contended that, this being so, the result of proof in bankruptcy would be that the shares would become fully paid up, and that this would be contrary to section 25 of the Companies Act, 1867. That enactment, however, does not prohibit every act on the part of a company which may give rise to an obligation to treat the shares as if they were fully paid up. Thus it was held in "*Burkinshaw v. Nicolls*" (3 App. Cas., 1,004) that a company by issuing a certificate that the shares to which it relates are fully paid up may preclude itself as against a holder

for value from insisting on payment in cash. Lord Cairns says (p. 1,016),—"It appears to me that it" (i.e., section 25) "leaves altogether untouched the question of the payment of the money upon the share, which payment it declares shall, no doubt, be an attribute or condition of every share in the company. But how that is to be, or what is to be the evidence of that payment, it leaves altogether untouched." It was also said that difficulties would or might arise in adjusting the rights between the holders of these shares and other shareholders who had paid up in cash. This is possible. Similar difficulties may also arise in working out rights upon the exercise of the power of forfeiture conferred by articles of association in the form of Table A to the Act of 1862. The existence of such difficulties is not sufficient to authorize the Court to decline to recognize a statutory right, if on the fair construction of the statute it is seen that the Legislature intended that the right should exist. Lastly, it was said that by section 75 of the Companies Act, 1862, express provision is made for proof against the estate of a bankrupt contributory of a company which is being wound up in respect of liability to future calls, while there is no such provision as regards a bankrupt holder of shares in a going company. At the time when the Companies Act, 1862, was passed the right of proof in bankruptcy depended on the Bankruptcy Acts of 1849 and 1861, in neither of which are to be found any enactments so extensive as those of section 31 of the Bankruptcy Act of 1869 and section 37 of the Bankruptcy Act of 1883. As to these it is remarked by Lord Selborne in "*Hardy v. Fothergill*" (13 App. Cas., 360) that "they are not confined (as those in the former Acts were) to certain specified kinds of contingent debts and liabilities, but they are expressed in general and comprehensive terms, so as . . . to indicate, *prima facie* at all events, that it was the object of the Legislature to discharge the bankrupt from every possible liability." Section 72 of the Companies Act, 1862, may, I think, be regarded as a step by the Legislature towards the attainment of this object rather than as affording an inference that going companies should not enjoy a right of proof within the terms of section 37 of the Bankruptcy Act, 1883. Section 55 of this Act enables a trustee in bankruptcy to disclaim onerous property of various kinds, including shares or stock in companies; and it is provided that such disclaimer shall operate to determine (amongst other things) the liability of the bankrupt and his property in respect of the property disclaimed. This section is not made applicable to the administration of the insolvent estates of deceased persons, but may, I think, be legitimately taken into consideration in determining whether the Legislature meant that a bankrupt should be released from liabilities of the description which I have to consider. It certainly shows that such liabilities were within the contemplation of the Legislature in passing the Act of 1883, and, in my judgment, the Legislature did intend to enable a bankrupt to get released from them. That being so, it follows that the claim ought to be admitted.

[Solicitors—Markby, Stewart, and Co.; H. B. Worrell and Son; Freshfields and Williams.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.JJ.) } Dec. 8.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE
UNITED STATES V. BISHOP (SURVEYOR OF TAXES).*

Revenue—Income-tax—Annual profits or gains—
Insurance company—Participating policy—

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

holders—Return of premiums by way of bonus—5 and 6 Vict., c. 35, sec. 54.

Decision of the Divisional Court (15 *The Times* L.R., 376) affirmed.

This was an appeal from the judgment of a Divisional Court (Mr. Justice Darling and Mr. Justice Channell) on a special case, reported in 15 *The Times* L.R., at p. 376. The case was stated by the Commissioners for the General Purposes of the Income-tax Acts for the City of London after meetings held on August 6, 1896, and May 6, 1897, when the Equitable Life Assurance Society of the United States appealed against three assessments of £80,000 made upon them under Schedule D of the Act 16 and 17 Vict., c. 34, for the years ended April 5, 1895, 1896, and 1897. The facts were thus stated:—The company was established by charter under the insurance laws of the State of New York. The principal office for the transaction of business is located in the city of New York. By the said charter it is provided as follows:—Article 3.—“The capital of the said company shall be \$100,000 in cash divided into 1,000 shares of \$100 each, which shall be personal property transferable only on the books of the company in conformity with its by-laws. The holders of the said capital stock may receive a semi-annual dividend on the stock so held by them not to exceed $3\frac{1}{2}$ per cent. of the same, such dividends to be paid at the time and in the manner designated by the directors of the said company. The earnings and receipts of the said company over and above the dividends, losses, and expenses shall be accumulated.” By Article 4—“board of directors”—it is provided:—“The corporate powers of the said company shall be vested in a board of directors, and shall be exercised by them and by such officers and agents as they may appoint. The board of directors shall consist of 52 persons, a majority of whom shall be citizens of the State of New York, each of whom shall be a proprietor of at least five shares of such capital stock.” It was further provided as to the election of directors that every stockholder should be entitled to one vote for every share of stock held by him, and the board of directors might, by a vote of three-fourths of the directors, provide that each life policyholder who should be insured in not less than \$5,000 should be entitled to one vote. But this power has not been exercised. By Article 5 the directors were empowered to elect annually a president and vice-president and to appoint a secretary and other officers and to determine the rates of premium and the amounts to be insured on any one life, and the terms of such insurances. Article 6 is as follows:—“The insurance business of the company shall be conducted upon the mutual plan. . . . The officers of the company within 60 days from the expiration of the first five years from December 31, 1859, and of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company, which shall exhibit its assets and liabilities both present and contingent, and also the net surplus after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policyholder shall be credited with an equitable share of the said surplus, and such equitable share after being ascertained shall be applied to the purchase of an additional amount of insurance (payable at death or with the policy itself) expressing the reversionary value of such equitable share at such interest as the directors may designate, or, if any policyholder so direct, such equitable share of surplus shall be applied to the purchase of an annuity to be applied in the reduction of his or her future premiums. In case of death the amount standing to the credit of the party insured at

the last preceding striking of balance shall be paid over to the person entitled to receive the same, and the proportion of surplus equitably belonging to him or her at the next subsequent striking of balance shall also be paid when the same shall have been ascertained and declared.” It was also provided that the officers of the company every five years were to cause a general balance statement of the affairs of the company to be made, which should show the amount received during the preceding five years for premiums, interest, and annuities, and the amounts paid for losses, expenses, and otherwise, and the balance remaining in the treasury, together with the manner in which the same is invested. A share capital of \$100,000 is required to be subscribed by every insurance company by the laws of the State of New York (being chapter 463 of the year 1853), and the capital is always invested in United States Government bonds and deposited with the Controller of the State of New York. A branch or department of the said company for Great Britain and Ireland has been established, and carries on business at No. 6, Prince's-street, in the City of London, under the management of a London board of directors, with a chairman, secretary, general manager, and trustees. It was admitted that the board of directors alone by their officers manage the affairs of the company. They declare the amount that shall be divided amongst the policyholders, who have no power to interfere in the management, and the amount to be set aside for the reserve. The undivided surplus over and above the company's liabilities amounted to £7,787,458 for the year 1894, £8,442,502 for 1895, and £8,995,245 for 1896. Policies are also granted by the company to persons without right of participation in the profits of the company. It was not contended, on behalf of the company, that they were exempt from income-tax in respect of this source of profit. The net premiums and interest after provision for liabilities, including death claims, &c., are applied to pay expenses, as determined by the directors in their discretion, and to provide a reserve as required by the regulations of the Insurance Department of the State of New York, then a dividend not exceeding 7 per cent. is paid to the shareholders on their capital, then the balance, as the directors may determine, is invested to provide for a division amongst the participating policyholders of the company by way of bonus on or increase to the amount insured, according to such principles as may from time to time be adopted by the society (through the directors) for such distribution. The contentions on the part of the Inland Revenue were that the company and its assets were not the property of the policyholders, and that they had neither control, power, liability, nor right except such as the shareholders by their directors chose to give to them; that the policyholders were not members of the company, but were third persons who contracted with the company. That the accumulated funds of the company were not the property of the policyholders, but were accumulated profits, and that the company could not properly claim to be a mutual insurance company; that the provision of article 6 of the charter that the insurance business of the company should be conducted upon the mutual plan could only relate to the division of such portion of the profits as the directors might determine; that the division of a portion of the profits over and above the fixed dividend payable to the shareholders did not alone make the company a mutual insurance company; and that the net surplus so far as the same was derived from premiums received in the United Kingdom was a profit or gain of the company liable to be assessed to income-tax under Schedule D to the Act (16 and 17 Vict., c. 34). The company cited the case of “*New York Life Insurance Company v. Styles*” (14 App. Cas., 381), and thereupon contended that premiums paid to the com-

pany were contributed as an estimated amount required to cover the risks for the year and the necessary expenses, and that any surplus or balance was not profit or gain liable to assessment, but was merely an excess of contribution over expenditure, which they contended would be ultimately returned to the contributors. The Commissioners of Taxes were of opinion that the company was not a mutual insurance company within the meaning of the case above cited, and was liable to be assessed to income-tax on profits or gains made in the United Kingdom, and they confirmed the assessments. The Divisional Court gave judgment for the Crown, upholding the assessments. The insurance company appealed.

Sir Robert Reid, Q.C., Mr. Foote, Q.C., and Mr. C. H. Neish appeared for the appellants; Mr. Cripps, Q.C., and Mr. Danckwerts for the Crown.

The COURT, without calling upon counsel for the Crown, dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the judgment of the Divisional Court was right. The question was whether three sums of £80,000 made by the Equitable Life Assurance Society of the United States in this country were chargeable with income-tax under Schedule D. The Divisional Court had held that they were chargeable, and the society appealed. A similar case had been before the House of Lords twice. In "*Last v. London Assurance Corporation*" (10 App. Cas., 438) the House of Lords decided in favour of the Crown. In "*New York Life Insurance Company v. Styles*" (14 App. Cas., 381) they decided in favour of the insurance company. It was now contended on the part of the appellants that this case came within the decision in *Styles's* case. The surveyor of taxes, on the other hand, contended that it was governed by *Last's* case. Now what was decided in *Last's* case? There a life insurance company issued participating policies at an increased premium, according to the terms of which at the end of each quinquennial period the gross profits of such policies were thus dealt with—two-thirds were returned by way of bonus or abatement of premiums to the holders of such policies then in force: the remaining third went to the company, who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division among the shareholders. The House of Lords held that the two-thirds returned to the policy holders were annual profits or gains and assessable to income-tax. Lord Bramwell dissented, and in giving judgment in *Styles's* case that learned Lord gave an account of the decision in *Last's* case. He said:—"I understand the principle of that decision to be that there was a company making profits, meaning to make profits not from its own members, but from those it dealt with; that, though it returned two-thirds of those profits to those it dealt with, they were not less profits; and that, therefore, income-tax was payable on them." In the present case the insurance society was a company with directors and shareholders and shares, just as in *Last's* case. It was argued that here the sum received by the shareholders in the way of dividend was very small compared with the sum which was paid over to the participating policy holders. But the sum paid to the participating policy holders at the end of every five years came out of the profits and gains made by the company during the five years, and the relative smallness of the sum received by the shareholders did not seem to him to affect the question. He could not distinguish between this case and *Last's* case. But then it was said that in *Styles's* case, which came before the House of Lords subsequently, *Last's* case was differentiated. What was the distinction which the House of Lords drew between those two cases? Clearly the distinction was this—that in *Styles's* case the life insur-

ance company had no shares and no shareholders, and that the only members were participating policy-holders who carried on a system of mutual insurance pure and simple as partners *inter se*. And the House of Lords held that the surplus of premiums over expenditure which was returned to the policy-holder as bonus was not profit or gain assessable to income-tax. In his opinion the present case did not come within *Styles's* case, but was governed by *Last's* case. The appeal therefore failed.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS delivered judgments to the like effect.

Chan. Div. }
(North, J.) }

1899.
Dec. 8.

THE LONDON AND NORTHERN BANK (LIMITED) v.
GEORGE NEWNES (LIMITED).*

Libel—Trade libel—Statement that a bank was in liquidation—Injunction granted.

This was an *ex parte* motion for an interim injunction to restrain publication of a trade libel. The paragraph complained of as a libel was published in the number of the *Money Maker*, a weekly serial, dated December 9 but issued on Wednesday last, under the heading "*Lists of Contributors*," as follows:—"Dr. D. T. Jones, of Sheffield, has had a narrow escape from being saddled with a liability of £10,000 in the London and Northern Bank, now in liquidation. He applied for 1,000 £10 shares, and sent £500 on account, but subsequently wrote to cancel his application. The Post Office stamp showed that a letter of allotment from the company, which was alleged to have crossed his letter, was not despatched until after his notice to cancel had been delivered. It was a question of only an hour or so, but Mr. Justice Cozens-Hardy held that the withdrawal notice was in time, and therefore adjudged the applicant his £500, with interest and costs." The application was supported by affidavits by the deputy-chairman and the general manager of the plaintiff company containing the following identical paragraph:—"The said bank was formed last year, and acquired the business formerly carried on for eight years by the Leeds Joint Stock Bank (Limited). It is untrue that the plaintiff bank is in liquidation. No proceedings or steps whatever have been taken or contemplated with the view to the liquidation of the plaintiff bank. Nor does any ground whatever exist on which such proceedings could be taken against the bank. The paragraph in question had reference to a claim by the plaintiff bank to enforce an agreement alleged to have been entered into by Dr. D. T. Jones therein referred to to take shares in the said bank. The said Dr. Jones had on the public issue of the shares of the plaintiff bank put in an application for the said shares which he afterwards purported to withdraw. The question in the litigation between the said Dr. Jones and the plaintiff bank was simply whether the notice of withdrawal had been given before or after the allotment letter had been posted, and the directors of the plaintiff bank were advised that it was their duty to have this question judicially determined. It was decided in favour of the said Dr. Jones."

Mr. Lawson Walton, Q.C., and Mr. J. Eldon Bankes were for the plaintiffs in support of the motion.

MR. JUSTICE NORTH thought it was a case in which he ought to grant an injunction. The general rule, as to cases in which an interlocutory injunction ought to be granted to restrain libel, was laid down by Lord Coleridge in delivering the judgment of five of the Judges in the case of "*Bonnard v. Perryman*" ([1891]

*Reported by D. FITCHER, Esq., Barrister-at Law.

1 Ch., 285) (7 *The Times L.R.*, 453):—"Upon the whole, we think, with great deference to Mr. Justice North, that it is wiser in this case, as it generally and in all but exceptional cases must be, to abstain from interference until the trial and determination of the plea of justification." That case was a strong one, and he had always had difficulty in seeing that, if that was not a proper case for an injunction, any case was likely to arise to justify the interlocutory interference of the Court. He did, however, think this case so strong as to be exceptional. The paragraph in question states that the plaintiffs are now in liquidation. It was clear that that statement was unfounded. Under the circumstances his Lordship thought the case so exceptional that he ought to grant the injunction. He thought the case bore some analogy to cases where the Court had restrained the advertisement of a winding-up petition.

[Solicitors—Simpson, Hope, and Co.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.JJ.) } Dec. 9.

HENNESSEY V. MCCABE.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—Factory and Workshop Act, 1895.

A man was on board a ship lying in dock, and was engaged in loading the ship with cargo from a lighter by means of a steam winch attached to the ship.

Held, that this was not an employment to which the Workmen's Compensation Act, 1897, applied.

This was an appeal from an award of the Judge of the Bow County Court under the Workmen's Compensation Act, 1897. The applicant was a stevedore's labourer, and he claimed compensation from his employer, a stevedore, for accidental injuries sustained by him in the course of his employment. At the time of the accident the applicant was on board a ship which was lying in dock in the port of London, and was engaged in loading the ship with cargo from a lighter by means of a steam winch which was attached to the ship. The lighter was lying alongside the ship, the ship being between the lighter and the quay. The County Court Judge made an award in favour of the applicant. The employer appealed, and the only question raised on the appeal was whether the employment on which the applicant was engaged at the time of the accident was an employment to which the Act applied.

Mr. RUGGE, Q.C., and Mr. ROSKILL appeared for the employer, and contended that this was not an employment to which the Act applied. By section 7, subsection 1, of the Workmen's Compensation Act, "This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about," among other things, "a factory." By subsection 2, "factory" includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. By section 23 of the Factory and Workshop Act, 1895, it was enacted that certain provisions of the Factory Acts, relating to the fencing of machinery, notice of accidents, powers of inspectors, and dangerous employments, should have effect "as if every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process, and any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the

purpose of the construction of a building or any structural work in connexion with a building, were included in the word factory . . . and the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery, shall be deemed to be the occupier of a factory." The word "factory" thus had an artificial meaning given to it for the purpose of the Workmen's Compensation Act, and under certain circumstances machinery might be a factory, and the person who used the machinery the occupier of a factory. But this was the case only where the machinery satisfied one or other of two conditions. It must be either machinery for loading or unloading from or to a dock, wharf, quay, or warehouse, or machinery used temporarily for the purpose of building. "*McNicholas v. Dawson*" ([1899] 1 Q.B., 773) was a case of machinery temporarily used for the purpose of the construction of a building. That case did not in any way touch the present. The only way in which this case could be brought within the Act would be by showing that this steam winch was machinery which was being used in the process of loading to or from a dock. The facts, however, showed that the cargo here was not being loaded to or from a dock, but was being loaded from a lighter into a ship. The County Court Judge said that he based his decision on "*Woodham v. Atlantic Transport Company*" ([1899] 1 Q.B., 15), but that case did not really govern this case. There cargo was being unloaded from a ship by means of a crane which was standing on a quay, and the Court held that the case was within the Act because machinery was being used in the process of unloading to a quay. In the present case there was no loading or unloading to or from a dock or quay, and therefore the case was not brought within the Act. They referred also to "*Flowers v. Chambers*" ([1899] 2 Q.B., 142), in which it was held that employment on board a ship lying in a dock was not employment on, in, or about a dock; and to "*Hall v. Snowden*" ([1899] 2 Q.B., 136) and "*Durrie v. Warren and Co.*" (15 *The Times L.R.*, 365; W.C.C., 78).

Mr. MONTAGUE LUSH, for the applicant, said he admitted that the case depended on the question whether this steam winch was machinery and plant used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse within the meaning of section 23 of the Factory and Workshop Act, 1895. He contended that it was machinery so used, and that the County Court Judge was right. The cargo in this case was being loaded from the dock. He was not suggesting that the lighter out of which the cargo was taken was a part of the dock, for this Court had already negatived that proposition; but he contended that loading the cargo from the lighter into the ship was loading from the dock. It was the ordinary way of loading a cargo from a dock to make use of lighters. The lighters, though not part of the dock, were part of the plant used for the operation of loading. If cargo was brought down to a quay in a cart and loaded from the cart into a ship, it would be none the less loaded from the quay because it was taken from the cart on the quay. The cart would not be the quay, but the loading would be a loading from the quay. If the argument on the other side was right, the word "dock" might as well be struck out of the section; for, according to their contention, there could not be a loading from a dock which was not a loading from a quay or wharf.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said the case had been well argued on both sides. The question was, whether a steam winch on board a ship lying in a dock used for

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the purpose of taking in cargo from a lighter was a factory within the meaning of the Workmen's Compensation Act. It was necessary to consider the incorporation into the Workmen's Compensation Act of enactments determining what constituted a factory. No case which they had previously decided covered the present. But in "*Flowers v. Chambers*" they held that a ship lying in a dock was not a dock, and in "*Durrie v. Warren and Co.*" they went a long way in the direction in which they were going to-day. His Lordship read section 7, subsections 1 and 2, of the Workmen's Compensation Act, and section 23 of the Factory and Workshop Act, 1895. The question was whether the steam winch in this case was machinery or plant used in the process of loading or unloading from or to any dock, wharf, quay, or warehouse, within the meaning of section 23 of the Act of 1895. It seemed to him that the steam winch was used for the purpose of loading cargo from a lighter which was lying alongside a ship into the ship, and not for the purpose of loading to or from any dock, wharf, quay, or warehouse. He thought it would be straining the section beyond all reasonable bounds to hold that loading from a lighter into a ship on which a steam winch was used was loading from a dock, wharf, quay, or warehouse. The case, therefore, did not come within the Act, and the appeal must be allowed.

LORD JUSTICE COLLINS agreed. He felt some difficulty in the case, and it seemed to him that Mr. Lush was logical and probably right in his interpretation of the word "dock" as embracing both the land bounding the water and the water itself. But he thought that the expressions "loading from a dock" or "unloading to a dock" must be taken to have the meaning which nine out of ten persons would attach to them—viz., as describing a process which involved some use of the land bounding the water. In his opinion the machinery used in this case did not constitute a factory. That question depended on the true construction of section 23 of the Factory and Workshop Act, 1895; and the effect of that section was to make the word "factory" include machinery only in certain circumstances, which, as it seemed to him, did not cover the circumstances existing in the present case.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Richard White, for the applicant; W. Hurd and Son, for the employer.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, J.J.) } Dec. 11.

THE MERSEY DOCKS AND HARBOUR BOARD V. THE
ASSESSMENT COMMITTEE OF BIRKENHEAD UNION.*

Rating—Rateable value—Assessment—Lairages
for cattle and sheep—Evidence as to annual receipts and expenditure.

This was an appeal from a judgment of a Divisional Court, consisting of Mr. Justice Lawrance and Mr. Justice Channell, on a special case stated by the Recorder of Birkenhead on an appeal brought by the Mersey Docks and Harbour Board to the quarter sessions of Birkenhead against a rate made by the rating authority for the township of Birkenhead. The appeal to the Recorder was from a poor-rate made on May 16, 1896, in respect of lairages at Woodside and Wallasey owned and occupied by the Mersey Docks and Harbour Board. The appellants were assessed at £24,056 gross estimated rental, and at £21,651 rate-

able value. The lairages consisted of buildings of brick and wood roofed over and used for the reception and slaughter of cattle and sheep brought from abroad and for the cooling and preservation of the carcasses. In the course of the hearing of the appeal, the respondents tendered in evidence certain accounts made up from the books of the appellants, showing the receipts and expenditure of the appellants in the conduct of the business of the lairages for the three years ending July 1, 1896, and the averages thereof. The appellants objected to the admission of any evidence as to the amount of the receipts and expenditure, but the Recorder held such evidence admissible, and admitted the evidence tendered by the respondents accordingly. The Recorder found that the said premises were the only place in the neighbourhood at which foreign animals could be landed except under penalties as provided by the Diseases of Animals Act, 1894, but there were lairages for foreign animals at Deptford, Manchester, Hull, Cardiff, Bristol, Glasgow, and other places. The chief controversy between the parties turned upon the principle applicable to the assessment of a tenement used for carrying on the business of a lairage. The lairages were erected and worked by the appellants under the provisions of their statutory powers, and not as a local authority under the Diseases of Animals Act, 1894. No local authority had been appointed under that Act in respect of the Port of Liverpool. The appellants contended that the assessment should be based upon the structural value of the buildings plus the value of the land, as in the case of an ordinary warehouse. The respondents contended that the assessment should be based upon the actual average receipts and expenditure in the conduct of the business of a lairage. The Recorder was of opinion that in the exceptional circumstances of the case it was not possible to ascertain what a tenant would give for the occupation of the tenement by merely considering the structural value of the buildings and the value of the land, or otherwise than by investigation of the actual average annual receipts and expenditure involved in carrying on the business of a lairage. The Recorder did not assess the rate upon the profits of the tenant, but he used them, together with other evidence, to test the values given by the appellants and respondents respectively. Having taken into consideration all the evidence before him as to the actual receipts and expenditure of the occupiers who carried on the business, the nature of the business, and the chances of its permanence, the structural value of the buildings, the value of the land, and all the surrounding circumstances, he came to the conclusion that the gross value given by the respondents was too low, but he felt that he had no power on the appeal to put it up. He therefore accepted the value as the nearest to the true gross value he could arrive at, and proceeded to determine the amount of the deductions to be made therefrom in order to arrive at the net annual value by a consideration of the evidence before him, most of which was given by the appellants. As both parties desired to obtain the opinion of the High Court upon the true principle of assessment applicable, the Recorder stated this case and found the following facts:—(1) The tenements subject to assessment were capable of separate beneficial occupation apart from their connexion with the rest of the appellants' property. (2) Their value was enhanced by their proximity to and connexion with the docks and rails belonging to the appellants. (3) There were tenants other than the appellants available for the occupation of the tenements for the purpose of carrying on the business of a lairage. (4) There were no similar tenements in the neighbourhood with which a comparison could be made. If the assessment ought to be based on the mere structural value of the buildings plus the value of the

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

land and without reference to receipts and expenditure he found that the gross estimated rental was £17,109 and £11,383 rateable value. If the principle of assessment contended for by the respondents was correct the gross estimated rental appearing upon the rate book was not too high, and the respondents admitted that it could not be increased. Consequently he adopted those figures and found the true gross estimated rental at £24,056 and £16,036 rateable value. The result was that as the net value was reduced, the appeal to the Recorder was allowed, and the rate was ordered to be made upon the rateable value of £16,036 instead of £21,651. The questions for the opinion of the Court were:—(1) Whether the accounts referred to above were properly admitted. (2) Whether the principle adopted by the Recorder was correct. If the answers to both questions were in the affirmative, then the gross and rateable values as found by the Recorder were to stand. If the answer to either question was in the negative and the appellants' contention was correct, then the assessment was to be reduced to £17,109 gross estimated rental and £11,383 rateable value. The Divisional Court affirmed the decision of the Recorder and gave judgment for the respondents. The appellants appealed to the Court of Appeal.

Mr. Marshall, Q.C., Mr. Horridge, and Mr. Hugo Marshall appeared for the appellants; Mr. Pickford, Q.C., Mr. A. A. Tobin, and Mr. R. M. Montgomery for the respondents.

The COURT, having taken time to consider, delivered judgment dismissing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—When the facts found in this case by the learned Recorder of Birkenhead are understood, in my opinion the answers to be given to the questions asked of us involve no real difficulty. The first question is whether the published accounts of the Mersey Docks and Harbour Board in relation to their receipts and expenditure in conducting the lairages of which they are occupiers were rightly received in evidence upon the hearing of the appeal at quarter sessions brought by the appellants, the Mersey Docks and Harbour Board, against an assessment of their lairages to the poor-rate; and the second is whether the principle adopted by the Recorder in arriving at the rateable value of the lairages as appears upon the special case is correct. The learned Recorder states that he did not assess the rate upon the profits of the tenant, but that he used them, together with other evidence, to test the value given by the appellants and respondents respectively. The material facts found by the Recorder are these:—First, that the lairages consist of lands and buildings in the occupation of the appellants within the ambit of the rating authority. Secondly, that the lairages are the only places in the neighbourhood at which foreign cattle can be landed except under penalties, as provided by the Diseases of Animals Act, 1894. Thirdly, that the lairages were erected and are worked by the appellants under statutory powers which enable them to exact charges for the lairages they provide for imported animals. Fourthly, that there are no similar hereditaments in the neighbourhood with which the lairages can be compared in order to ascertain what rent a tenant from year to year would be likely to give for the lairages, and that they fall within the category of cases which in rating law are known as exceptional cases. Fifthly, that it is not possible to ascertain what rent a tenant from year to year would give for the occupation of the lairages by merely considering the structural value of the buildings and the value of the land upon which the buildings stand. And, lastly, that to ascertain what rent such a tenant would give, the actual average annual receipts and expenditure obtained and incurred in carrying

on the work of the lairages must be investigated. Now, first of all, it is manifest that the rental value of these lairages can not be ascertained by adopting the ordinary method of ascertaining what rent the hypothetical tenant from year to year would be likely to give for the hereditament about to be assessed—viz., by comparing that hereditament with other similar hereditaments in the neighbourhood, and ascertaining what rent the other hereditaments command, and thus arriving by comparison at an approximation as to what rent a tenant from year to year would be likely to give for the hereditament in question. As this method, which is, as I have said, the ordinary method for ascertaining rateable value, cannot be adopted, some other method has to be resorted to. What, then, in such a case is the next method usually brought into play? It is to take the structural value of the buildings and the value of the land upon which they stand, and to calculate what would be the interest upon the capital sum which would have to be expended if the occupier had become the purchaser and not the tenant. For instance, if the cost of the buildings, plus the value of the land, was, say, £10,000, the interest thereon, say, at 4 per cent., being £400 a year, the assumption is made that the hypothetical tenant, being desirous of occupying the premises, not purchasing, but becoming a yearly tenant, might be willing to pay as rent a sum in some degree represented by the interest upon the money he would have had to expend, had he become a purchaser instead of a tenant. This is a method which is adopted when the comparison of the hereditament with other similar hereditaments is impracticable. But suppose, as in the present case, in addition to the rent which a tenant might ordinarily be likely to give, there is a capacity in the hereditament itself of making a profit not personal to the tenant, but which is attached to the hereditament, why is not this capacity to be considered as an element when seeking to ascertain what the hypothetical tenant would be likely to give by way of rent? Surely a proposing tenant would take this additional element into consideration when calculating what rent he would give for the hereditament he was about to take; and why, then, is this not also to be taken into consideration by the tribunal which has to ascertain, as best it can, what rent the tenant, as a tenant from year to year, would be likely to give? There is, as it seems to me, no reason whatever why this capacity attached to the hereditament itself should not form an element in the consideration, and there is good authority, as I will show in a moment, that this can be taken into consideration. I will take two of the cases to which Mr. Pickford has called our attention, which sufficiently show when a capacity of making profit cannot and when it can be taken into account. In the case of "The King v. the Trustees of the Duke of Bridgewater" in the year 1829 (9 B. and C., p. 68), the trustees were by statute empowered to take tolls upon the tonnage of goods passing along the Bridgewater Canal, and they in addition carried on the trade of carriers thereon, receiving freight for the goods so carried. The Court held that the tolls were to be taken into consideration when arriving at the amount at which the occupation of the trustees was to be assessed, but not the profits made by them in the carrying business, because, as Bailey, J., in delivering the judgment of the Court, said, "I lay out of consideration the fact of the trustees being carriers, because their occupation only is to be considered. The profits of carrying goods are the profits of their trade. The tonnage is the profit of the land occupied by them." And, therefore, this tonnage profit, being attached to the land, had to be considered when arriving at the rateable value of the hereditaments—i.e., the canal. Again, in the year 1842, in the case of "Reg. v. The London

and South-Western Railway Company" (1 Q.B., 558), it was held that the defendant company was liable to be rated for its land improved in value by the profits accruing from the railway, which in this case was held to include both the tolls and their carrying trade, because, as Lord Denman, C.J., pointed out, when delivering the judgment of the Court, at p. 580, the defendants were "occupying buildings and lands on an entire line of railway and carrying on a trade, not merely therein and thereon, but thereby." This, as it appears to me, applies to the present case upon this ground. I think the Recorder was right. I now come to two cases which fall within the definition of exceptional cases, of which the present case is one. In the year 1875, "Reg. v. Verrall" (1 Q.B.D., 9) was decided. It was a case of rating a racecourse, an undoubted exceptional case, and it was held by Sir Alexander Cockburn, C.J., and Mr. Justice Field that in ascertaining its rateable value the accounts showing the receipts and expenditure in respect of the racecourse were legitimate evidence, and were clearly elements for the consideration of the justices when arriving at the value of the occupation of the racecourse. So, again, in the case in 1880 of "Clark v. Overseers of Fisherton-Anger" (6 Q.B.D., 139), Mr. Justice Field and Mr. Justice Bowen held that, in ascertaining the rateable value of refreshment rooms upon a railway station, there being no means for a comparison, the receipts and expenditure during the past year ought to be received in evidence as an element in ascertaining the rateable value. In the case of "Dodds v. Assessment Committee of South Shields Union" ([1895] 2 Q.B., 133) this Court approved of the last two cases, and it is clear from the report that Lord Esher must have been alluding to a case other than "Clark v. Overseers of Fisherton-Anger," when he said he did not understand it. This Court, in "Cartwright v. Sculcoates Union" ([1899] 1 Q.B., 667), said nothing as to the accounts of receipts and expenditure not being received in evidence in a case like the present, and in my opinion that case has no application to a case where a profit is attached to the hereditament itself. For the reasons above I am of opinion that in this case the accounts of the Mersey Docks and Harbour Board were rightly received in evidence by the learned Recorder, and that he was right when he took evidence of the structural value of the buildings and land and also admitted in evidence the receipts and expenditure of the lairages for the past year, each, in my judgment, being elements fit for his consideration when ascertaining as best he could what rent the hypothetical tenant from year to year would be likely to give for the lairages. He did not take the profits as the basis whereon to assess the rateable value and then add thereto the structural value, but he took evidence of the profits merely to test the values given by the appellants and respondents respectively. The point made by Mr. Horridge upon a passage in Lord Herschell's judgment in the case of "London County Council v. Churchwardens of Erith" ([1893] A.C., at p. 592), in my opinion has not applicability here, because the Recorder has found that there were tenants other than the Mersey Docks and Harbour Board available for the occupation of the lairages. For these reasons I think that the judgment of my brothers Lawrance and Channell must be affirmed, and this appeal dismissed with costs.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS delivered written judgments to the same effect.

[Solicitors—Rowell, Rawle and Co., agents for A. T. Squarey, Liverpool, for the appellants; J. E. and H. Scott, agents for Thompson, Hughes, and Mathison, Birkenhead, for the respondents.]

Q.B. Div. (Darling and }
Channell, JJ.)

1899.
Dec. 11.

ATTORNEY-GENERAL V. DOBREE AND ANOTHER.*

Revenue—Estate duty—Policy of insurance—
Finance Act, 1894.

A policy of insurance brought into settlement by a husband is liable on his death to the payment of estate duty under the Finance Act, 1894.

This was an information laid by the Attorney-General against Mr. Harry Hankey Dobree and Mr. John Leonard Tomlin, the defendants. The question was whether or not the proceeds of a policy of insurance brought into settlement were property which was liable on the death of the husband to the payment of estate duty under the Finance Act, 1894. In September, 1866, Mr. Falconer John Atlee, upon his marriage with Mary Dobree MacColl, effected a policy of insurance on his own life for £1,501 10s., payable at his death to his wife subject to a yearly premium of £50, payable by him during his life. In September, 1867, he assigned the policy to trustees for the purposes of an indenture of settlement of September 20, 1867, whereby, in pursuance of an agreement made previous to the marriage, Mr. Atlee assigned the policy upon the trusts of the settlement. Mr. Atlee covenanted to keep up the policy and pay the premiums during his life and did in fact do so. Under the settlement the policy was payable to Mrs. Atlee during her life. There was a joint power of appointment in favour of the children of the marriage, which was exercised in favour of Mr. George Gordon Falconer Atlee, subject to Mrs. Atlee's life interest. Mr. Atlee died on October 2, 1894, leaving Mrs. Atlee surviving him. The moneys payable under the policy were duly received by the defendants as trustees of the settlement. The Commissioners of Inland Revenue claimed estate duty upon these moneys, but the defendants refused to pay, on the ground that no such duty was payable. It was contended on behalf of the Crown that estate duty became payable in respect of the moneys received under the policy as property passing on the death of Mr. Atlee by virtue of section 1 and 2 (1) (d) of the Finance Act, 1894. The latter section provides that property passing on the death of the deceased shall be deemed to include "any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." It was also contended that the moneys came within section 2 (1) (e), which includes within the scope of the Act "property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom." On behalf of the defendants it was contended that the money did not come within section 2 (1) (d), because on the death of Mr. Atlee it was not the benefit or interest Mr. Atlee had in the policy which passed—that had passed before—but merely the sum of money paid by the insurance company. It was further contended that this sum came within the exception in section 3 of the Act, which provides that "estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the person under whose disposition the property passes," and it was argued that the transaction with the insurance company was equivalent to the purchase of a sum of money payable on the death of the policy holder, the purchase-money of which was paid by instalments. "*The Lord Advocate v. Fleming*" [1897] A.C., 145), was cited.

The Attorney-General, the Solicitor-General, and Mr. Vaughan Hawkins appeared for the Crown; and Mr. Haldane, Q.C., and Mr. Danckwerts for the defendants.

The COURT gave judgment for the Crown.

MR. JUSTICE DARLING referred to section 15 of the Act, which provides that "estate duty shall not be payable in respect of a single annuity not exceeding £25 purchased or provided by the deceased, either by himself alone or in concert or arrangement with any other person, for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person." He said that this section threw a light upon the meaning of section 2 (1) (d), the only difference between the present case and the case contemplated by section 15 being that the one was the case of a lump sum and the other of an annuity. It was clear that section 2 (1) (d) was intended to include a case like the present. He did not think that the moneys came within the exception in section 3. The case contemplated by that section was where a person had bought property from another and had paid the price, but the property was only to pass upon the death of the vendor. In that case the purchaser would clearly derive no benefit at the death of the vendor. He would only be getting what he had paid for.

MR. JUSTICE CHANNELL said that he agreed with the judgment of his learned brother, on the ground that the duty claimed was given by section 2 (1) (d), and on the ground that it was not prevented from becoming due by virtue of section 3.

[Solicitors—The Solicitor of Inland Revenue, for the Crown; J. L. Tomlin and Son, for the defendants.]

Judicial Committee of the Privy Council } 1899.
(Lords Macnaghten, Morris, Davey, } Dec. 12.
and Robertson)

WENTWORTH AND OTHERS V. WENTWORTH AND OTHERS.*
Privy Council Appeals—New South Wales—Will
—Construction—Discretion as to conversion of
estate—Tenants for life.

This was an appeal from a decree of the Supreme Court of New South Wales of June 11, 1897.

Mr. Warmington, Q.C., and Mr. Theobald, Q.C., were counsel for the appellants; Mr. Swinfen Eady, Q.C., Mr. O. Leigh Clare, Dr. George Serrell, and Mr. Edgar J. Elgood for the respondents.

LORD MACNAGHTEN, in delivering their Lordships' judgment, said William Charles Wentworth, of Vaucluse, near Sydney, whose will had given rise to the questions which had been argued on the appeal, was a gentleman of considerable property. He died on March 20, 1872. His will was dated October 19, 1870. At the date of his will and at his death his wife was alive, and he had two sons and five daughters living. Three of the daughters were unmarried. His will, shortly stated, was to this effect:—After certain devises and bequests he gave the residue of his property, real and personal, to trustees—of whom his wife and his eldest son, Fitzwilliam Wentworth, were two—upon trust for conversion. He empowered his trustees to postpone the conversion of any part of his real or personal estates for such period not exceeding 21 years

from his death as to them should seem expedient, and he directed that until such conversion, and until the proceeds should be invested as therein directed, the income arising from his estate from time to time remaining unsold and unconverted should during such period of 21 years be applied in paying his debts and the rent-charges, yearly sums, and other payments thereinbefore directed to be paid out of his residuary estates or out of the annual proceeds thereof, or so much thereof as the proceeds of any converted residuary estates or the income thereof should be insufficient to pay, and that subject thereto the surplus, if any, of the annual proceeds of his unsold and unconverted estates during the said period of 21 years, and all accumulations thereof, should go in augmentation of the principal or capital of his residuary estates, and be applied and disposed of as part thereof. The will contained directions for raising three sums of £25,000 each for the benefit of his three unmarried daughters. The ultimate residue of his estate was to be divided between such of his seven children as should be living at his death in equal shares. The shares of the daughters were settled upon trusts which were in effect for the daughter for life, with remainder for her husband for life, with remainder for her children who being males should attain 21, or being females should attain that age or marry. The share of the testator's second son, D'Arcy Bland Wentworth, was settled upon trusts under which he is entitled to a protected life interest, with remainder over for the benefit of his children. There was an ultimate gift upon failure of the trusts of any of the settled shares for the testator's children living at the time of such failure, with a direction that any share accruing to D'Arcy Bland Wentworth should belong to him absolutely, and any share accruing to a daughter should be held upon the same trusts as her original share. The testator declared that his trustees should have a discretionary power generally as to the sale, calling in, and conversion of any real and personal estate whatsoever forming part of his residuary estate, and the times and manner of selling and converting the same for the purposes of his will. Among the powers conferred upon the trustees was a power authorising them to grant a lease or leases (with or without the surface) of the coals or other minerals lying under any of his estates comprised in the residuary devise, with all proper and necessary powers, licences, easements, privileges, and authorities for getting and working the same for any term not exceeding 60 years. The period of 21 years from the testator's death expired on March 20, 1893. The conversion of his estate was not then completed. Part of the residuary real estate consisted of land in Northumberland, New South Wales, which was known to contain valuable seams of coal, though the coal was not worked or let or agreed to be let in his lifetime. The trustees had retained that property unsold up to the present time. But in 1876 the then trustees granted a lease of the coal which they were authorized to let, or the greater part of it, with certain surface rights for 40 years from January 1, 1876. Under that lease as modified by a subsequent agreement the coal had been extensively worked and the trustees had received large sums in respect of rents and royalties. For some years past their receipts had exceeded £7,000 a year. The present suit was instituted in November, 1895, by the respondent Fitzwilliam Wentworth, then the sole surviving trustee, for the purpose of determining certain questions which had arisen as to the respective rights of the persons interested as tenants for life and as remaindermen in the shares of the testator's residuary estate settled by his will. The present appeal had been brought by D'Arcy Bland Wentworth and his encumbrancers

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

in the interest of the tenants for life. They challenged the judgment of the Chief Judge in Equity on two grounds. In the first place they said that the Chief Judge was wrong in holding that during the period of 21 years from the testator's death the trustees were bound to accumulate the income arising from the investment of the rents and royalties received under the mining lease of 1876. In the second place they contended that as from the expiration of the period of 21 years the tenants for life became and were entitled to a full share of the rents and royalties accruing under the mining lease, or at any rate to something more than what the Chief Judge had held them entitled to. The opinion of the Chief Judge was that so long as the property remained unconverted the rents and royalties attributable to the settled shares ought to be invested, and that the tenants for life were only entitled to the income arising from such investment. As regarded the first point, which was only faintly argued on the first hearing and not pressed by Mr. Warmington on the rehearing, their Lordships agreed with the Chief Judge in Equity. They were of opinion that according to the true construction of the will the trustees were bound to accumulate the rents and royalties received under the mining lease by investing such rents and royalties and the income resulting from such investment during the period of 21 years from the date of the testator's death. On the second question their Lordships took a different view from that which was taken by the Chief Judge in Equity. The period of conversion was left to the discretion of the trustees subject to the proviso that it was not to exceed the limit of 21 years from the testator's death. The trustees in the exercise of their discretion postponed it for the full period of 21 years. But at the expiration of that period the whole of the estate, according to the directions of the will, ought to have been converted and invested and ready for division. It might be that owing to circumstances it would not have been practicable to have converted the whole estate within the prescribed period except at an undue sacrifice. In that case, if the administration had been in the hands of the Court, the Court, no doubt, would have taken care that the property was not unduly sacrificed. But at the same time it would have been the duty of the Court, as far as practicable, to place the tenants for life in the same position in which they would have been if the directions of the will had been complied with. It did not seem fair or reasonable that the tenants for life should suffer because the circumstances of the case were such as to justify the trustees in departing from the strict letter of their instructions or because, without any such justification, the trustees had neglected the duty imposed upon them by the will. In this country, in the case of income-producing property directed by will to be converted, but retained for a time unconverted for the benefit of the estate, it had been the practice of the Court to put a value on the property, and to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value. That was the rule laid down by Vice-Chancellor Parker in "*Meyer v. Simonsen*" (5 De G. and S., 723), and followed by Lord Cairns in "*Brown v. Gollatly*" (L.R., 2 Ch., 751). Their Lordships thought that the principle of those cases ought to be applied to the present, but they did not think that it would be expedient to hamper the Court by laying down any fixed rule as to the rate of interest to be allowed to the tenants for life on the estimated value of the capital of the property. Their Lordships, therefore, thought that the decree of June 11, 1897, ought to be varied by omitting the declaration that "the trustees are under no obligation to immediately

sell the lands still unsold belonging to the testator's estate," and the declaration that such rents and royalties as had accrued from the lands since March 20, 1893, formed part of the capital of the residuary estate and ought to be distributed or invested accordingly, and by inserting in lieu of the last-mentioned declaration a declaration that until the testator's residuary real estate was sold and converted in accordance with the directions of the will the tenants for life of the settled shares were entitled as from March 20, 1893, to receive out of the rents and royalties accrued and accruing from the lands such an annual sum as in the opinion of the Court would under all the circumstances of the case be a fair equivalent for the annual income that would have been received by them if the lands had been sold on March 20, 1893, and the proceeds of such sale had been invested in accordance with the directions of the testator's will, and that there ought to be a reference to the Master in Equity to ascertain the amount payable in accordance with such direction, and that subject thereto the residue of such rents and royalties formed part of the capital of the residuary estate, and ought to be distributed and invested accordingly. It would, of course, be competent for the Court if it thought it necessary to require security by insurance or otherwise in order to safeguard the interests of the persons entitled in remainder. Their Lordships would, therefore, humbly advise her Majesty that the decree ought to be varied accordingly. The costs of all parties as between solicitor and client would be paid out of the estate.

[Solicitors—Mander and Son; for the appellants; Burton, Yeates, and Hart, and P. J. Gordon and Son, for the respondents.]

Court of Appeal (Lindley, M.R.,)
Jenne, P., and Romer, L.J.)

1899.
Dec. 13.

BOOSEY V. WRIGHT.*

Copyright—Musical composition—Song—Rolls of perforated paper used for producing musical sounds.)

Held, no infringement.

In this case the plaintiffs appealed from a decision of Mr. Justice Stirling (reported in 15 *The Times* L.R., 322). There was also a cross-appeal by the defendants upon a subsidiary point. The case raised an interesting and novel question of musical copyright. The plaintiffs, who were the well-known musical publishers, claimed an injunction to restrain the defendants from infringing their copyright in three songs—"My Lady's Bower," "The Better Land," and "The Holy City." The defendants were the agents for sale in this country of a mechanical musical instrument called the *Æolian* which was played by means of wind admitted to pipes or reeds through perforations in strips or rolls of paper which were inserted in the instrument and were unrolled by its action. The plaintiffs' case was that these perforated rolls which were sold by the defendants were, in fact, records of the musical compositions in question by means of which the music could be reproduced with the aid of the instrument, and that they constituted infringements of the plaintiffs' copyright in such compositions. Some of the perforated rolls contained in the margin directions to the performers as to time and expression—*e.g.*, piano, crescendo, &c., which directions were copied from the plaintiffs' songs, and the plaintiffs complained of these also as being infringements of their copyright. Mr. Justice Stirling held that the paper rolls, so far as they contained perforations, were parts

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

of the instrument, and were not copies of sheets of music within the Copyright Act, 1842; but that the addition of the directions as to time and expression was an infringement of the plaintiffs' copyright. He therefore refused the injunction as to the perforations, but granted it as to the directions. The plaintiffs appealed against the former part of this judgment, and the defendants against the latter part.

Mr. Butcher, Q.C., and Mr. Scrutton appeared for the plaintiffs; and Mr. Moulton, Q.C., Mr. T. Terrell, Q.C., and Mr. Eustace Smith for the defendants.

The appeals were argued on December 4 and 5, when judgment was reserved.

The COURT dismissed the plaintiffs' appeal and allowed the defendants' appeal.

The MASTER of the ROLLS read the following judgment in which the PRESIDENT of the PROBATE DIVISION concurred:—The plaintiffs are entitled to copyright in three sheets of music. What does this mean? It means that they have the exclusive right of printing or otherwise multiplying copies of those sheets of music—i.e., of the bars, notes, and other printed words and signs on those sheets. But the plaintiffs have no exclusive right to the production of the sounds indicated by or on those sheets of music; nor to the performance in private of the music indicated by such sheets; nor to any mechanism for the production of such sounds or music. The plaintiffs' rights are not infringed except by an unauthorized copy of their sheets of music. We need not trouble ourselves about authority; no question turning on the meaning of that expression has to be considered in this case. The only question we have to consider is whether the defendants have copied the plaintiffs' sheets of music. The defendants have taken those sheets of music and have prepared from them sheets of paper with perforations in them, and these perforated sheets, when put into and used with properly constructed machines or instruments, will produce or enable the machines or instruments to produce the music indicated on the plaintiffs' sheets. But is this the kind of copying which is prohibited by the Copyright Act; or rather is the perforated sheet made as above mentioned a copy of the sheet of music from which it is made? Is it a copy at all? Is it a copy within the Copyright Act? A sheet of music is treated in the Copyright Act as if it were a book or sheet of letterpress. Any mode of copying such a thing, whether by printing, writing, photography or by some other method not yet invented would no doubt be copying. So, perhaps, might a perforated sheet of paper to be sung or played from in the same way as sheets of music are sung or played from. But to play an instrument from a sheet of music which appeals to the eye is one thing; to play an instrument with a perforated sheet which itself forms part of the mechanism which produces the music is quite another thing. I have consulted Johnson's, Richardson's, and Murray's dictionaries to ascertain the meanings attributed to the word copy; and I do not myself think that the perforated sheet can be said to be a copy of the sheet of music unless the word "copy" is used in a very loose and inaccurate sense. Be this as it may, I cannot think or bring myself to decide that the perforated sheet is a copy of a sheet of music within the meaning of the Copyright Act. The fundamental ideas underlying them are different and the uses to be made of them are fundamentally different. Music appeals to the ear, but a sheet of music appeals to the eye, and the observation of Mr. Justice Bayley in "*West v. Francis*" (5 B. and Ald., p. 743) is applicable not only to engravings but to all kinds of books, and the Copyright Act treats a sheet of music as it treats a book. He said "A copy is that which comes so near to the original as to give to every person seeing it the idea

created by the original." I do not say that the defendants' perforated rolls cannot possibly be regarded as sheets of music. They may possibly be so regarded by specially skilled persons who have learned to read the perforations. Conceding for the sake of argument that a person might be trained to play or even to sing from the perforated sheets, it is clear that they are not made to be so used, nor are they ever so used in fact; and we ought in my opinion to deal with the case on broad business lines and not on unpractical though theoretically possible assumptions. If these perforated rolls were new, it appears to me that their invention might be patented; and this could not in my opinion be said of any copy of any book. It may be true that the manufacture and sale of the perforated sheets diminish the sale of the plaintiffs' sheets of music. But it does not follow that the plaintiffs' copyright has been infringed; and I am of opinion that it has not. I regard the defendants' perforated sheets as part of a mechanical contrivance for producing musical notes; and I cannot think that manufacturers of musical instruments infringe any person's copyright by so constructing their machines and appliances to be used with them as to produce musical notes indicated on a sheet of music. On this broad and very important question, which so far as I know has never been raised before in this country, I am of opinion that the decision of Mr. Justice Stirling is correct. There is, however, another but comparatively subordinate question on which I am unable to agree with him. He has restrained the defendants from copying the directions on the plaintiffs' sheets of music to the person using them. The defendants' appeal from this part of the judgment ought in my opinion to succeed. The directions in the plaintiffs' sheets of music are no doubt protected by their copyright so long as they are used in connexion with their musical scores. But apart from those scores the plaintiffs have no copyright in such directions. The directions are not in themselves a sheet of music, nor are they a sheet of letterpress separately published. Even if they were they would be mere words, not sentences forming a literary composition in which copyright could be acquired. Upon this point the case is governed by "*Hollinrake v. Truswell*" ([1894] 3 Ch., 420), and the injunction granted by Mr. Justice Stirling to restrain the use of these directions must be discharged. The net result is that the plaintiffs' action wholly fails. Their appeal must be dismissed and the defendants' appeal allowed. The order appealed from must be varied by striking out the injunction, and judgment must be entered for the defendants with costs here and below.

LORD JUSTICE ROMER read a separate judgment to the same effect. He said that the rights under the Copyright Act of an author of a musical piece were (1) to prevent others from copying the published music regarded as a book; and (2) to prevent the music itself being performed in public without the author's permission. But any one might perform the music in private. The Act, in his judgment, never contemplated that the cylinder of a musical box, taking that as one of the best known mechanical instruments, could be regarded as a copy of the printed music, even though an accomplished musician might be able by inspection of the cylinder to gather from it the notes of the music. In the present case the sheets which were said to be copies of the plaintiffs' published sheets of music were issued only for the purpose of being used as parts of a mechanical musical instrument to produce musical sounds. In no practical or substantial view could the defendants' sheets be regarded as copies within the meaning of the Act of the plaintiffs' sheets of music regarded as books. The plaintiffs' sheets and the defendants' sheets were issued and used for substantially different objects. He

also agreed with the Master of the Rolls, though with some doubt, that the defendants' appeal ought to be allowed.

[Solicitors—Wilkinson, Howlett, and Wilkinson; Maples, Teesdale, and Co.]

Court of Appeal (Lindley, M.R., } 1899.
Jeune, P., and Romer, L.J.) } Dec. 13.

TAYLOR V. ANNAND.*

Patent—Infringement—Mechanism for facilitating rapid application of type to newspaper printing machines—Proper subject-matter for patent—Alleged anticipation—Patent held valid.

Judgment was delivered upon this appeal against a decision of Mr. Justice Cozens-Hardy, reported in *The Times* of March 30 last. Judgment was reserved on the 4th inst. The action was brought by the assignees of letters patent (No. 5,470 of 1886) granted to John Henry Burton and others for "improvements in arrangements and mechanism to facilitate the rapid application of type representing late news or matter to, and the printing of the same by, newspaper printing machines. The plaintiffs sought an injunction and consequential relief in respect of an alleged infringement of the patent by the defendants. The plaintiffs' invention, although not at first of much pecuniary value, became at a later period largely used, but almost, if not quite, universally with a modification introduced in 1888 by a subsequent patent, which was not, however, the subject of consideration in the present action. The object of the invention was to meet a want felt by the publishers of newspapers, and especially of evening newspapers, of a rapid means of inserting late news coming to hand after the stereotypes have been fixed on the main printing cylinders. In the earlier editions of evening papers there is a blank space left for late news, and the plaintiffs' invention provided a method of filling up this blank space. The nature of the invention is stated in the judgment of Lord Justice Romer. Mr. Justice Cozens-Hardy dismissed the action. He was of opinion that the alleged invention had been anticipated by prior specifications, and that it did not form proper subject-matter for a patent. The plaintiffs appealed.

Mr. Astbury, Q.C., and Mr. J. C. Graham were for the plaintiffs; Mr. Moulton, Q.C., and Mr. A. J. Walter were for the defendants.

The COURT allowed the appeal.

LORD JUSTICE ROMER read the following judgment of the Court. The invention disclosed in the patent of 1886, which is the subject of this appeal, is one limited in its scope, but of considerable practical importance. It relates to the most modern form of newspaper printing machines, known as the Endless Webb letterpress printing machines. These machines were the outcome of the discovery how to rapidly make and print with small cylindrical stereotypes. They had numerous advantages over prior printing machines, but had, prior to the invention in question, a defect which was a substantial one to newspapers, and especially to evening newspapers, which have to publish rapidly the latest news arriving. To insert late news the only available method was to cut away a sufficient portion of the stereo, and replace it by short ordinary type. But this took time, and, owing to the small size of the main printing cylinder, and the rapidity of its motion when printing, there was a difficulty in holding the ordinary type in a box so as to print properly, and in fastening the box to the cylinder, and only a small box and a small amount of type could be used, so

that, before the invention, only a small portion of news could be inserted in any one place, and the practical method of insertion was as follows:—A box, called a "fudge box," was used for the type. It was of necessity small, and held the type badly from a printing point of view, inasmuch as the surface of the type was not properly concentric with the cylinder, and only a few lines could print properly. Moreover, the method by which the box was fastened to the cylinder was clumsy and slow, for the box had to be fixed by its insertion into a corresponding small shallow hole in the stereo, which hole had either to be cut out for the purpose when wanted, or to be previously shaped when the stereo was made. The defects of this method of printing late news were apparent for some years, but prior to the invention no remedy for them had been discovered. The invention may be shortly described as consisting of the employment of a short movable printing drum, revolving on an axis parallel with the axis of the stereo cylinder, and capable of having quickly inserted and holding firmly on its surface boxes of ordinary movable type, whose face should be concentric with the drum. This drum was so adjustable and geared that any column of the paper left unprinted on by the main stereo cylinder could be printed on by the type on the face of the drum. It was necessary for the complete success of the invention that the box should be one into which type could be quickly and firmly fixed, and so that when fixed the type should have its face concentric with the drum. The patentees invented and by their specification described a special mode of packing a box with type to answer the above requirements. The above invention was undoubtedly an ingenious and useful one, and was made additionally useful by a subsequent improvement, by which the boxes round the drum could be so arranged as to make the surface of the printing types in them continuous. With that improvement we are not directly concerned in this action, and only mention it because of a suggestion made on behalf of the defendants that it was the improvement alone which made the invention useful. In our opinion that suggestion is unfounded. The defendants contend that the invention was anticipated, and, failing that, they then contend that, having regard to the state of knowledge at the time the improvement described by the patentees was made, there was not sufficient invention on the part of the patentees to justify a patent for the improvement, or, in other words, that there was no proper subject-matter for the patent. With regard to the alleged anticipation, the defendants only rely on certain prior specifications. They do not venture to allege anything beyond what may be called "paper anticipations." We have considered the specifications relied upon before us by the defendants' counsel, and, in our opinion, none of them constitutes an anticipation of the invention. We need only mention one or two. Take Applegarth's of 1858. That was before the stereo machines, the subject of the plaintiffs' 1886 patent, came into use, and Applegarth was not considering or dealing with such machines. The special problem which was solved by the patent of 1886 was not before Applegarth. He was not considering or dealing with the difficulty of quickly printing stop news in a modern printing machine. What Applegarth was primarily thinking of was printing in colours, though he does point out that his machine could be used for printing other matter. He, no doubt, pointed out that you could do the printing then ordinarily done by a large cylinder by employing smaller auxiliary cylinders to do part of the work. But he nowhere points out or suggests the use of a small movable drum, or any means for rapidly fixing or holding securely ordinary type on his auxiliary cylinder with curved face to the type so as to print correctly. His improvement as

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

applied to the modern stereo machine would have been of no practical use whatever. And, however valuable may have been his general idea of the use in printing off small auxiliary cylinders, it seems quite clear that in no true sense could his specification be called an anticipation of the 1886 patent. In the next place Duncan and Wilson's specification of 1879 should be mentioned. That is instructive, because it was after the modern stereo machine had come into use, and it shows an ingenious attempt to solve the difficulty which was only successfully solved by the patent of 1886. Duncan and Wilson's method was a failure. They employed an auxiliary cylinder, and pointed out that a full cylinder need not be employed, but they did not employ or refer to a movable carrier or drum like that of 1886, and only suggested the use of type arranged so as to form a flat surface, but acted upon by a spring or cam so as to come out when desired and print. Their method was in no way an anticipation of the plaintiffs' patent, but is of importance as showing what invention was required to arrive at the patent of 1886. Lastly, we may refer to Mewburn's specification of 1885. That really carried matters no further than Applegarth's of 1858, except that it suggested for holding types the use of grooves running along the whole length of the auxiliary cylinder. It in no way suggested the use of the small movable drum or any practical way of holding type with a cylindrical face to be fitted in the grooves, and the machine shown in Mewburn's specification, without alteration so as to make it like the plaintiffs', would have been useless for practical work, and consequently it appears not to have come into use. We now pass on to consider the next contention of the defendants as to there being no proper subject-matter for the plaintiffs' patent. It appears to us impossible in the circumstances of this case to say that there was no invention properly so called required to arrive at the improvement patented, or that the plaintiffs' patent was in substance one merely for the application of a known machine or tool to a new want. Prior to the invention there was no known machine which would do in any practical or efficient way the special work done by the improved machine described in the patent of 1886. And, in our opinion, to arrive at that improvement there was required on the part of its discoverers great ingenuity and invention in the true sense of the word. Now that the way to effect the improvement is known it is easy to belittle it. It can, of course, readily enough be pointed out that the principle of using a small auxiliary cylinder was known before; that a drum is only a small cylinder; that a movable drum was not in itself a new discovery; and so forth. This process of undermining an invention is well known, and, if allowed to prevail, would destroy many valuable and undoubtedly valid patents. But the process is radically wrong. The way to ascertain whether a novel and useful improvement in machinery required invention in the true sense is to consider how matters stood just before the improvement was discovered. In the present case, looking at the state of public knowledge at the time of the improvement in question, it appears to us impossible to say that to arrive at it no real invention was required, or nothing more than a happy idea of using for the purpose some tool already at hand. But we need not further dwell upon the point. Sufficient commentary is afforded by the facts that for years the defects in the stereo-machines to which we have previously called attention remained unremedied, and that when Duncan and Wilson tried to remedy it they could only suggest means which differed considerably from those adopted by the patent of 1886, and which failed. There still remain for consideration some minor questions, chiefly depending on the special claims made by the specifica-

tion. As we have already pointed out, the inventors as part of their invention designed a special means of speedily and efficiently fastening in a box type which should have, when fixed, a true cylindrical surface. This special way of fastening forms the subject of the first claim, while the second claim is for the combination of the special way of fastening and the movable drum. Both these claims are undoubtedly good, for practically the defendants cannot deny that, limited as it is to a special means of fastening, the first claim is valid. But the defendants denied that they are using that special means, and say, therefore, that they have not infringed claims 1 and 2. Mr. Justice Cozens-Hardy has held that the defendants have not infringed claims 1 and 2, and we are not prepared to differ from him in this. The plaintiffs, though not admitting that these claims have not been infringed, have not strenuously argued the point, for they say that it is practically unimportant to them whether the defendants have or have not infringed the first two claims, if they are held to have infringed the third claim, and it was on this third claim that the plaintiffs chiefly relied. This brings us to a consideration of the third claim. On the construction of this claim we agree with the plaintiffs, and with the view taken by the learned Judge, that it is not restricted to a combination involving the use of the special means of fastening the subject of claim. The claim is for a combination of the special drum with (stating it shortly) the ordinary stereo-machine, but "substantially as and for the purpose" described in the specification, and illustrated by the drawings. This covers the main invention to which we have above referred, and though the patentees rightly enough have not confined their invention to the special fastening, they clearly indicated in their specification and drawings that their drum is to be one capable of carrying, and in use carrying, a box holding properly packed type capable of printing on the spaces in the papers left for the purpose unprinted on by the main cylinder. Having shown by their specification and drawings one efficient means of holding the type in a box, the patentees have done what was necessary, and they then, by claim 3, point out in effect that their invention can be used (as it obviously can) with any other efficient type-holding box, and they claim accordingly. The Court below came to the conclusion that, because claim 3 was not limited to the special means of fastening in the box, it was too wide, and that the main invention had been anticipated, or was not the proper subject matter of a patent. For the reasons already stated we cannot agree with this view. The learned Judge appears to us to have placed too much reliance on the evidence of Mr. Beaumont (the defendants' only witness), a gentleman who apparently had no practical acquaintance with the modern printing machines, and seems not to have realized the difficulties in the way of the inventors, or appreciated the evidence given on behalf of the plaintiffs. The last point we have to consider is one taken by Mr. Moulton and most ingeniously and ably argued by him. It was not taken in the Court below, nor was the attention of the witnesses called to it. It is said (truly) that claim 3 refers to the drum marked (b) in the drawings, and that in the drawings and specifications no type-holding box is shown or suggested, except one which has a dovetailed base to be inserted into a corresponding dovetail opening on the surface of the drum and so held. It is said that, as speed in the insertion of late news was of the essence of the patented invention, the dovetail was important. From this it is argued that claim 3 is limited to the dovetail, and it is then said that the defendants have not used the dovetail, and that consequently there has been no infringement. Even assuming that this point is now open to the defendants, it appears to us unsound. When

the nature of the invention is considered it is clear that the particular method of fastening the box on the drum was comparatively unimportant, and formed no part of what has been called the pith and marrow of the invention. It must be remembered that claim 1 has nothing to do with the shape of the box itself, but is concerned only with the means of fastening type inside the box. And, when it is seen what the defendants have done, it is obvious that they have substantially taken and used the main invention the subject of claim 3, making only a colourable alteration in the way the box is fastened to the drum. In fact, even if the dovetail had formed an essential part of the invention, it is by no means clear that the defendants ought not to be held to have infringed. When their box is in position and held firm on the drum it is really held by a species of dovetail. But we need not decide that. It is sufficient for us to say that, in our opinion, the defendants have infringed claim 3, by substantially taking and using the invention thereby claimed. In the result, the order of Mr. Justice Cozens-Hardy must be discharged. It must be declared that the plaintiffs' patent is valid, and, if asked for, a certificate that its validity came into question in this action must be given. Then it must be declared that the defendants have infringed claim 3, and the usual injunction and order for an account must be granted. The defendants must pay the general costs of the action here and below. The plaintiffs will, of course, as part of their costs get the costs of the issues on which they have succeeded. On the other hand, the defendants will get the costs of the issues as to infringement of claims 1 and 2, with a set off of costs.

The defendants' counsel suggested that there would be an appeal to the House of Lords, and asked that there might be a stay of proceedings under the judgment pending the appeal, especially as the patent would expire in four months.

The MASTER of the ROLLS said that there was no ground for granting a stay of proceedings.

[Solicitors—W. J. and E. H. Tremellen, for A. MacDonald Blair, Manchester; J. H. and J. Y. Johnson, for W. J. S. and J. A. S. Scott, Newcastle-on-Tyne.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.JJ.) } Dec. 13.

GRANT V. THE GOLD EXPLORATION AND DEVELOPMENT
SYNDICATE (LIMITED.)*

Principal and Agent—Secret commission—Bribe
to agent of vendee—Liability of vendor.

This was an appeal by the defendants from the judgment of Mr. Justice Bigham; reported in *The Times* of January 24 last. The action was brought to recover a balance due to the plaintiff in respect of a sale of a gold mine to the defendants. The defence consisted of a counter-claim for £500, being the alleged balance of a commission which the plaintiff had promised to pay to a Mr. Govan, one of the directors of the defendant syndicate. The only question in the case was whether the defendants were entitled to succeed on the counter-claim. The facts, as found by the learned Judge in the Court below, were as follows:—In August, 1896, Govan, being then a director of the defendant syndicate, went to British Columbia for the purpose of buying mining properties on the syndicate's behalf. He there met the plaintiff, who had for sale a property of the kind wanted. He told the plaintiff that he might be able to float a company which should buy the property, but that if he did so he should require a commission. Thereupon the

plaintiff gave Govan a commission note by which he agreed to pay to Govan 10 per cent. on all sums, whether cash or shares, received by him on the flotation of the company. At the time the plaintiff gave this note to Govan he did not know that Govan was acting for any principal. He gave it in perfect honesty and good faith. Subsequently the plaintiff came to England, and it was agreed between him and Govan that the price to be paid to him for the mine should be £25,000 in cash and £115,000 in fully-paid £1 shares of the new company. After the price had been fixed, the plaintiff ascertained that Govan was making the purchase as agent for the defendant syndicate, who were to form and float the company, and a little later, in January, 1897, a contract was concluded between the plaintiff and the syndicate by which the plaintiff sold the mine to the syndicate at the price fixed by Govan. The company was floated, and 115,000 shares were duly allotted to the plaintiff. Ten per cent. of the shares, amounting to 11,500 shares, were put into the name of a nominee at the request of the plaintiff and were accepted by Govan as payment of that part of his commission. The syndicate then paid the plaintiff £10,000 cash, leaving a balance due of £15,000. The plaintiff, in March, 1897, saw Govan about it, who said he would get the syndicate to pay £5,000 in cash, and the balance, £10,000, by a four months' promissory note. Govan stipulated, however, with the plaintiff that if he procured this settlement with the syndicate his (Govan's) cash commission should be paid at once, without waiting for the £10,000 promissory note to mature and be paid. Both the plaintiff and Govan regarded the cash commission as not payable until the plaintiff had in fact received his £25,000. The plaintiff agreed to this, on the terms that the cash commission should be reduced to £2,000, thus, in consideration of promising a present cash payment, getting the cash commission reduced by £500. The syndicate paid the plaintiff a further £5,000 and gave him the promissory note for £10,000, and the plaintiff paid Govan the £2,000. Half of the amount of the £10,000 promissory note was paid by the defendant syndicate when the note matured, and a new note for the remaining £5,000 with interest was given. It was on this latter note that the plaintiff now sued. The facts as to the agreement to pay Govan commission subsequently came to the knowledge of the syndicate, and a committee appointed to consider the matter reported that Govan should repay the £2,000 and return the 11,500 shares to the syndicate. Govan agreed to do this, and it was resolved that the repayment of the £2,000 and the transfer of the 11,500 shares to the syndicate be accepted in full satisfaction of the syndicate's claim. Subsequently the syndicate came to the conclusion that they were entitled to get from the plaintiff a further sum of £500, being the amount by which the commission payable to Govan had been reduced, and the syndicate claimed to deduct the £500 from the balance due on the promissory note. Their contention was that when the contract of sale was entered into the plaintiff had notice that Govan was the defendants' agent, and therefore knew, or ought to have known, that the defendants, and not Govan, were entitled to the benefits accruing under the commission note; and it was said that the plaintiff had no right to reduce the commission from £2,500 to £2,000. It was further said that the selling price of the mine had been increased by the amount of the commission. The learned Judge said that the plaintiff, when he ascertained what Govan's true position was, should have insisted upon paying the commission to the defendants. Probably, also, the plaintiff ought not to have made the arrangement for the reduction of the commission by £500, at all events not without the consent of the defendants. But the defendants had lost their remedy by their

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

conduct after they had discovered the real facts of the case. Knowing all the facts, they had elected to treat their rights as defined by the second agreement, and they thereby got the benefit of an immediate instead of a deferred settlement of the commission. They could not now say they were not bound by all the terms of the second agreement, one of which was that the commission should be reduced by £500. There would be judgment for the plaintiff on the claim and counterclaim.

Mr. Rufus Isaacs, Q.C., and Mr. T. W. Chitty appeared for the defendants; Mr. Duke, Q.C., and Mr. Kerly appeared for the plaintiff.

The COURT, having taken time to consider, allowed the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—The question in this case is, as to what is the position of a vendor of property, who pays a secret commission to a person whom he knows to be the agent of the vendee, and the facts are as follows:—By an agreement dated January 8, 1897, the plaintiff sold a gold mine in British Columbia, of which he was then possessed, to the defendant syndicate, and he sues the syndicate upon a promissory note for £5,000 given to him by them in part payment of the purchase-money. As to the sum of £500 the defendants counterclaim, and assert that upon the facts which they subsequently discovered they are entitled to recover this sum from the plaintiff, and it is agreed by the learned counsel on each side that this case is to be decided upon the admission that the plaintiff has received this sum of £500 from the defendants. I now revert to the facts antecedent to the agreement of January 8, 1897. In the month of August, 1896, the plaintiff, who, as before stated, was possessed of a gold mine in British Columbia, was desirous of selling it, and he there met a Mr. Govan. By an agreement in writing dated September 26, 1896, and made between the plaintiff and Govan, the plaintiff gave an option on his mineral claims to Govan for a period of six months, and in this agreement it was stated that the option was granted to Govan to enable him to deal with the properties with the object of forming one or more limited liability companies on the London market, and Govan agreed to use his best endeavours with regard to the successful flotation of such company or companies on terms to be thereafter discussed and settled between the plaintiff and him, the plaintiff agreeing to hand Govan on any such successful flotation 10 per cent. on all the sums received in cash or shares accruing to the plaintiff. It will be seen that by this agreement the plaintiff agreed to pay to Govan one-tenth of what purchase-money he might be able to obtain from the company which through his instrumentality was to be brought into existence to become the purchasers of the plaintiff's mine, and I agree with Mr. Justice Bigham that, when a vendor sells property subject to the payment by him of a commission, the commission is added to the price asked by the vendor; in other words, the purchase-money by reason of the commission to be paid by the vendor is loaded with the amount of commission so to be paid. At the time when this agreement of September 26, 1896, was entered into the plaintiff did not know that Govan was agent and managing director, as in fact he was, of the defendant syndicate, though he did know that Govan was connected with the companies. The learned Judge has found that at this time the plaintiff was acting with perfect honesty and good faith, but this by no means exhausts the case; for after the plaintiff came to this country, until which time the negotiations for sale were not completed, a new set of facts arose, which give rise to the defendants' counterclaim. In the month of December, 1896, the plaintiff came to England at the instance of Govan in relation to the sale of his gold

mine. Upon his arrival he went to see Govan, who had a room in the office of the defendant syndicate in Ryder-street. The plaintiff was constantly there, and he admitted in cross-examination that before the contract of purchase and sale of his property was entered into between him and the defendants upon January 8, 1897, he knew that Govan was a director of the defendant syndicate, and that he was, as such director, negotiating with him (the plaintiff) for the purchase of his property on behalf of the syndicate. The plaintiff made an effort in his evidence to get rid of this fatal admission, which was undoubtedly true, by suggesting he had sold the property to Govan before he knew of the above facts, but when pressed in cross-examination this suggestion was found to be without foundation, and in my judgment was clearly not the truth. The price fixed by the contract of January 8, 1897, was £140,000, of which £25,000 was to be paid in cash at certain named times, and the balance by a transfer to the plaintiff or his nominees of 115,000 fully paid-up shares of £1 each in a company about to be promoted by the syndicate. It appears to me plain that the meaning of what took place between the plaintiff and Govan was that one-tenth of the tenths of the purchase money was to go to Govan as commission, and Govan was to get up a company to buy the plaintiff's mine, and that the price which was to be paid to the plaintiff for the purchase of his mine was to embrace and cover Govan's cash commission of £2,500. At the time when the defendant syndicate contracted to purchase the plaintiff's mine—viz., on January 8, 1897—as a matter of fact the defendants had no knowledge of the arrangement made between their managing director, Govan, and the plaintiff as to the payment of this commission of £2,500 to him, nor did they discover it until the next year—viz., in March, 1898—under the circumstances hereafter mentioned. Upon March 17, 1897, upon which date payment of £15,000, part of the purchase money, had not become due, it was agreed between the plaintiff and Govan that, if Govan would get the defendant syndicate to pay to the plaintiff £5,000 in cash at once and £10,000 in promissory notes, he would give Govan £2,000 in cash down instead of £2,500 payable to Govan under the agreement of September 26, 1896, and which had not then become payable, and for which Govan would then have had to wait. The plaintiff admitted that at the time he made the agreement of March 17, 1897, for Govan to get him £5,000 in cash at once and £10,000 in promissory notes from the defendants, and for him to pay Govan £2,000 in cash, he (the plaintiff) knew that Govan was a director of the defendant syndicate and was acting for them. Govan succeeded in doing what was desired, and upon March 18, 1897, £2,000 in cash, and upon March 25, 1897, £3,000 in cash, making £5,000 in all, was paid to the plaintiff. The way in which the plaintiff then paid Govan his commission of £2,000 in cash down is very significant, and well worthy of attention, considering the arguments addressed to us by the plaintiff's counsel. The plaintiff under cross-examination admitted that he wrote out a cheque (this was on March 17, 1897) for £1,000, and went with this cheque to a bank where the plaintiff had an account, accompanied by Govan, that Govan took with him a bag, and that the plaintiff asked the cashier to give him bank-notes in exchange for the cheque, which the cashier did, and that the plaintiff thereupon handed £1,000 in notes to Govan. Upon March 25, 1897, the plaintiff drew another cheque for £1,000 to complete the bargain between him and Govan, and the same thing was repeated as regards this cheque as with the former, and Govan was handed by the plaintiff this £1,000 also in notes. It was in this way that the plaintiff paid the £2,000 commission to Govan. It is

also a fact of peculiar significance that, when the defendants had floated the new company, and 115,000 of its shares were allotted to the plaintiff in part payment of the purchase money of his mine, 10 per cent. of those shares—i.e., 11,500—were placed in the name of a Mr. Allingham at the request of the plaintiff, and this allotment was accepted by Govan as payments by the plaintiff to him of his (Govan's) commission which was to consist of shares. The plaintiff when challenged as to these transactions was unable to give any intelligible reason either for the payment of the £2,000 in the notes to Govan and not by cheque, or for the allotment of the shares in the name of Allingham. It has been well said that secrecy is a badge of fraud, and these transactions in my opinion constitute good evidence that the plaintiff knew well that Govan was receiving this commission from him without the knowledge or assent of the defendants. What then is the case proved? It is that a vendor is paying a secret commission to a person whom he knows to be the agent of the purchaser, in order to induce that agent to get the purchaser to pay the vendor a price for his property enhanced by the amount of the commission, of which fact the purchaser had no notice and the vendor knew that he had no notice. The evidence shows that the plaintiff subsequently quarrelled with Govan, and that the plaintiff through others gave information to the directors of the defendant syndicate of what had taken place as regards the agreements of September 26, 1896, and March 17, 1897, and the payment of commission to Govan. I do not understand that the plaintiff informed the directors of the way in which he had paid the commission to Govan. The directors of the syndicate then called upon Govan to explain what he had done and to return the £2,000 which he had received from the plaintiff, and he thereupon paid to the syndicate the £2,000, and they also insisted that the £500 which formed part of the purchase money and which the plaintiff had received should be returned to them by him, and they refused to meet the promissory note sued on so far as £500 was concerned, and set up the counter-claim in this action alleging that the 10 per cent. commission was a secret profit or bribe by the plaintiff to Govan, their agent, and that they had unknowingly paid to the plaintiff the amount of the contracted commission (£2,500) in the purchase money of the mine. Apart from the point upon which my Brother Bigham decided against the defendants, it appears to me that the defendants are in the right in the position they took up, and indeed had it not been for this point, about which hereafter, the learned Judge would have decided in the defendants' favour, for the whole tenor of his judgment shows that he would have done so. In my judgment the contract of purchase of January 8, 1897, was a corrupt bargain, as was also the contract of March 17, 1897, and the evidence shows that, when each of those contracts was entered into, the plaintiff well knew that the defendant syndicate had no knowledge of the commission contracted to be paid to Govan by the plaintiff, nor that the purchase money they agreed to pay to the plaintiff was enhanced by the amount of that commission. It was said by the plaintiff's counsel that the case in the House of Lords of "*Cavendish Bentinck v. Fenn*" (12 App. Cas., 652) decided that where a person charges fraud, the onus is upon him to prove it, and to establish his charge in a case like the present he must establish that the person charged had not communicated the act complained of to the injured person, and unless he proves this the charge is not made out, for it is possible that he may have made the communication, in which case there would be no fraud, and "further he must prove that the person making the charge has, in fact, been injured by concealment. Assuming that in the present case this

onus of proof is upon the defendants, though I am by no means certain that it is, I say that the defendants have satisfied this onus, and shown out of the plaintiff's own mouth that he knew that Govan had not disclosed to the defendants the fact that he was receiving commission from the plaintiff, and that they have also proved that they have been injured by the amount by which the purchase money had been increased to pay the contracted commission. For the same reason I need not discuss the case before my brother Romer of the "*Lands Allotment Company v. Broad*" (13 The Reports, 699). The case in this Court of the "*Mayor of Salford v. Lever*" ([1891] 1 Q.B., 168) is a clear authority that where an agent who has been bribed to do so induces his principal to enter into a contract with a person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies—he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of entering into the contract, and it is immaterial whether the principal sues the agent or the third person first. This is the head note of this case, and accurately describes what was decided thereon. A great deal of argument was addressed to us whether an action for money had and received would lie at the suit of the defendants against the plaintiff in this case. Lord Esher in the above case said it signified not what it may be called, whether damages or money had and received, and Lord Justice Lindley said:—"It is obvious that in some forms of action the corporation have a right to recover the shilling (i.e., the £2,500 in this case). Under the old practice, I think they could have recovered it by an action for money had and received, and probably they could have recovered it in more ways than one." It is not necessary upon the facts of this case to decide whether money had and received would lie, for I am of opinion that the £2,500 can be recovered from the plaintiff in action for damages for deceit, though I am by no means prepared to hold that an action for money had and received would not lie. Apart from what I am now coming to and upon which Mr. Justice Bigham decided adversely to the defendants, I am of opinion that the defendant syndicate have a good counter-claim against the plaintiff to recover the sum of £500. The point upon which Mr. Justice Bigham decided against the defendants was that in April, 1898, they settled with Govan after they had notice of the agreements of September, 1896, and March 17, 1897, and that they therefore knew that Govan had agreed with the plaintiff for a reduced commission of £2,000, and the learned Judge held that the defendants thus elected to adopt the agreement of March and take from Govan the £2,000 which he had received under it from the plaintiff, for if there had been no such agreement Govan would not by then have received any commission at all. But how does this afford any answer by the plaintiff to the good cause of action which the defendants then had against him? The plaintiff was no party to this settlement with Govan, which was made solely between the defendants and Govan. The agreement with Govan which is recorded in a resolution of March 23, 1898, was only a wiping out and settlement by agreement of the claims of the defendants against Govan, not against the plaintiff. The resolution was as follows:—"It is resolved that the repayment of the £2,000 offered by Mr. Govan be accepted with his assurance that he received the money in the full belief that he was justified in accepting it and without any dishonourable intention and thereby unwittingly made a mistake." With all submission to my brother Bigham, I cannot see how this settlement with Govan gets rid of or affords any answer

to the cause of action which the defendants had against the plaintiff any more than the agreement which was set up in the "Salford case" by way of defence was held to afford an answer by the defendant Lever. For the reasons above I think judgment must be entered for the defendants upon their counter-claim, with costs of action here and below.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS read judgments, in which they also arrived at the conclusion that the appeal ought to be allowed.

[Solicitors—Gush, Phillips, Walters, and Williams, for the plaintiff; Snell, Sons, and Greenip, for the defendants.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Dec. 13.

THE QUEEN V. LONDON COUNTY COUNCIL.*

Metropolis—Sewers—London County Council—
Absolute obligation to make sewers—Metropolis Management Act, 1855, sec. 135—Local Government Act, 1888, sec. 40 (8).

This was an appeal from the judgment of a Divisional Court, consisting of Mr. Justice Grantham and Mr. Justice Kennedy, on a motion to make absolute a rule nisi obtained November 25, 1898, for a *mandamus* to the London County Council commanding them to consider and determine whether they thought any, and, if so, what, sewers and works, or diversions, or alterations of any existing sewers or works vested in them and referred to in section 135 of the Metropolis Management Act, 1855 (18 and 19 Vic., c. 120), were necessary for the effectual sewerage and drainage of that part of the metropolis which was situate in the parish of Charlton, within the Lee district and near to the southern outfall main sewer, and, further, commanding them to make such sewers or works, if any, or such diversions or alterations as aforesaid as they might think necessary for the effectual sewerage or drainage of the said part of the metropolis, and, further, commanding them to cause the southern outfall main sewer to be kept so as not to be a nuisance, and for such purpose to construct and place either above or under ground such reservoirs, sluices, engines, and other works as might be necessary in accordance with the said section of the said Act and section 40 (8) of the Local Government Act, 1888 (51 and 52 Vic., c. 41). The proceedings before the Queen's Bench Division are reported in *The Times* of July 3. The affidavits on which the rule was obtained showed that the Lee district was constituted under the Metropolis Management Act, 1855, and other Acts, including the Plumstead and Hackney Act, 1893, whereby the district included, amongst other parishes, the parish of Charlton within the administrative County of London. They alleged that effectual and necessary works for the proper drainage of Charlton had not been provided by the London County Council. When the main (south outfall) sewer was constructed in 1861 by the Metropolitan Board of Works no provision was made for the sewerage or drainage of the lower part of Charlton and adjoining land in Woolwich and Greenwich and for other low-lying lands in Plumstead. The land in Charlton contained about 167 acres, and before the construction of the said main sewer about 216 dwelling houses were standing on this area and many more stood on the adjoining low-lying land in Woolwich and Greenwich. Since 1861 the number of houses lawfully erected had increased, and on the 167 acres in Charlton there were now over 420 small houses with a resident

population of 2,000 people, besides 80 factories. The only sewers existing, or even possible, at the present levels of the Council's main sewerage system for draining such 167 acres were local sewers vested in the Lee Board of Works and running almost on a level and necessarily discharging into the Council's main sewer only about 2½ ft. from the bottom or invert thereof. To prevent flooding these local sewers had to be closed by entrance traps or peustocks when the main sewer of the London County Council was even less than half full. The local sewers were therefore for hours daily, and always in wet weather, mere elongated cesspools filled with the sewage and surface water of such low-lying lands and houses. It was alleged that the main southern outfall was defective and too small, and frequently led to the flooding of houses in Charlton. The Divisional Court were divided in opinion, Mr. Justice Grantham thinking that the rule should be made absolute, Mr. Justice Kennedy thinking that it should be discharged. Mr. Justice Kennedy having withdrawn his judgment in accordance with the usual practice, the judgment of the Court was that the writ of *mandamus* should issue. The London County Council appealed.

Mr. Cripps, Q.C., and Mr. Daldy appeared for the appellants; Mr. Lawson Walton, Q.C., and Mr. J. A. Hamilton for the respondents.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that prior to 1863 the Metropolitan Board of Works made two outfall main sewers, one on the northern side of the Thames, and one on the southern side, under the Metropolis Management Act, 1855, which contained provisions for stopping the sewage of London from being discharged into the Thames in the neighbourhood of the metropolis, and imposed on the Board the duty of constructing a new main drainage. The southern main sewer started from Wandsworth and extended along the right bank of the river, and debouched at Crossness Point. On the left hand side of this southern main sewer, between it and the river, lay the marshy land of North Charlton, which at the time when the main sewer was made was partly built upon. The making of the main sewer resulted in a most abominable nuisance to the district of Charlton. The affidavits showed that the houses were often flooded with sewage, and that sewage often lay under the floors of the rooms. Complaints as to this disgraceful condition of things had been made continually to the County Council ever since 1890. The County Council had appreciated the complaints, and had sent down experts to examine into the matter, but still the same sort of thing had been going on for years and years. Letters were written and memorials were sent in, and meeting of officials of the council had been held, but nothing had been done to remedy the state of affairs. Could anything have been done? The evidence showed that three things could have been done. The County Council might have put up a new pumping station, like those which they had in other places, or they might have established a duplicate system of drainage at Crossness, or they might have adopted a scheme of storm overflows. He could not see that the answers which the Council had made, as to expense or otherwise, afforded any excuse. In his opinion section 135 of the Metropolis Management Act, 1855, imposed upon the Board of Works the absolute obligation of making the sewers therein referred to, though it left the character of the sewers in the discretion of the Board. It further imposed on them a duty to keep all their sewers in such a way as not to be a nuisance or injurious to health. He thought the County Council had not performed the duty imposed on them of making the sewers required by the section, and that they had not taken all care and diligence to keep their sewers so

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

as not to be a nuisance. He therefore thought the rule ought to be made absolute for a *mandamus* and that the appeal must be dismissed.

LORD JUSTICE COLLINS said he was of the same opinion. He thought the County Council said in effect that they admitted their obligation to provide Charlton with drainage, but that they had provided such a scheme for the metropolis as a whole as they thought necessary, and that that scheme did not embrace the Charlton district at all, because they did not think it advisable to embrace it. Their affidavits showed that their scheme was never intended to provide for the marshy districts. They had not really taken the claims of Charlton into consideration at all. The Act imposed a duty upon them, and they had no discretion as to saying whether they would do their duty or not; the only discretion they had was as to method. He thought they had not made any reasonable answer to the case against them.

LORD JUSTICE VAUGHAN WILLIAMS agreed. He thought the County Council had a discretion as to the manner in which they should perform their statutory duty, but no discretion as to whether they should perform it or not. The affidavits showed that for reasons of policy they had determined not to perform a portion of their statutory duties. They could not now argue that they had done what they considered necessary, for the affidavits showed clearly what they considered necessary, and that they were not minded to do what they considered necessary. It was therefore right that the *mandamus* should issue.

MR. CRIPPS said he might now state that the County Council had determined to adopt a large scheme, which would provide proper drainage for the district in question.

LORD JUSTICE A. L. SMITH said the *mandamus* would lie in the office for 12 months, subject to a right to the prosecutors to apply to the Court again at the end of six months.

House of Lords (Lord Halsbury, L.C.,
Lords Macnaghten, Morris, Davey,
Brampton, and Robertson) } 1899,
Dec. 14.

RUABON STEAMSHIP COMPANY (LIMITED) V. LONDON ASSURANCE.*

Insurance—Marine—Repairs in dock—Dock dues—Survey for reclassification.

A vessel, insured under a marine policy against loss or damage by sea perils, having been docked to repair sea damage, was surveyed, on the owner's behalf, with a view to reclassification.

H.L. that the principle of "The Vancouver" (11 App. Cas., 573) did not apply, and the dock dues were not apportionable between the underwriters and the owner, but were to be borne by the former.

Decision of the Court of Appeal (14 *The Times* L.R., 320) reversed.

This appeal was twice argued, first on March 20 and 23 before a House constituted of the Lord Chancellor, Lord Watson, Lord Macnaghten, and Lord Morris; it was reargued by one counsel on either side on the first day of the present sitting, November 16, when judgment was reserved. The appeal involved only minute pecuniary considerations—the sum in controversy being only £2 5s.—but raised a principle of great moment to shipowners and underwriters. Mr.

Justice Mathew and the majority of the Court of Appeal held themselves concluded by the decision of the House of Lords, about 13 years ago, in the "Vancouver case" (reported in 2 *The Times* L.R., 857, 11 App. Cas., 573; 56 *L.J.*, Q.B., 100). The appeal was from an order of the Court of Appeal made on March 30, 1898, dismissing with costs an appeal by the appellant company against a judgment given by Mr. Justice Mathew on August 6, 1897, in favour of the respondents in an action in which the appellants were plaintiffs and the respondents defendants. The appellants were owners of the steamship Ruabon, which they insured under various policies, including a policy effected with the respondents for £2,000, against loss or damage by perils of the sea. On November 30, 1895, while the policy was in force, the Ruabon, while on a voyage from Kustendji to England, stranded and suffered damage, for which it was admitted that the underwriters were liable. She was accordingly taken to Cardiff and put into dry dock for the purpose of having the necessary average repairs effected. After the repairs were completed, an average statement was prepared, according to which the respondents were liable to the appellants in the sum of £82 5s. From this, however, the respondents claimed to deduct £2 5s. for the following reasons:—While the ship was in dry dock, in the course of repairing the damage caused by the stranding, the appellants took the opportunity of calling in Lloyd's surveyor to look at the ship, and ascertain whether any repairs were necessary to enable this ship to pass her No. 1 Lloyd's classification. The surveyor certified that no classification repairs were necessary, and the ship accordingly passed her classification. The time at which it would be necessary for the ship to be classified had not at that date arrived, but by the rules of Lloyd's Register the time might be anticipated, and the owners were at liberty to call for a survey at the time when the ship was in the dry dock. The appellants, however, contended that they did not in fact take the ship into dry dock, and the dock expenses were not incurred for the purpose, or with the intention, of having the ship surveyed and classified, the appellants only having taken advantage of her being there to call in the surveyor to sight her bottom and see whether classification repairs would be necessary, and that the time during which the dock was used for effecting the underwriters' repairs was not in any way increased and no additional expenses were incurred by reason thereof. The respondents contended that as the ship in fact underwent her classification survey at the same time that the average repairs were effected the docking expenses ought to be divided between owners and underwriters. They accordingly deducted from the sum of £82 5s. (for which they were liable according to the average statement) the sum of £2 5s. as representing the proportion of that portion of the docking expenses which was attributed to the defendants by the average statement which the defendants contended ought to be borne by owners. No evidence was called at the trial, the action being tried on admissions made by the parties. The admissions were:—1. That the vessel in fact passed her No. 1 Classification Survey at Lloyd's Register of British and Foreign Shipping as required by the rules when she was in dock, the opportunity of her being in dock being taken to see if reclassification repairs were necessary. 2. That docking was necessary for the vessel to pass such survey. 3. That items amounting to £25 were proper charges for the work done. But the first admission was made subject to the following qualification or limitation:—"Not that she went into dock for that purpose, nor that any such repairs were done, nor that the time had arrived at which it was necessary for her to pass such survey." A like qualification was attached to the second and third

* Reported by J. B. in *The Times*, Eng. Business Law.

admission. It was contended on behalf of the respondents that the case was governed by the "Vancouver Case," and that, inasmuch as the appellants had in fact used the dock for the purpose of survey and classification and derived a benefit therefrom, the above-mentioned expenses (which include the cost of entering and leaving the dock) ought to be shared equally between the appellants and the respondents. It was contended that otherwise the appellants would obtain more than an indemnity from the underwriters, which they were not entitled to do. Mr. Justice Mathew gave judgment for the respondents on the ground that the present case was not distinguishable from the "Vancouver Case." This decision was affirmed in the Court of Appeal by Lord Justice Chitty and Lord Justice Collins, Lord Justice A. L. Smith dissenting. The appellants contended that in the "Vancouver Case" the only expenses incurred in the present case—viz., those of getting the ship into and out of the dock—were not in issue and were not considered by the Law Peers in the "Vancouver Case." The case is reported below (14 *The Times* L.R., 330; [1898] 1 Q.B., 722; 67 L.J., Q.B., 548).

Mr. Cohen, Q.C. (Mr. Montague Lush with him), was for the appellants; Mr. Joseph Walton, Q.C. (Mr. J. A. Hamilton with him), for the respondents.

The LORD CHANCELLOR.—The sum sought to be recovered in this case is a very small one, but the principle discussed and decided is one of very far-reaching importance, and I am unable to concur in the judgment of the majority of the Court of Appeal. The agreed facts may be very shortly stated. The steamship Ruabon having been placed in dock for the purpose of repairs, for which the underwriters were liable, while she was in dock the owner took advantage of the opportunity to have the vessel surveyed. It is part of the agreed facts that the holding of the survey added not a farthing to the cost, or a moment to the period of time during which the execution of repairs proceeded, and the question raised is whether the owner of the vessel is responsible on any reason known to the law to bear part of the expense involved in the docking of the vessel and keeping her there while the repairs were being executed. I notice that in more than one of the judgments it is said that the owner of the vessel used the dock for his own purposes. I think there is a fallacy in the employment of that word "used." He went on to his own vessel and held a survey, and I think it is not true to say that the dock was used for his purposes at all. He took advantage of the opportunity which was afforded to him by another person (the insuring company) being under contract to do that themselves which gave him an opportunity of seeing the vessel, and which, if he had been minded to make a survey, he would have had to pay for himself. But unless the phrase "using of the dock" is explained it seems to me to be fallacious first to say that he used the dock and then to infer that as he used the dock he is called upon to pay for it. I propose to examine in detail the various cases, or rather the various classes of cases, where the right to contribution has been held to be part of our law. But it seems to me a very formidable proposition indeed to say that any Court has a right to enforce what may seem to be to them just, apart from common law or statute. The Courts, no doubt, will enforce the common law, and will apply it to new questions of fact which arise; but I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it. Many cases might be put where the generality of such a proposition would be plainly contrary to any received principle, and to my mind the

question now in debate—admitted to be absolutely novel—would not be covered by any principle known to the law, except such a general proposition as I have indicated above. Now I am unable to affirm that that is the condition of the common law. The doctrine of "Average" has been repeatedly held to be a rule derived from the Maritime Law of Rhodes. In his judgment in "Strang v. Scott" (14 App. Cas., 601) Lord Watson said, "The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text as presented by Paulus (Dig. L. 14, tit. 2) is, 'Si levandæ navis gratia jactus meicium factus est, omnium contributione sarcitur, quod pro omnibus datum est.'" Lord Bramwell, it is true, in "Wright v. Marwood" (7 Q.B.D., 67) rested it upon an implied contract *inter se* to contribute by those interested. Lord Esher, on the other hand, in "Burton v. English" (12 Q.B.D., 220), spoke of it as a right arising not from any contract at all, but from the old Rhodian laws, which had been incorporated into the law of England as the law of the ocean. It is not necessary to go minutely into the arguments arising from the difference of opinion as to the origin of the law. It is, at all events, a known principle enforceable by the Courts resting either upon positive enactment adopted into our law or from an implied contract between the parties. So Lord Coke in "Sir William Harbert's Case" (2 Coke, Part III., p. 43) explains very clearly when dealing with "contribution." He says:—"Note, reader, when it is said before and often in our books that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him anything by way of contribution, but it ought to be intended that the party, who is only extended for the whole, may by *audita querela* or *scire facias*, as the case requires, defeat the execution, and thereby he shall be restored to all the mean profits, and compel the conusee to sue execution of the whole land; so in this manner every one shall be contributory, *hoc est*, the land of every *ter-tenant* shall be equally extended." Lord Redesdale, in the case of "Stirling v. Forrester" (3 Bligh, 596), said that "the decision in 'Deering v. Lord Winchilsea' (1 Cox, 318; 2 Bos. and Puller, 270), proceeded on a principle of law which must exist in all countries—that where several persons are debtors all shall be equal. The doctrine is illustrated in that case by the practice in questions of 'average,' &c., where there is no express contract, but equity distributes the loss equally. On the prize of wines, it is immaterial whose wines are taken; all must contribute equally. So it is where goods are thrown overboard for the safety of the ship, the owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation." I know of no case in which anything like the present claim has been advanced. There is no debt here for which both the parties in question are bound to some third person. It cannot be denied that the underwriters here were themselves bound to incur all the liability they did incur, and that the shipowner was under no such liability. There is here no joint ownership which makes a liability upon all partaking of that ownership, and which liability each is under an obligation to some third person to fulfil. In another part of Lord Redesdale's observations in the case of "Stirling v. Forrester," his Lordship makes clear what he means by his commentary on the case of "Deering v. Lord Winchilsea." He says:—"The principle established in the case of 'Deering v. Lord Winchilsea' is universal—that the right and duty of contribution is founded on doctrines of equity; it does not depend upon contract. If several persons are

indebted and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditors to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in *Deering v. Lord Winchelsea*, and in that case there was no evidence of contract as in this. So in the case of land descending to coparceners, subject to a debt, if the creditor proceeds against one of the coparceners, the others must contribute. If the creditor discharges one of the coparceners, he cannot proceed for the whole debt against the others; at the most they are only bound to pay their proportions." In all the cases that I have referred to, and in all the observations made by the learned Judges, the liability of each of the persons held to be bound to contribute is assumed to exist either by contract or by some obligation binding them all to equality of payment or sacrifice in respect of that common obligation. But this is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons, except that one person has taken advantage of something that another person has done, there being no contract between them; there being no obligation by which each of them is bound; and the duty to contribute is alleged to arise only on some general principle of justice—that a man ought not to get an advantage unless he pays for it. So that if a man were to cut down a wood which obscured his neighbour's prospect and gave him a better view, he ought upon this principle to be compelled to contribute to cutting down the wood. Or if a man built a wall so as to shield his neighbour's house from undue wet or danger from violent tempests he ought to be entitled to contribution because he has got an advantage from what his neighbour did. I can find no authority for any principle which includes this case. The heads of "average," "principal and surety," "joint debtor," or "ownership of lands," all of which are liable in execution and only one of which has been made the subject of execution, are intelligible heads of the law and are included within well-known and ascertained principles. This case seems to me to go entirely beyond those ascertained principles, and for which it would appear there is no authority. No statute has authorized it; no principle of the common law comprehends it; and I am therefore unable to concur with the judgment of the majority of the Court of Appeal. But it remains to consider whether the case is not covered by authority. That supposed authority is to be found in what has been called the "*Vancouver*" case, "*The Marine Insurance Company (Limited) v. The China Transpacific Company (Limited)*," reported in 11 App. Cas., p. 578. I cannot think that that case establishes any such proposition as is insisted on here. In that case the sole question was whether a particular average loss sustained by the respondent exceeded 3 per cent. within the meaning of the warranty. It is necessary to observe somewhat minutely the facts of that case, in order to see whether there is anything in it which affects the question now in debate. The *Vancouver*, the vessel in question, was insured in a time policy which contained the warranty "free from average under 3 per cent." During a voyage covered by the policy she sustained certain damage not known at the time, but when, some time after, the owners, for their own purposes of cleaning and scraping her, put her into dock the damage was observed then and there, and the underwriters were of course

liable to make good the particular average loss for which under the policy they were liable. The question having arisen in this form, and the owners having paid the whole of the dock dues while the vessel was being scraped and cleaned, and while simultaneously the obligation of the underwriters was being fulfilled by the repair of the damage, it was argued that the accidental circumstances of the owner having put his vessel into dock, and the underwriter having thereby escaped any liability to the dockowner for dock dues, the cost of repairs to him was thereby brought under the agreed amount of 3 per cent. What the Court had to determine was the liability under the policy in question, and with reference to that question which, be it observed, is to be measured by what the damage would cost to repair, the Court held that the dock dues were part of the cost, and that, under the circumstances, as the operations were simultaneously performed, the cost should be attributed (let the phrases be noted) in moieties to the operations of those two persons interested. Now the owner paid the dock dues, and if he had not done so the underwriter would undoubtedly have had to pay for dock dues, and if he had the amount paid would have been over 3 per cent. It came, in fact, to a calculation of the extent of the damage done, and that being measured by its cost of repair, it was held that the 3 per cent. was reached. What Lord Herschell meant is, I think, sufficiently explained by what he says in commenting on the case of "*Pitman v. The Universal Marine Insurance Company*" (9 Q.B.D., 192), as to the mode in which the particular average loss was to be arrived at in that case. He says all the Judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, he is entitled as a general rule to recover the sum properly expended in executing the necessary repairs, less the usual allowances. Now the facts found in that case relied on were that the vessel was put into dry dock on January 4, 1876. It was discovered on the afternoon of the same day that her stern post was broken. It was found by the special case that if the vessel had required nothing but scraping and cleaning, the purpose for which alone she was put there by her owners, she might have been finished and discharged by the evening of the 6th, whereas for the purposes of her repair, for which the underwriters were responsible, she required the whole time from the 4th to the 11th of January, when in fact she was discharged. How a mode of thus calculating the particular average loss so as to satisfy the contract between the two parties to it can justify such a proposition as is here insisted on I am wholly unable either to understand or to agree to, and I think this judgment should be reversed.

LORD MACNAGHTEN read a short judgment to the same effect.

LORD MORRIS and LORD DAVEY concurred.

LORD BRAMPTON.—My Lords,—I entirely concur in the judgment which has been delivered by the Lord Chancellor. I take the general rule to be correctly stated by Lord Herschell in the *Vancouver* case, "that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled to recover the sum properly expended in executing the necessary repairs less the usual allowances, as the measure of his loss. I take it also as admitted that, but for the matter I am about to mention, it would not be disputed that the respondents were liable under their policy to pay as an indemnity against the loss by perils of the sea which occurred, the full sum of £82 5s. claimed. This represents *prima facie* their responsibility. The respondents seek to reduce this amount by the sum of £2 5s. by reason of a survey of the ship which the

plaintiffs, the owners, caused to be made by Lloyd's surveyor, during the period the vessel was under repair on the pontoon, which, for this purpose, I may call a dry dock. If they are right in making a reduction on this account, no question being raised as to the amount, the respondents are entitled to retain the judgment pronounced in their favour by the majority of the Court of Appeal. Since the decision of "the Vancouver case" (11 App. Cas., 573), by which, of course, we are bound, and which to me seems to be founded on good sense, it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea, one of such operations being to effect repairs for the cost of which underwriters are responsible—the other to clean and scrape the ship necessitated by wear and tear, the cost of which must be borne by the owners themselves and neither of such operations could be performed unless the ship were drydocked, and both of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous drydocking; in such cases the cost of docking and all dock dues during the period the vessel is in dock, must be shared in proportion, having regard to the period of joint or separate actual use of it. I do not, however, find anything in the "Vancouver case" which would justify such division of dock dues, unless in such cases as I have mentioned. The present is a very different case. The Ruabon was drydocked solely to enable the underwriters to effect the repairs for which they were liable and with no other object, and no other repair was, in fact, done or required to be done; on the ship; the survey of Lloyd's surveyor was in no way necessary for any purpose connected with the work performed on the vessel, but was only made to entitle the owners to reclassification at Lloyd's, and need not have been made at that moment, nor at any particular time, so long as it was made within the time limited by Lloyd's rules, which had then nine months to run. It is quite true that if it had not then been made it would have been necessary if she were afterwards surveyed to have incurred the expense of again drydocking her at the owners' expense, and to that extent the owners might have been benefited. I say might, because the owners might have sold the vessel in the meantime, or some other thing might have occurred to render such survey unnecessary. Assuming, however, that the expense of another drydocking was in this way saved and that to that extent the owners were benefited, I think that circumstances are immaterial, and does not warrant a claim for contribution towards the dock dues imperatively incurred on the underwriters' account in the discharge of their obligations. I think that such contribution can only be insisted upon in those cases where work is done to the vessel itself, by two or more persons, each separately and simultaneously engaged under different obligations in doing portions of it, drydocking being necessary for each. If the respondent's claim for contribution were allowed I see no reason why such a claim might not be made against an owner who, while his ship was in dry dock sold her, subject to immediate inspection and survey by his purchaser. A variety of other cases similar in character might be suggested. I think the owners, in causing the survey to be made in this case, were taking what (in p. 588) Lord Herschell termed "an incidental advantage" from the fact that a damage arising from a risk within the policy has necessitated repairs at the expense of the underwriter; and he puts by way of illustration the case of a vessel

in ordinary course requiring scraping and painting at intervals of five years, and before the time for such operation has arrived meeting with a disaster by perils of the sea and docked for repairs for which underwriters were responsible; and the shipowner taking the opportunity of scraping and painting his ship. In repudiating the notion that the entire time occupied in that operation should be borne by the shipowner, he adds, "if they were to be borne by him at all." This observation of that noble and learned Lord makes it clear to me that he did not contemplate his judgment covering such a case as this, where nothing was in fact done on the ship and the survey did not in the smallest degree delay the completion or add one farthing to the expense of the repairs done for the underwriter. I think, therefore, this appeal should be allowed.

LORD ROBERTSON concurred.

The appeal was therefore allowed.

[Solicitors—Botterell and Roche, for the appellants; Waltons, Johnson, Bubb, and Whetton, for the respondents.]

Chan. Div. }
(Wright, J.) }

1899.
Dec. 14.

IN RE JOSEPH HARGREAVES (LIMITED).*

Company—Winding up—Jurisdiction of the Court
—Power to order production of documents—
Discretion—Companies Act, 1862, sec. 115.

In this case the liquidator desired production under section 115 of the Companies Act, 1862, by the Surveyor of Taxes of the Bradford First District of three balance-sheets of the company which, while it was a going concern, had been left with him for income-tax assessment purposes. He declined to produce the balance-sheets, and was supported in his objection by the Board of Inland Revenue, which passed a resolution as follows:—"In the opinion of the Board of Inland Revenue, who have duly considered the question, the production of the documents referred to in the summons . . . would be prejudicial and injurious to the public interests and service." A minute of this resolution was proved by the secretary to the Board.

Mr. P. WHEELER, for the liquidator, said that the liquidator represented the company which had furnished the balance-sheets, and no objection could be raised to the company itself seeing them. He also cited authorities to show that the objection ought to be made personally by the head of the objecting department.

Mr. DANCEWERTS, for the Board of Inland Revenue, contended that the objection was sufficiently taken by the minute.

MR. JUSTICE WRIGHT, in delivering judgment, said that the jurisdiction under section 115 was a special one, and by the terms of the section the Court had a discretion. If his Lordship had sufficient evidence that, in the opinion of the Commissioners of Inland Revenue the production of the documents would be injurious to the public interest, it would require very strong evidence to make him order production. Income-tax returns might contain very confidential matter, and persons making the returns should be able to be certain that the returns would be confidential. If it was shown that the production of documents which had got into the hands of an official might be necessary, there might be cases in which the Court could require the principal officer or head of the department to come into Court and prove that, in the opinion of those best calculated to judge, the production of the documents would be against

*Reported by F. EVANS, Esq., Barrister-at-Law.

public policy. See "*Beatson v. Skene*" (5 H. and N., 838). But "*Hennessy v. Wright*" (21 Q.B.D., 509) showed that the Court might allow other evidence to be adduced than that of the head of the department, and "*Kain v. Farrer*" (37 L.T., 469), which was discussed in that case, was not an authority against the Inland Revenue. The practice had been, except in exceptional cases, to accept the certificate of the Board, who could not very well come themselves. In point of form the objection was sufficiently taken, and no ground had been shown for overruling it. Even if his Lordship had the power to do so, he ought not, in his discretion, to overrule it. The application must be dismissed.

[Solicitors—*Jaques and Co.*, for Neill and Holland, Bradford; The Solicitor for Inland Revenue.]

Chan. Div.
(Farwell, J.) }

1899.
Dec. 14.

HEXTER V. PEARCE.*

Specific Performance—Agreement to grant lease—
Agreement affecting an undivided moiety of
lands—Decree of specific performance granted.

This was an action for specific performance which is reported only on the point set out below.

Mr. Warmington, Q.C., and Mr. Badcock, Q.C., appeared for the plaintiffs; Mr. Vernon Smith, Q.C., and Mr. Ward Coldridge for the defendants Mr. and Mrs. Pearce; Mr. T. L. Wilkinson for the other defendant.

The defendant Mr. P. W. Pearce is the owner in fee simple of an undivided moiety of certain lands, in all about 50 acres, near Teignbridge, in the county of Devon, and the defendant Mrs. Pearce is entitled to an annuity charged upon the said moiety. The plaintiffs, Messrs. Hexter and Humpherson, are pottery manufacturers carrying on business at Kingsteignton, in the same county. On May 11, 1896, the defendants, Mr. and Mrs. Pearce, agreed with the plaintiffs to grant them a lease of the clay and other minerals in or upon Mr. Pearce's moiety of the said lands as from the termination of the existing lease held by the other defendant Mr. W. H. W. Wilkinson. In September, 1898, Mr. and Mrs. Pearce refused to grant a lease to the plaintiffs, who now claimed specific performance of the agreement of May 11, 1896. In April, 1894, and in March, 1898, leases were granted to the defendant Wilkinson by all the persons in whom the said lands vested in undivided shares, giving him the right to raise merchantable potter's clay (with certain defined restrictions) from the said lands.

Mr. WARMINGTON, for the plaintiffs, said that there was no case which laid it down that specific performance could not be decreed of an agreement affecting an undivided moiety of lands, though, on the other hand, there was no reported case in which specific performance of such an agreement as the present had been decreed. "*Burrow v. Scammell*" (19 Ch. D., 175), however, was a somewhat similar case, and "*Porter v. Lopes*" (7 Ch. D., 358) might also be cited. The general rule was that unless specific performance was impracticable or would involve great hardship, it should be granted, and there was nothing in the present case to take it out of the general rule. The plaintiffs and Mr. Wilkinson could easily arrange a working agreement, and it must be presumed that they would act as reasonable men. Even if inconvenience should result, and he did not see why it should, that would not be sufficient to debar specific performance.

Mr. VERNON SMITH, for the defendants, Mr.

and Mrs. Pearce, argued that the Court should not grant specific performance of a contract when the result would be great inconvenience to the parties interested. The remedy in the present case should be damages. The result of specific performance would probably be a partition action and the appointment of a receiver, and the Court should hesitate before making a decree that might lead to further litigation. He relied on what was said in "*Price v. Griffiths*" (1 De G., McN., and G., 86).

Mr. WILKINSON followed on the same side. The evidence was to the effect that there were about three-and-a-half acres of merchantable clay left.

MR. JUSTICE FARWELL, in delivering judgment, said that the question was whether he should grant specific performance or merely award damages. Though the evidence had been somewhat conflicting, it was clear that it would not be impracticable for both the plaintiffs and the defendant Wilkinson to work the clay that was left under the land. Apart from the question of impracticability, either misconduct or great hardship was necessary in order to take away the right to specific performance. There was no direct authority on the point—"Price v. Griffiths" being clearly distinguishable—but it would be a strong thing to lay it down that specific performance could not be granted merely because the contract was concerned with an undivided moiety of lands. Whether the results of the contract would be inconvenient or not was a matter for the parties to consider when entering into it. He would, therefore, decree specific performance of the agreement.

Q.B. Div. (Darling and }
Channell, JJ.) }

1899.
Dec. 14.

BROWN V. THE COMMISSIONERS OF INLAND REVENUE—
GORDON V. THE SAME.*

Revenue—Stamp duty—Bond, whether issued or
offered for subscription in the United Kingdom
—Stamp Act, 1891, sec. 82 (1) (b) (i) and (ii).

The question in these two cases being similar they were heard together. They came before the Court in the form of cases stated by the Commissioners of Inland Revenue. In each case an instrument was presented to the Commissioners for their opinion as to the stamp duty with which it was chargeable. In the first case the instrument was a bond of the Norfolk and Western Railway, a company formed under the laws of the State of Virginia, U.S.A., for \$1,000, payable to bearer, or, if registered, to the registered holder thereof. The Commissioners were of opinion that the instrument was a marketable security by, or on behalf of, a foreign company which was made or issued in the United Kingdom, or which, if not issued in the United Kingdom, had been offered for subscription and given or delivered to a subscriber in the United Kingdom within the meaning of section 82 (1) (b) (i) and (ii) of the Stamp Act, 1891, and they assessed duty on the bond at the rate applicable to marketable securities transferable by delivery—namely, 1s. for every £10 or fractional part of £10 of the money secured. The points at issue were (1) whether the bond was issued in the United Kingdom and, if not, (2) whether it was offered for subscription and given or delivered to a subscriber in the United Kingdom. The bond was one of a series of bonds given by the Norfolk and Western Railway in pursuance of a scheme for the reconstruction of the Norfolk and Western Railroad Company. The last-mentioned company had a large share capital and had issued a large number of bonds of various descriptions, upon which the interest was largely in arrears. A

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

scheme for the reconstruction of the company under the name of the Norfolk and Western Railway was devised to be carried out by a committee in New York. Every bondholder whose security would be affected by the scheme was invited, by means of a circular, to become a party to the scheme, and to deposit his security with a depositary appointed for the purpose in each of the countries where the bondholders resided. Every bondholder who so deposited his security received in exchange a certificate of deposit. When a considerable number of the bondholders whose securities were affected had deposited their securities, a foreclosure decree was obtained against the old company, and its property was conveyed to the new company. Thereupon under the scheme the holders of certificates of deposit became entitled to receive bonds in the new company in proportion to their holdings in the old company. On various dates between December 2, 1896, and January 18, 1897, the new company executed and delivered to the Mercantile Trust Company bonds, of which the bond in question was one, to the value of \$23,322,500. This was the total number of bonds (less \$175 not delivered) which would have been exchangeable against certificates of deposit representing disturbed bonds of the old company had all the holders of such disturbed bonds assented to the scheme. The great majority of the bondholders assented to the scheme. The Mercantile Trust Company, having, in accordance with the scheme, duly certified the new bonds, delivered them in New York to the secretary of the committee formed to carry out the scheme of reconstruction. The secretary redelivered them in New York to the Mercantile Trust Company for distribution to the various holders of certificates of deposit. The Mercantile Trust Company accordingly forwarded to Messrs. Brown, Shipley, and Co., the depositary appointed to receive the old bonds in England, the number of new bonds to which holders of certificates of deposit given out by them were entitled. The bonds were subsequently handed to the holders of the certificates of deposit on presentation and in exchange for those instruments. Among the bonds sent to Messrs. Brown, Shipley, and Co. was the bond in question, which was handed by Messrs. Brown and Shipley to the appellant in exchange for a certificate of deposit. The old bonds were handed to the committee, who cancelled them. It was contended on behalf of the appellant that the delivery of the bond by the new company to the Mercantile Trust Company was an issue of the bond in New York; that when the bond was certified by the Mercantile Trust Company and delivered by them to the secretary of the committee in New York it became a complete and valid obligation of the new company and was "made" and issued in New York; that if not issued when delivered to the committee it was, at any rate, issued when redelivered by the committee to the Mercantile Trust Company; and that having been issued in New York it was not issued in the United Kingdom by Messrs. Brown, Shipley, and Co. handing it to the appellant. It was also contended that the bond was never offered for subscription within the United Kingdom. In the second case, "*Gordon v. the Commissioners of Inland Revenue*," the instrument was a bond for \$1,000 of the Erie Railroad Company. It was one of a series of bonds of the value of \$30,927,000 given under a scheme of reconstruction similar to that described in the other case. \$29,632,893 of bonds only were required to satisfy the claims of the old bondholders. The additional \$1,494,107 of bonds were intended to meet possible contingencies of more bonds being required than the above number. The bonds were delivered by the new company to the Farmers' Loan and Trust Company. When so delivered the bonds were duly executed, but the trustees' certificate necessary to complete them

was not then signed. The bonds, having received the trustees' certificate, were then delivered in New York to the reconstruction committee in a fully complete form. The committee forwarded to Messrs. J. S. Morgan and Co., one of the depositaries in England, the number of new bonds to which the holders of trust receipts were entitled, and they were distributed by Messrs. J. S. Morgan and Co. as in the other case. The appellant's bond was one of the bonds thus distributed. The old bond for which the new bond was given passed to the reconstruction committee. Of the bonds not distributed, including those intended for bondholders who had not joined the scheme as well as the additional bonds reserved for contingencies, \$20,000 worth were sold to produce cash, and the remainder were handed to the new company. The decision of the Commissioners was the same as in the last case. The contention of the appellant in this case, as in the last, was that the bonds were not issued in England because they had been already issued in New York when the Farmers' Trust and Loan Company delivered them to the reconstruction committee without appropriating them to any specific purpose. The contention of the Crown in both cases was that the deliveries of the bonds in New York were not issues of them within the meaning of the Act and that the real issue of the bonds took place in England, and in any case that they were offered for subscription and delivered to a subscriber in England.

Mr. Cohen, Q.C., Mr. Willes Chitty, and Mr. Kenneth Chalmers appeared for the appellant Brown; Sir Edward Clarke, Q.C., and Mr. Alfred Lyttelton for the appellant Gordon; and the Solicitor-General and Mr. Danckwerts for the Crown.

The COURT gave judgment in favour of the Crown.

MR. JUSTICE DARLING, dealing with the case of "*Brown v. Commissioners of Inland Revenue*," said that there was no issue of the bonds when they were handed by the Mercantile Trust Company to the secretary of the reconstruction committee, nor when they were handed back by the secretary to the Trust Company. All the secretary did was to turn them over and see if they were certified. In neither case did the bonds get into the hands of "some one who could make them available for his benefit," as it was held they must do by Lord Justice Rigby in "*Baring v. Commissioners of Inland Revenue*" ([1898] 1 Q.B., 78, at p. 91). The act on these occasions was no more than if the bonds had been given to the Postmaster of the United States with the name of the person to whom they were addressed in London written on them. The delivery of the bonds to the Mercantile Trust Company to be certified certainly did not amount to an issue. That was done in pursuance of the scheme. There was therefore no issue of the bond in question until it was handed to the appellant in this country. Dealing with the case of "*Gordon v. Commissioners of Inland Revenue*," his Lordship said that the scheme in this case was nearly the same as in the last, but in this case there came a time when the bonds were delivered in New York in a fully complete form, and it appeared also that \$20,000 of them were sold by the reconstruction committee to produce cash. The committee clearly had wider powers of dealing with the bonds in this case. They practically had an unfettered discretion. He therefore had with hesitation come to the conclusion that they were issued in New York. But there was practically no difference, because having regard to the whole scheme of reconstruction he was of opinion that the bond in question came within section 82 (1) (b) (ii), because it was offered for subscription and delivered to a subscriber in England.

MR. JUSTICE CHANNELL concurred. He said that he saw no difference between the two bonds. There was a reconstruction scheme in each case to be carried out by

the old bondholders exchanging their bonds for a new security, the best provision possible being made for those who were unwilling to become parties to the scheme. Circulars were issued to the old bondholders offering them the new issue in exchange for the old bonds, and, inasmuch as the new bonds were afterwards delivered, the second clause of section 82 (1) (b) was complied with. The case of "Chicago Terminal Elevator Company v. Commissioners of Inland Revenue" (75 L.T., 527), cited by Mr. Cohen, was distinguishable. That was sufficient for a judgment in favour of the Crown, but he was further of opinion that there was in neither of the cases an issue of the bonds in America. So far as the old bondholders were concerned the issue was in this country. The reconstruction scheme was necessarily carried out by forming a committee to carry it out. The old bondholders sold their bonds to this committee and in return received from them a contract to give new bonds, the committee having power to put an end to the scheme. In each case the committee were under an obligation not to deal with the bonds otherwise than for the purpose of carrying out the scheme. Looking at the scheme in each case as a whole he came to the conclusion that the handling of the bonds in America could not be called an issue of them within the section of the Act.

[Solicitors—The Solicitor for Inland Revenue, for the Crown; Rompas and Co., for Brown, Birchan, and Co., for Gordon.]

Q. B. Div. (Lord Russell of Kil-
lowen, C.J.)

1899.
Dec. 14.

BOSTOCK V. THE RAMSEY URBAN DISTRICT COUNCIL.*

Practice—Costs—Public Authorities Protection Act, 1893.

This Act does not interfere with the Court's discretion as to costs. Sec. 1 (b) merely provides that where a public authority is defendant, and obtains a judgment with costs, he is to have solicitor and client costs.

This was an action for malicious prosecution. At the trial, which was reported in *The Times* of the 7th ult., there was no question of fact to go to the jury, and the learned Judge gave judgment for the defendants, without costs. The question whether the learned Judge had power to deprive the defendants of costs was not raised at the time, but it was subsequently arranged that the point should be argued before the learned Judge.

Mr. Blake Odgers, Q.C., and Mr. P. Rose-Innes were counsel for the plaintiff; Mr. Lawson Walton, Q.C., and Mr. J. W. Cooper for the defendants.

Mr. BLAKE ODGERS said that the defendants had raised the question whether his Lordship had power to deprive them of costs in view of the Public Authorities Protection Act, 1893, sect. 1 (b), which provides that when in an action against a public authority a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client. Counsel contended that this meant that if the judgment carried costs they were to be taxed as between solicitor and client. This section repealed section 264 of the Public Health Act, 1875, which had replaced a similar provision in the Public Health Act, 1848. The last-named Act provided that if in an action against a local authority judgment be given for the defendant he should be entitled to "full costs of suit." In "Avery v. Wood" ([1891] 3 Ch., 115)—a copyright case—it was held that these words only meant costs as between party and party. In "Itching Bridge Company v. Local Board of

Health of Southampton" (27 L.J., Q.B., 128) it was held that the provision of the Public Health Act, 1848 (which had been replaced by section 264 of the Public Health Act, 1875), enacting that an action against a local authority "shall be tried in the county or place where the cause of action occurred, and not elsewhere," did not take away the discretion of the Court as to venue. In "Robinson v. The Mayor and Corporation of the Borough of Workington" ([1897] 1 Q.B., 619) the late Mr. Justice Cave gave judgment for the defendants without costs, but no point was taken, either before him or in the Court of Appeal, as to the power of the Judge to deprive a public authority of costs. In "North Metropolitan Tramways Company v. London County Council" ([1898] 2 Ch., 147) Mr. (now Lord) Justice Romer said that he did not think that the Act was intended to take away the discretion of the Court to deprive the public authority of its costs; but the present point was not raised in that case. In "Cree v. Vestry of St. Pancras" ([1899] 1 Q.B., 693) Mr. Justice Bruce held that his discretion had been taken away by the Act.

Mr. LAWSON WALTON said that the last-cited case was expressly in point. The discretionary power of the Court must be taken to have been contemplated by the Legislature in passing the Act of 1893. It was clear on principles of interpretation that if a statute contained positive language in reference to a matter in which under previous statutes a discretion existed that discretion must be held to have been taken away. In "Itching Bridge Company v. Local Board of Health of Southampton" the provision as to venue was treated as applicable to the parties, but not to the discretion of the Court. In the present case, however, the Act deprived the Court of discretionary power, and therefore the plaintiffs were not entitled to rely on decisions on an earlier Act.

The LORD CHIEF JUSTICE, in giving judgment, said that the question raised was one of general importance. Two points had to be considered—(1) whether there was no good cause for depriving the defendants of costs; and (2) whether he had any discretion in the matter. The action was one for malicious prosecution, the charge having arisen in the following way. The plaintiff was the principal proprietor of a travelling circus, which visited the town of Ramsey, and his representatives proceeded to place his wagons in a particular part of a public thoroughfare where, in the opinion of the representatives of the local authority, they would have been an obstruction of the highway. Instead of doing what common sense would have suggested if this was an inconvenience of serious moment, instead of calling a policeman or two policemen and requiring the removal of these vehicles, the defendants' representatives acquiesced in the circus being held. There was no ground for suggesting that the proprietors of the circus were trying to assert a right. But the defendants preferred an indictment against the plaintiff at the assizes for obstructing the highway, and Mr. Justice Wills concluded that there was no evidence on which he could properly be indicted, and the jury returned a verdict of not guilty. At the conclusion of the evidence in the present action his Lordship held that the plaintiff had not made out the absence of reasonable and probable cause, for the vehicles were an obstruction, and that there was no ground for suggesting malice, and therefore he gave judgment for the defendants. As to the question whether there was good cause for depriving the defendants of their costs, the only point that created any doubt in his mind was whether, although the conduct of the defendants might have been unreasonable in the action that they had taken, this was not a cause that ought to operate on the mind of the Judge. It seemed to him

*Reported by J. F. WALKER, Esq., Barrister-at-Law.

that the antecedent course of conduct did enter into the question whether there was good cause. If it was the wrong antecedent conduct of the authorities that led to the prosecution and brought about the apparent necessity for the plaintiff to vindicate himself against these charges, then, although it was not conduct in the litigation, the Judge might properly take it into consideration. Assuming that there was just cause, had his Lordship authority to deal with the question? The power of the Court to deal with costs was given by Order 65, Rule 1, which had the force of an Act, and which gave the Court a discretion, provided that in cases tried by a jury the costs should follow the event unless there was good cause to the contrary. In "*Itching Bridge Company v. Local Board of Health of Southampton*" it was held that the provisions as to venue did not take away the discretion of the Court, and the language of the Act of 1893 was not more emphatic than that of the Act of 1875. As to the reason of the thing, if a public authority brought litigation upon itself by unreasonable conduct, why should there not be a discretion as to costs just as in the case of a private individual? The one authority in favour of the defendants was "*Cree v. The Vestry of St. Pancras*," but as he did not find that the point was argued, and as it was a recent case, he did not feel bound to conform to it. The Act meant no more than this—that where judgment was obtained by the defendant with costs he was entitled to solicitor and client costs. It left untouched the salutary discretion of the Court to deprive the defendant of costs. He was not clear, however, that even where the defendant was to get costs it would not equally be in the discretion of the Judge to say that they were only to be taxed costs.

The judgment was accordingly allowed to stand for the defendants, without costs.

[Solicitors—Guilford E. Lewis, for the plaintiff; Stevens, Son, and Parkes, for the defendants.]

House of Lords (Lord Halsbury, L.C., } 1899.
Lords Macnaghten, Morris, and } Dec. 15.
Shand)

FOX V. "STAR" NEWSPAPER COMPANY.*

Practice—Non-suit—O. 26—Discontinuance.

The effect of O. 26 is to do away with the plaintiff's right to take a non-suit.

Decision of the Court of Appeal (14 *The Times* L.R., 280) affirmed.

This appeal was heard on June 16 and 19 last concurrently with an appeal of the same plaintiff against the *Evening News* (Limited). Their Lordships dismissed the appeal against the *Evening News*, and the case is reported in our issue of June 20. The action was for an alleged libel which appeared in the *Star* under the heading, "An Exciting Scene in Croydon County Court to-day." The substance and character of the libel appear in the report of the other appeal, and need not be stated, as the question on which their Lordships reserved judgment was of a purely technical character. The action came for trial on December 16, 1897, before the Lord Chief Justice and a special jury, immediately after the action against the *Evening News*. In the latter case the verdict was for the defendants. The jury was sworn in the action against the *Star*. The junior counsel for the appellant opened the pleadings and then the appellant's leading counsel stated that in view of the previous case he should offer no evidence. The Lord Chief Justice ruled that this was equivalent to a verdict for the defendants. The appellant, however, claimed to be non-suited, but the Lord Chief Justice refused the

application, and the verdict was given for the defendants. An appeal to the Court of Appeal was dismissed. The case is reported below (14 *The Times* L.R., 280; [1898] 1 Q.B., 636; 67 L.J., Q.B., 454).

The appellant appeared in person; Mr. Blake Odgers, Q.C., Mr. Temple Franks, and Mr. Llewelyn Williams were for the respondents.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said,—This was an action for libel. After the jury had been sworn and the pleadings opened, the plaintiff claimed to be non-suited; the Lord Chief Justice held that he was not entitled to be non-suited, and directed a verdict for the defendants. The sole question on this appeal is whether the old system by which a plaintiff at his own election could lose his writ, as it was said, and at his election bring another action for the same cause is still a system which exists in our law. I am very clearly of opinion that it does not. Our whole system has been changed, and I think the reason why the word "non-suit" itself is not now to be found in the rules is that it was determined that the power of a plaintiff at common law to claim a non-suit or the plaintiff in equity to dismiss his bill at his own option should no longer be permitted, and it is probable that the word "discontinuance" was supposed to apply to both forms of procedure both at common law and in equity. Accordingly by Order 26, rule 1, the only mode by which a plaintiff can submit to defeat is under that order unless he allows the proceedings to go on until the verdict is recorded against him. The word "discontinuance" no doubt had under a former system the more limited application, and the old system of non-suit is manifestly no longer capable of being reconciled with the new procedure either in form or substance. The substance is that when it once comes into Court, and when the plaintiff offers no support to his action, there must be a verdict for the defendant. This is the course pursued by the Lord Chief Justice. I think it was entirely right, and I move your Lordships that this appeal be dismissed with costs.

The other noble and learned Lords concurred.

[Solicitors—J. G. Lincoln, for the appellant; Harrison and Davies, for the respondents.]

House of Lords (Lords Macnaghten, } 1899.
Morris, Shand, Davey, and Brampton) } Dec. 15.

MASKELYNE V. STOLLERY AND ANOTHER.*

Contract—Offer and acceptance—Parol contract
—Offer of a reward—Dispute as to words used
—Question for jury.

Decision of the Court of Appeal (15 *The Times* L.R., 79) affirmed.

This was the famous box-trick case, and the appellant was the well-known conjuror of the Egyptian-hall. Mr. Maskelyne was the defendant in the action in which the respondents claimed to have won the £500 reward offered by him for a correct imitation of his trick. The action was twice tried, first before Mr. Justice Willa and a special jury who were unable to agree, and, secondly, in November, 1898, before Mr. Justice Lawrence and a special jury. On the second occasion the verdict was given for the respondents. Lords Justices A. L. Smith, Rigby, and Collins dismissed the appellant's appeal on December 2, 1898. The story is fully told in Lord Macnaghten's judgment. The case is reported below (15 *The Times* L.R., 79). The appeal was heard last July, when their

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

Lordships reserved judgment. Their Lordships dismissed the appeal by a majority of three to two.

Mr. Joseph Walton, Q.C., Mr. Herbert Reel, Q.C., and Mr. F. Street were for the appellant; Mr. Witt, Q.C., and Mr. R. E. Humphreys for the respondents.

LORD MACNAGHTEN.—In this case the respondents, who were plaintiffs in the action, claimed from the appellant, Mr. Maskelyne, a reward of £500, which he offered publicly for a correct imitation of his box trick. Mr. Maskelyne is a public entertainer, unvaried probably in the invention and exhibition of mechanical tricks and illusions, and an expert, if anybody is an expert, in such matters. One of his performances is known as his box trick. It was one of his earliest inventions and has long been a favourite with the public. The secret of the trick has never yet been discovered. A box is brought upon the stage, differing apparently in nothing from an ordinary strong box of the same size. Mr. Maskelyne invites the spectators to come forward and examine it. When curiosity is satisfied Mr. Cook, who is Mr. Maskelyne's confederate or partner, gets into the box. It is shut and locked and the key is handed to one of the audience. It is then canvassed—the canvas is laced up through eyelet holes—and it is corded. Any one present is at liberty to cord it as he pleases, and the knots are sealed. Then the box is placed in a cabinet to screen it from the view of the audience. After a short interval the cabinet is thrown open. The box is found apparently in the same condition in which it was when it was placed in the cabinet—canvassed, laced up, and corded. The cords and the canvas covering are removed, the box is opened and found to be empty. The late occupant has disappeared altogether from box and cabinet. A mysterious performance of this kind leads, as Mr. Maskelyne says, to a host of imitations. "So-called imitations," he terms them, and he describes them as "rubbishy." "I should not mind," he said in his evidence, "if the copies were as good as the original. But," he added, "it does not pay imitators to make copies as good, and therefore it ruins the reputation of the original." So in order, as he says, "to get the interest of the audience," and also "to show the superiority of his 'trick over others,'" Mr. Maskelyne in introducing his box trick was in the habit of offering a reward of £500 to any one who could "discover the secret of his box trick, or produce a correct imitation of it." Although Mr. Maskelyne did not make a set speech when introducing his box trick, it was agreed that the offer was made in those very words. Now, the respondents did not and do not claim to have discovered the secret of Mr. Maskelyne's box trick, but they say they have produced a correct imitation of it. They made a box in size and appearance exactly like Mr. Maskelyne's box. They offered to bring it for Mr. Maskelyne's inspection. He told them in reply that he took no interest in such things, and that they had made a mistake "common among silly applicants for the reward." Then their solicitors wrote to Mr. Maskelyne asking him to give their clients an opportunity of demonstrating their trick. "Surely you must take me for a greenhorn," he replied. "I refuse to inspect your clients' apparatus. If I was to undertake to inspect all the tomfool imitations of my mysteries which are brought to my notice I should have little time for anything else." Though the appellant refused to look at the respondents' box they gave a number of performances in their lodgings. The respondent Evans got into their box and was locked up in it. It was treated just like Mr. Maskelyne's box. It was canvassed and corded and hidden from view by shutting the folding doors in the apartment in which the exhibition took place. After a short interval Mr. Evans signified that he was ready by shooting or knock-

ing at the door. The folding doors were opened. The box was seen to be still canvassed and corded and apparently untouched. On being opened it was found to be empty. A number of witnesses were produced who had been present at these performances. They seemed to be persons of intelligence. Many of them were strangers to the respondents. They had seen the rival box tricks. They declared that there was apparently no difference whatever between them. They were exactly alike, "as like as two peas in a pod," according to one witness. "That," said the plaintiffs' counsel, "is a correct imitation of Mr. Maskelyne's box trick." "No," said the other side, "you cannot have a correct imitation of his box trick without a correct imitation of the mechanism of the trick. You must show that you have found out his secret. There is Mr. Maskelyne's box; let the plaintiffs point out its mechanism." But the plaintiffs would not look at Mr. Maskelyne's box, and on the other hand Mr. Maskelyne would not look at the plaintiffs' box. So the jury, who seem to have thought that they ought to have been admitted behind the scenes, were left to deal with the matter on the evidence before them and the speeches of counsel. After a summing up to which, as it seems to me, no objection can fairly be taken, though isolated passages may be open to criticism, the jury found for the plaintiffs and judgment was given accordingly. The Court of Appeal unanimously refused an application asking that judgment should be entered for the defendant or a new trial directed. The case now comes before your Lordships. The grounds of appeal are the same as those which were presented to the Court below. It was urged that the construction of the offer made by Mr. Maskelyne was for the Judge and not for the jury. In the first place, it is to be observed that the offer was not in writing. It was made by word of mouth, and, although the actual terms of the offer itself are not in dispute, it is impossible to arrive at the true meaning of the offer without taking into consideration everything that passed when the offer was made. It appears to me, therefore, that the question was properly left to the jury, for the reasons which are given fully by Lord Justices A. L. Smith and Collins. But I quite agree with Lord Justice A. L. Smith that it is too late for the appellant to raise the point now. The case was tried twice. It came first before Mr. Justice Wills and a special jury. The question left to the jury was what was the meaning of Mr. Maskelyne's offer. On that occasion the jury were unable to agree. The question was tried again before Mr. Justice Lawrence and another special jury. Again the question was what was the meaning of the offer. The jury found in favour of the contention put forward by the plaintiffs and against Mr. Maskelyne's view. But until the application to the Court of Appeal no suggestion was made that the question was one for the Judge and not for the jury. Indeed, until the verdict was given against him, the leading counsel for the defendant seems to have been just as willing to leave the matter to the jury as the counsel for the plaintiffs were. His contention was that you could not have a correct imitation of Mr. Maskelyne's box trick unless you correctly imitated the mechanism of Mr. Maskelyne's box, and he continually referred to the mechanism in the box as the trick. "How you can," said he, "have a correct imitation with a different trick is a matter for my Lord and the jury to consider." Not, your Lordships will observe, for the consideration of the Judge alone, but for the consideration of the jury as well. It seems to me that, even if the matter were open to doubt, it would be much too late to raise this contention now, having regard to the footing on which both trials were conducted. Then it was said that the parties were not *ad idem*. Mr. Maskelyne meant one thing by his offer;

the appellants in their acceptance took the offer to mean something else. But if the whole question was one for the jury to determine, surely it was for the jury to say what was the fair meaning of the offer addressed to persons of ordinary intelligence. Then, again, it was said that there was no case to go to the jury. But though I do not say that I should have agreed with the jury, I think there was a case for the jury to consider, and I think that reasonable men considering the matter fairly might have come to the conclusion at which the jury arrived. As Lord Justice Collins says, the jury might naturally ask why did Mr. Maskelyne put his offer in the alternative? If the offer was a reward for the discovery of the secret why did he talk about a correct imitation of his box trick? What did Mr. Maskelyne mean by saying that these imitations ruined the reputation of the original; and, above all, why did he say that he made the offer to show the superiority of his trick above others? One other point was raised. It was said that if the fair meaning of the second alternative of the offer was that the reward might be earned by a correct imitation of the performance of the box trick without imitating correctly the mechanism of Mr. Maskelyne's box, the performance was not complete without the cabinet in which Mr. Maskelyne always placed his box on the stage. That point is, I think, also completely disposed of by the judgment of the Court of Appeal. It seems to be clear upon the evidence that the cabinet was not an essential part of the box trick, and that the reward was offered for a correct imitation (whatever that may mean) of the box trick, without any reference to the cabinet trick, which seems to be a different and an independent trick altogether. On the whole, therefore, it appears to me that there is no ground for disturbing the verdict of the jury. There was no misdirection; the whole case was before the jury. Each party put his view clearly and forcibly, and the jury, as they were entitled to do, chose between them; whether your Lordships' choice would have been the same if your Lordships had been in the place of the jury is not a matter to be considered. I have, therefore, to move that the appeal be dismissed, with costs.

LORD MORRIS dissented, and was in favour of a new trial.

LORD SHAND delivered a judgment agreeing with that of LORD MACNAGHTEN, with whom also LORD DAVEY concurred.

LORD BRAMPTON agreed with LORD MORRIS that there ought to be a new trial.

[Solicitors—Reed and Reed, for the appellants: Avery and Wolverson, for the respondents.]

Court of Appeal (A. L. Smith and } 1899.
Vaughan Williams, L.JJ.) } Dec. 15.

ATTORNEY-GENERAL V. LORD STANLEY OF ALDERLEY.*

Crown—Prerogative—Right to remove action from County Court to Q.B.D., even after judgment.

This was an appeal from an order of a Divisional Court, consisting of Mr. Justice Ridley and Mr. Justice Darling, reported in *The Times* of November 11, 1899. Lord Stanley of Alderley was the owner of the surface of land on a mountain called Holyhead Mountain in Anglesey, under a grant in fee in 1840 from the Crown, by which the mines, minerals, and quarries within, upon, or under the land were reserved to the Crown, with full power to the Crown and its assigns to enter upon, work, use, and enjoy the same as fully and effectually

to all interests and purposes as if the grant had not been made. The Crown granted a lease of the minerals to Messrs. Wild, who erected on the surface of the land a building for storing dynamite for the purpose of working the quarries of china stone. Lord Stanley of Alderley brought an action in the County Court against Messrs. Wild, claiming £1 damages for trespass by them in entering on the plaintiff's land for the purpose of erecting thereon a building for storing dynamite and other explosive substances, and also for an injunction as hereinafter set out. On July 11, 1899, the County Court Judge gave judgment in favour of Lord Stanley, finding that the erection of the building for storing dynamite was not reasonably necessary for the purpose of working the quarries, and he gave judgment for Lord Stanley for £1 damages, and granted an injunction restraining Messrs. Wild, their servants, agents, and workmen from using or trespassing on the land of the plaintiff at Holyhead Mountain for the purpose of and for erecting thereon a building for storing dynamite and other explosive substances and from committing waste on the land. Messrs. Wild gave notice of appeal to the Queen's Bench Division. On August 12, 1899, the Attorney-General filed an information against Lord Stanley asking that it might be declared that the Crown and its lessees, agents, and servants were entitled to enter upon, work, use, and enjoy china stone and all other mines, minerals, and quarries in, under, and upon the lands conveyed by the deed of 1840, and for that purpose to do and exercise all such acts, powers, and privileges upon or affecting the surface of the lands as might have been done or exercised by the Crown's authority if the surface had not been granted by the deed, and that the rights of the Crown might be declared, and that the Crown and its lessees might be quieted in the possession of the premises; and that the maintenance on the surface of the land and the use of a store for explosives for the purpose of working the quarries of china stone was, as against Lord Stanley, a lawful and proper exercise of the powers reserved to the Crown by the deed; and for an injunction to restrain Lord Stanley from doing any act or taking or continuing any legal proceeding for the purpose of interfering with the store for explosives or with any buildings maintained on the lands, or with acts done or to be done by any lessee or licensee of the Crown in exercise of the surface powers and privileges reserved by the deed, and that all proceedings for the purpose of enforcing the order of the County Court should be stayed. Upon application by the Crown the Divisional Court made an order directing the appeal in the County Court action to be transferred to the Revenue side of the Queen's Bench Division of the High Court, and that all further proceedings in the appeal should be stayed until after the hearing of the information. Lord Stanley appealed. It was contended on his behalf that the Crown was not entitled by virtue of its prerogative right to have proceedings stayed after final judgment. The right of the Crown to have proceedings in which it was interested stayed only applied to proceedings in which final judgment had not yet been obtained, and did not apply to an appeal. "*Cawthorne v. Campbell*" (1 Anstr., 205); "*Attorney-General v. Barker*" (L.R. 7, Ex. 177); "*Attorney-General v. Constable*" (4 Ex. D., 172); "*Attorney-General v. St. Aubyn*" (Wightw., 167); "*Leonard v. Rogers*" (cited in Wightw., at p. 204); "*Yates v. Dryden*" (Cro. Cas., 589); "*Attorney-General v. Hallett*" (15 M. and W., 97) were referred to.

Mr. Haldane, Q.C., and Mr. Bryn Roberts appeared for Lord Stanley; the Solicitor-General (Sir R. B. Finlay, Q.C.) and Mr. Vaughan Hawkins appeared for the Crown.

The COURT dismissed the appeal.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

LORD JUSTICE A. L. SMITH said that the first question was whether it was within the prerogative of the Crown to have a cause in the County Court, whatever its position in that Court might be, removed to the Revenue side of the Queen's Bench Division, formerly the Revenue side of the Court of Exchequer. That point was not seriously contested. The first part of the order of the Divisional Court was therefore right. The order went on to direct that all further proceedings on the appeal from the County Court should be stayed until after the hearing of the information. It was objected that the application was made too late, as the Crown had no right to have the action stayed after judgment in it had been delivered. His Lordship could find no authority for such a limitation. Indeed, "*Yates v. Dryden*" was a direct authority against that view, because thereafter a writ of error was brought, that was, after judgment had been delivered the Attorney-General intervened, and the Court stayed the proceedings on the writ of error. That was a direct authority upon the second part of the order of the Divisional Court staying the appeal in the County Court action pending the hearing of the information. In "*Attorney-General v. Barker*," Lord Chief Baron Kelly said:—"I feel bound to hold that the Crown has at any time a right to insist upon its claim to land, or upon its right to the establishing of any customs belonging to a manor, by means of a suit instituted by the Crown itself, and is not bound to abide the event of any action or suit in which the Crown, through a subject, is made the real defendant, and can only appear as defendant." The authorities showed that it was part of the prerogative of the Crown to have the action removed and stayed, and that the Crown should become the actor in the litigation involving its rights, and that this could be done after judgment. As to the discretion of the Court apart from the prerogative of the Crown he desired to say nothing.

LORD JUSTICE VAUGHAN WILLIAMS agreed. When there was an action between two subjects of the Crown which raised a question of the title of the Crown or some other question in which the Crown was interested, the Crown had two rights, which were not necessarily connected; first, to have the action removed to the Revenue side of the Queen's Bench Division. That removal did not of itself put an end to the action. The form of the action was moulded or modified in such a way as might be necessary for the conduct of the trial when the action was removed. Secondly, the Crown had the right to apply to have the action stayed until the information which raised the same question of right was determined. The case of "*Yates v. Dryden*" showed that a stay might be obtained without the removal of the action, and "*Leonard v. Rogers*" showed that there was no objection to the Crown adopting both proceedings at the same time. His Lordship did not wish to say whether the Crown was entitled *jure coronæ* to an order to stay the action, excluding all question of the discretion of the Court. So far as the removal order was concerned the Crown was entitled to it as of right *jure coronæ*.

[Solicitors—T. D. Jones, for T. R. Evans, Holyhead, for Lord Stanley; Solicitor to the Office of Works, for the Crown.]

Chan. Div. }
(Cozens-Hardy, J.) }

1899.
Dec. 15.

BARSHT V. TAGG.*

Vendor and Purchasers—Conditions of sale—Construction—"Outgoings"—Liability of vendee.

*Reported by F. EVANS, Esq., Barrister-at-Law.

This was an action by a purchaser for specific performance of a contract annexed to the conditions of sale in respect of three leasehold houses, known as 167, 168, and 169, Elwin-street, Hackney-road, Middlesex, sold by auction at the Mart, on July 7, 1898, the three houses comprising Lot 5 in the particulars of sale. The third condition of sale was as follows:—"Each purchaser is, at the close of the sale to him, to pay down a deposit of £10 per cent. on the amount of his purchase money, and to sign an agreement in the form subjoined to these conditions for the completion of his purchase according to these conditions, and to pay the remainder of his purchase money on the 11th day of August, 1898, at the office of the vendor's solicitor," at which time and place the purchases are to be completed, and a purchaser paying his purchase money is as from that day to be let into possession or receipt of rents and profits, and up to that date all rents, rates, taxes, and outgoings are (if necessary) to be apportioned, and such apportioned rents shall be paid on completion by such purchaser to the vendor. If, from any cause whatever, other than wilful default on the part of the vendor, the completion of the purchase is delayed beyond the before-mentioned day, the remainder of the purchase money is to bear interest at the rate of £6 per cent. per annum from that day to the day of the actual payment thereof, or, at the option of the vendor, he may receive the rents and profits up to the day of the actual completion of the purchase. The property shall, as from the day of sale, be at the sole risk of the purchaser, and the vendor shall not incur any liability by reason of its then or subsequently becoming or remaining untenanted, uninsured, or deteriorated." The plaintiff paid a deposit of 10 per cent. and a title was made out to his satisfaction and was accepted before August 11, but the plaintiff was not then in a position to complete, and did not complete, and the defendant had ever since remained in possession of the property. On November 9, 1898, notices were served, under the Public Health (London) Act, 1891, upon the defendant, as "owner" of the three houses forming Lot 5, that nuisances existed on the houses, the nature of the alleged nuisances being specified in the notices, which required the nuisances to be abated. The defendant, without waiting for any further proceedings to be taken by the public authority, caused the requisite work to be done to the houses and paid the cost of the work, amounting to £24 17s. 3d. As his Lordship pointed out, this sum was not a charge upon the rents, and would have been payable by the defendant even if all the houses had been empty, and the plaintiff would on completion get the houses improved by reason of the expenditure of this money. The plaintiff in February, 1899, was ready to complete, and offered to pay interest at 6 per cent. on the balance of the purchase-money from August 11 on receiving the rents and profits from that date, and in that case to repay the £24 17s. 3d., but he insisted that if the defendant retained the rents and profits since August 11 the defendant ought himself to pay this sum.

Mr. Buckmaster was for the plaintiff; and Mr. Eve, Q.C., and Mr. S. R. Earle were for the defendant, the vendor.

At the conclusion of the arguments his Lordship reserved judgment.

MR. JUSTICE COZENS-HARDY delivered judgment, and after stating the facts continued as follows:—"I think it is settled law that in the absence of any stipulation on the subject the vendor must bear all expenses and outgoings of property sold down to the time when a good title was first shown, so that the purchaser could prudently take possession, and also pay interest on his unpaid purchase money from that time, and as from that time all such expenses and outgoings must be borne

by the purchaser; see "*Carrodus v. Sharp*" (20 Beav., 56). The sum in question is an "outgoing" to which this principle would be applied. See "*Tubbs v. Wynne*" (L.R. [1897], 1 Q.B., 74). As the title was accepted on or before August 11, I think that, in the absence of any stipulation, the plaintiff would have been entitled, on the one hand, to the rents and profits as from that date, and, on the other hand, would have been bound to repay the sum which the defendant has paid in respect of these outgoing. The question which I have to decide is whether to any and, if so, what extent the position of the parties is altered by the express stipulation contained in Condition 3. Now that condition distinctly provides that, if completion takes place on August 11, all rates, taxes, and outgoing are to be apportioned, and that the purchaser is to pay to the vendor an apportioned part of the current rents which have not yet been received but which in due course the purchaser will receive from the tenants. If, however, the purchaser is not ready to complete on that day, what is to happen? It is clear that the vendor must remain in possession until completion, and it seems to me that an option is given to the vendor. He may say, "You must pay me 6 per cent. interest, and I will account to you for the rents and profits since August 11"; or he may say, "I have in my pocket a certain sum which I have received from tenants since August 11. I will keep that sum and make no claim against you for interest." I do not think that, in that event, he can require the purchaser to make any payment in respect of the apportioned part of the current rents. He can only retain so much of the rents and profits as he has in fact received up to the actual completion. Is there anything in this condition to relieve the plaintiff from the obligation to discharge the outgoing? I think not. I cannot regard the second sentence of the condition as simply making the first sentence applicable to the actual date of completion whenever it may be. There are not in it any words about outgoing or apportionment, and I think it would be wrong to insert them by implication. I may observe that in *Key and Elphinstone's* Precedents the words "less outgoing" are expressly added. The result is that I think the plaintiff is not entitled to specific performance except on the footing of paying to the defendant, in addition to the balance of the purchase-money, the sum of £24 17s. 3d. I presume the plaintiff elects to complete on that footing. As this is the only question raised the plaintiff must pay the costs of the action less the costs of the day (December 7), when, through the defendant's neglect, the action had to stand over, and those costs of the day must be set off.

[Solicitors—Harris and Chetham; E. Betteley.]

House of Lords (Lord Halsbury, L.C., } 1899.
 Lords Macnaghten, Morris, Shand, } Dec. 16.
 and Brampton)

DE NICOLS V. CURLIER AND OTHERS.*

International Law—Husband and wife—French law as to community of goods—Change of domicile—Will.

A Frenchman and a Frenchwoman having married in France without entering into any contract altering the French law as to community of goods between husband and wife subsequently acquired a domicile in this country, the husband taking out letters of naturalization as a British subject.

Held, that "movable goods," such as money

and securities, acquired by the husband during his domicile here were not affected by his will made here according to English law, so as to deprive his widow of the rights originally vested in her by the French law at her marriage.

Decision of the Court of Appeal (14 *The Times* L.R., 428) reversed.

This was an appeal from an order of the Court of Appeal dated May 19, 1898, reversing an order of Mr. Justice Kekewich of February 3, 1898. The appellant, whose maiden name was Anne Célestine Lacoste, was born in France in 1831 and was the widow of Daniel Nicolas de Nicols, who died on February 28, 1897. The appellant was married to Mr. de Nicols, who was also a Frenchman, and whose name was then Thevenon, at the mayor's office of the third district of Paris on May 30, 1854. No contract of marriage or instrument expressing the conditions of the marriage was executed. The married couple came to England in 1863, and lived there until the husband's death. Mr. de Nicols became a naturalized subject of the Queen in 1865. Establishing themselves in business the appellant and her husband opened the Café Royal in Regent-street and amassed a large fortune. The husband made his will on March 22, 1895, in the English form. The question was whether the law of France in respect of the property of which the husband purported to dispose by his will was applicable so as to override the provisions of the will. The appellant contended that when the domicile became English there existed between her and her husband the sort of partnership known in French law as a community, and that she had a vested right in his share in it, and that a change of domicile did not in this respect affect her legal position. For the respondents it was argued that the principles of English law prevailed in regard to the movable property acquired during the coverture, and that the wife's rights were changed with the change of domicile. The case was argued on June 23 and 27 and on July 3, when their Lordships reserved judgment. The hearing before the Court of Appeal is reported 14 *The Times* L.R., 428; L.R., 1898, 2 Ch., 60; 67 L.J., Ch., 419.

The Lord Advocate (Mr. Graham Murray, Q.C.) Mr. Westlake, Q.C., Mr. Renshaw, Q.C., and Mr. Ingle Joyce were counsel for the appellant; Mr. Dicey, Q.C., and Mr. Whinney, Mr. Edgar Elgood, and Mr. F. H. Maugham for the respondents.

The LORD CHANCELLOR, in giving judgment, said.—It is not necessary to state with great minuteness how the question in the present appeal arises. It is enough to say that two French subjects were married according to the laws of France on May 30, 1854. No marriage contract or instrument in writing was executed by either of the parties. The parties lived together, and in the year 1863 they came to England, and in the year 1865 the husband obtained the status of a naturalized British subject. The whole dispute turns on the question whether the changed domicile and naturalization of the husband affected the wife's rights so as to give the husband the power to dispose of all the movable property by will instead of being restricted to the power of disposing of only one-half of it, as he undoubtedly would have been so restricted by the French law if the French law is decisive of the question. The parties, as I have said, were married according to French law, and the first thing to do is to see how the matter would be dealt with in respect of such a marriage by the French law. There is no real conflict between the learned persons who have given evidence on this question. One of them, indeed, besides giving evidence as to what the French law is, upon which he is an authority entitled to respect, has

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

also gone on to express an opinion upon how that law should be treated in this country, upon which subject he is no authority at all, and indeed such a question is not the subject of evidence at all, but pure matter of English law for English Courts to decide. The law of France as applicable to the matter now in debate is deposed to by M. Paul Lax, a licentiate of law in the University of France, an advocate who has practised in the Court of Appeal in Paris, and his evidence upon the subject is not really questioned by the gentlemen on the other side. M. Lax says :—" 2. According to the law of France, and in particular Articles 1,393 and 1,401 of the Code, civil parties having intermarried without entering into a formal pre-nuptial contract are governed so far as their present and after acquired property is concerned by the legal system of community of goods as defined by Articles 1,401 to 1,496 in Title V. of the same Code, which title is headed 'Du Contrat de mariage et des droits respectifs de époux.' 3. The husband and wife having so intermarried without entering into a pre-nuptial contract in writing are placed by the sole fact of the marriage and stand exactly in the same position in all respects as if previously to their marriage they had in due form executed a written contract, and thereby adopted as special and expressed covenants all and every one of the provisions contained in Articles 1,401 to 1,496 above referred to. 4. Subject to the exceptions specified in the next following paragraph the community of goods includes (1) all personal property belonging to the husband and wife at the date of the marriage or having devolved upon either of them during coverture ; (2) all interest or income of whatever nature and source accrued or received during coverture ; (3) all real estate acquired during coverture (Article 1,401 Code Civil). 5. Real estate possessed by either spouse at the time of the marriage or that may during coverture devolve upon him or her by way of inheritance, gift *inter vivos* or will, exclusive of real property acquired during coverture by any other means whatever does not become common property, but remains the separate property of the spouse so possessing the same or upon whom the same has so devolved, and any real estate is deemed to be common property unless it is clearly proved that either husband or wife possessed the same previous to the marriage or became entitled to it during coverture by way of inheritance, gift *inter vivos* or will, as aforesaid (Articles 1,402 and 1,404 Code Civil). 6. The administration of the common property belongs to the husband alone, who may sell, deal with, and mortgage the same without the wife's concurrence (Article 1,421 Code Civil). The common property, real as well as personal, stands or is invested in the name of the husband alone. 7. In the case of a legal community of goods any trade or business carried on either by the husband alone or by the husband and wife jointly is necessarily carried on for the account and benefit or at the risk of the community of goods. The whole assets of the said community, also the husband's separate real estate, if any, and the husband himself personally *in infinitum* are liable for the debts of such trade or business, the wife not being liable for the same except to the extent of her share in the common property. The name of the husband alone appears in the firm or style of any trade or business carried on as aforesaid. 8. In case any real estate which remains the separate property of either spouse has been disposed of and the purchase consideration has not been reinvested in the name of the one to whom such real estate belonged but has been merged in the common property the spouse whose separate property the real estate so disposed of was is on the winding up of the community of goods preferentially entitled to receive out of the common property the amount of the

purchase consideration referred to (Article 1470 Code Civil). 9. The community of goods when once constituted between husband and wife and whether created by an instrument in writing or by the operation of Articles 1,393 and 1,400 of the Code Civil cannot cease or be determined by mutual consent or by any cause or event whatever except the following—that is to say (1) decease, (2) divorce, (3) judicial separation, (4) separation of estates decreed by a competent Court of Justice." If this is the law by which the matter is to be governed, it cannot be denied that the appellants here must succeed, and it is a little difficult to understand upon what principle contracts and obligations already existing *inter se* should be affected by an act of one of the contracting parties, over which the other party to the contract has no control whatever. And, indeed, it is not denied that if, instead of the law creating these obligations upon the mere performance of the marriage, the parties had themselves by written instrument recited in terms the very contract the law makes for them, that in that case the change of domicile could not have affected such written contract. I am wholly unable to understand why the mere putting into writing the very same contract which the law created between them without any writing at all should bar the husband from altering the contract relations between himself and his wife, when if the law creates that contract relation then the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction. A written contract is after all only the evidence of what the parties have agreed to, and it would seem to be of no superior force as evidencing the agreement of the parties than a known consequence of entering into the married *status*. I not only do not understand, but I should decline to assent to any such view, unless I am compelled by authoritative decision or statute to adopt a view which to my mind is so entirely unreasonable. And it does not appear to me that any Court before whom this question has come would disagree with me as to its being unreasonable. The Master of the Rolls himself says :—" It is not altogether satisfactory to hold that a change of domicile cannot affect an expert contract embodying the law of the matrimonial domicile, but that a change of domicile does affect the application of that law if not embodied in an express contract." My Lords, I should think that in order to be binding on your Lordships, a previous decision must be in principle, and as applicable to the same circumstances, identical, and it appears to me that the case by which the Master of the Rolls thought himself bound—"Lashley v. Hogg"—is quite distinguishable both in principle and circumstances. To omit other questions, the cardinal distinction between the French and the Scotch law is not, I think, without an important bearing upon the very question in debate, and I think it may be stated shortly thus :—If the wife by the marriage in Scotland acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if by the marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what was not his, and herein, I think, is to be found the key to Lord Eldon's judgment. He says :—" The true point seems to be this, whether there is anything irrational in saying that as the husband during the whole of his life has the absolute disposition over the property, that, as to him, whom the policy of the law has given the direction of

the family as to the place of its residence, that he who has therefore this species of command over his own actions, and over the actions and property which is his own, and which is to remain his own, or to become that of his family according to his will—why should it be thought an unreasonable thing, that, where there is no express contract, the implied contract shall be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy in case the husband thinks proper to die intestate." It will be observed that the whole point of what Lord Eldon argues—that the whole of the property, apart from express contract, is absolutely and entirely the husband's, and that as by law he can dispose of it as he will it is not unreasonable that he should be at liberty to do something which by its legal effect will change what, I think, are inaccurately described as the rights of the wife, but are accurately described as what would have been the rights of the wife if no change had taken place, because in substance she has until the husband's death no rights at all. Doubtless it is true that, according to the authorities on Scotch law, the right of the wife is no right at all in its strict sense. When speaking of the *jus mariti* it is described as a legal assignation to the husband, and in commenting on this authority the late Mr. Fraser, while at the Scotch Bar, in his book on "The Law of Husband and Wife," 2nd edition, Vol. I., p. 677, says:—"At a very early period of our law, the distinction between the two rights was recognized. The right of administration was regarded as being nothing more than its name imports—a right of administering the property of the spouses, while the *jus mariti* was something separate and superior, its purpose being to transfer the property from one spouse to the other. The distinction is settled and taken in a number of cases, ranging from an early period to the present time, and has not been so clearly marked in some institutional works, solely from the desire of the writers to reconcile it with the notion of an absolute veritable *communio*." . . . "The distinction is thus stated in argument in the session papers of 'Gowan v. Pursell.' The *jus mariti* over the movables is a right during the existence of the marriage of absolute property. The husband may sell, or squander, or wastefully destroy the movables that fall under communion." How different the position of the wife is under the French law is sufficiently indicated in contrast to the above extract by section 1,443 of Code Civil, which enacts that:—"1,443. A separation of property can only be judicially sued for by the wife whose dowry is in danger, and when the disorder of the husband's affairs is such that there is reason to fear that his property will not be sufficient to satisfy the wife's rights and claims. Any voluntary separation is void." And if the propositions are put shortly—that the wife acquires no proprietary rights by marriage under the Scotch law at all, but under the French law acquires a real proprietary right, the distinction between the two systems is evident enough. The *communio bonorum* in Scotland is a mere fiction. In France it is a reality, and in England, as the Master of the Rolls says, the parties to the litigation now being discussed, Mr. and Mrs. Hog, were both English, married in England, where her unsettled property existing, and after acquired, became the property of Mr. Hog by the mere fact of the marriage, and gave Mrs. Hog no proprietary right whatever to the movable property in question. Once it is admitted that the marriage gives a proprietary right, and therein is the importance of the distinction Lord Eldon took between what was inaccurately argued in that case as a proprietary right conferred by the fact of marriage and a real proprietary right conferred by specific contract, the anomaly pointed out by the Master of the Rolls and sought to be explained

becomes at once intelligible. It is only material as illustrating what was the prevailing train of thought in the minds of Lord Eldon and Lord Rosslyn. Both of them speak of the words "implied contract," by which I presume they implied from the relation of husband and wife, and not unnaturally they deduce the conclusion that if it is implied from that relation only the husband's change of domicile may bring with it the consequential change from such relation. Here, however, as I have endeavoured to point out, the French marriage confers not only an implied but an actual binding partnership proprietary relation fixed by the law upon the persons of the spouses, the binding nature of which it appears to me no act of either of the parties contracting marriage can affect or qualify. I can only account for the absolutely inaccurate use of the Scotch term *jus relictae* as arising from a reference to a dispute that appears to have existed in the Scotch authors as to whether those rights flowed from the communion, whereas, to quote again from Mr. Fraser's book, p. 671, where he says:—"It has been found, in accordance with the opinions of the French commentators, of Dirleton, and other lawyers of our own country, that the *jus relictae* and *legitim* are in all respects the same; that they are mere casual contingent rights during the subsistence of the marriage, existing then only in hope, and coming into proper rights merely at its dissolution, that they are not rights of division of a fund already held in common, but rights of debt against the husband's executors, constituting the widow and the children creditors, whose right comes into being by the husband's death, and secondary creditors too, for all other debts must be paid before theirs." It is therefore, as I understand, than when once Lord Eldon came to the conclusion that the husband and wife had become Scotch domiciled spouses the property not affected by a previous complete and irrevocable right would properly be distributed according to Scotch law. It follows, therefore, if I am right, that that case is not binding on your Lordships, and that we are at liberty to decide the question now in dispute in accordance with reason and common sense. I therefore move your Lordships that the order appealed from be reversed, the costs to be costs in the summons.

LORD MACNAGHTEN, after stating the facts, said:—"The question for your lordships' consideration is whether Mr. and Mrs. De Nicols continued subject to the system of community of goods after they became domiciled in England. On the one hand, it is contended that the change of domicile from French to English destroyed the community altogether, and therefore that the testator's will operated upon the whole of the property vested in him which, but for that change, would have been common. On the other hand, it is said that the community continued notwithstanding the change of domicile, and that Mr. De Nicols remained bound by the article of the Code Civil, which provides that a testamentary donation by the husband cannot exceed his share of the community. If the case were not embarrassed by the judgment of this House in "*Lashley v. Hog*" (Scotch Appeal Cases, 4 Paton, 581), which was discussed so fully at the Bar, it would not, I think, present much difficulty. Putting aside "*Lashley v. Hog*" for the moment, the only question would seem to be what was the effect, according to French law, of the marriage of Mr. and Mrs. De Nicols without a marriage contract? Upon that point there cannot, I think, be any room for doubt. It is proved by the evidence of M. Lax, the expert in French law called on behalf of the appellant, that, according to the law of France, a husband and wife intermarrying without having entered into an ante-nuptial contract in writing are placed by the sole fact of the marriage and stand precisely in the same position in all respects as if pre-

viciously to their marriage they had in due form executed a written contract, and thereby adopted as special and express covenants all and every one of the provisions contained in Articles 1,401 to 1,496 in Title V. of the Code Civil, headed "of marriage contracts and the respective rights of spouses." In support of this conclusion M. Lax refers to the relevant articles of the Code and to a decision of the highest authority pronounced by the Cour de Cassation in January, 1854. The case as reported by Sirey presents the argument so clearly and so concisely that I may be pardoned for referring to it more in detail. The summary in Sirey's Reports is as follows:—"The conjugal association as to property once formed at the time of the marriage by the operation of the law of the domicile or nationality of the husband cannot be altered later on either by a change of nationality or by the acquisition of a new personal domicile subsequently to the marriage." The case was this—an Englishman and an Englishwoman—Mr. and Mrs. Boyer were married in England without any settlement. Afterwards they went to France and jointly acquired immovable property there. The husband became a French citizen. The wife died first. On her death duty was demanded and paid on one-half of the property as having devolved upon her children as her next-of-kin. An action was brought for return of the duty. The tribunal of Lille ordered repayment, holding that "the matrimonial compact in respect of property is as immutable as the marriage itself of which it is an accessory." The Revenue authorities appealed. The Cour de Cassation affirmed the decision. They founded their judgment upon their view of English law, which seems right enough, and upon the following considerations—that "the rule of the marriage of the spouses Boyer has followed them to France when they went there to settle and there acquired property," and that "the said rule has the same force as if a formal contract had been entered into between the said spouses for the regulation of their fortune." Although this reasoning may not seem quite in accordance with the opinion which Lord Eldon expressed in *Lashley v. Hog* "as to the effect of an English marriage without a settlement, it indicates, I think, the view which according to French law would be taken of the compact as to property constituted by a French marriage under the Code Civil without an ante-nuptial agreement. The expert who was called on behalf of the executors, does not attempt to contravene this conclusion of law. He endeavours to minimize its effect by treating it as a self-evident proposition—as in fact being nothing more than what the code declares. He adds, however, that, in his opinion, the effect of a change of domicile or nationality upon the community system was never considered by the framers of the code. That may be so. But if there was a valid compact between the spouses as to their property, whether it was constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicile. Why should the obligations of the marriage law under which the parties contracted matrimony, and which according to the law of the country where the marriage was celebrated are equivalent to an express contract, lose their force and effect when the parties become domiciled in another country? As M. Lax points out, change of domicile and naturalization in a foreign country are not among the events specified in the code as having the effect of dissolving or determining the community. Let us suppose a case the converse of the present one. Suppose an Englishman and an Englishwoman, having married in England without a settlement, go to France and become domiciled here. Suppose that at the time of the acquisition of the French domicile the husband has £10,000 of his

own. Why should his ownership of that sum be impaired or qualified because he settles in France? There is nothing to be found in French law, nothing in the Code Civil to effect this alteration in his rights. Community of goods in France is constituted by a marriage in France according to French law, not by married people coming to France and settling there. And community must commence from the day of the marriage. It cannot commence from any other time. It appears to me, therefore, that the proposition for which the executors contend cannot be supported on principle. That, I think, was the view of the Court of Appeal. But they considered that the judgment of Lord Eldon in *Lashley v. Hog* "compelled them to decide in favour of the executors. Mr. and Mrs. Roger Hog, an Englishman and an Englishwoman, intermarried in England without a settlement. Mr. Hog made a fortune in England, settled in Scotland, and became domiciled there. After this change of domicile the wife died in the lifetime of the husband. Some years later the husband died a domiciled Scotchman. There was a good deal of litigation as to the administration of Mr. Hog's estate, and there were appeals to this House. In one of these appeals, among other things, this House determined that Mrs. Lashley, who was one of the children of the marriage, had "a claim in right of her mother, the wife of the said Mr. Roger Hog, who at the time of her death had his domicile in Scotland, to a share of the movable estate of her father at the time of her mother's death." No doubt, if the law had not been altered by the Act 18 Vict., c. 23, s. 6, that decision would be binding upon this House in a similar case. But when you are asked to apply the decision to a case where the circumstances are different it seems to me that the proper course is to ascertain, if you can, the principle of the decision and then to see if that principle is applicable to the circumstances of the case under consideration. This is the case of a French marriage with a settlement prescribed and constituted by the law of the land and followed by naturalization in a foreign country. *Lashley v. Hog* was the case of an English marriage without a settlement and a change of residence to another part of the United Kingdom. Now what was the principle on which Lord Eldon proceeded? After a long discussion Lord Eldon comes to the point by asking this question:—"Why should it be thought an unreasonable thing that where there is no express contract the implied contract should be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy, in case the husband thinks proper to die intestate?" Then his Lordship goes on to say:—"This has been the principle which it seems to me has been adopted, as far as we can collect what has been the principle adopted in cases in those parts of the island with which we are best acquainted; and, not being aware that there has been any decision which will countervail this, thinking that it squares infinitely better with those principles upon which your Lordships have already decided in this case, it does appear to me, attending to the different sentiments to be found in the text writers upon the subject, that it is more consonant to our own laws, and more consonant to the general principle, to say that the implied contract is that the rights of the wife shall shift with the change of residence of the wife, that change of residence being accomplished by the will of the husband, whom, by the marriage contract in this instance, she is bound to obey." I may observe in passing that in that passage Lord Eldon was referring to the difference of practice in the administration of intestates' effects then prevailing in the different provinces of York and Canterbury, and also to a previous decision in the case of *Lashley v. Hog* "on the question. It is not, I think, very easy to see how the

principle which Lord Eldon selects as the ground of his decision could in the case of an English marriage and the subsequent acquisition of a Scotch domicile be legitimately extended so as to deprive the husband of his own property, and transfer it in his lifetime to the next-of-kin of his wife. It seems to me that the result can only be reached by one or other of two alternatives. Either it must be held that the implied contract on the part of the husband is that in case of a change of a domicile the wife shall enjoy all the rights of a woman married in the country where the new domicile is established, and that he will surrender in her favour so much of his rights as may be inconsistent therewith; or else it must be assumed that marriage in Scotland is not required to create communion of goods, but that communion of goods is incidental to the status of married persons in Scotland; or, as Lord Eldon puts it, "the law of Scotland 'recognizes' communion of goods 'in the married state.'" Now, if that assumption be necessary in order to support Lord Eldon's conclusion in "*Lashley v. Hog*," it is obvious that there is so wide a divergence between the law of Scotland, or what is assumed to be the law of Scotland, and the law of France as to make the decision inapplicable to the present case. If, on the other hand, Lord Eldon's conclusion is a legitimate extension or development of the principle on which his argument is founded, it seems to me that there is no room for the application of the principle in the circumstances of the present case. The principle, as Lord Eldon explains, is founded on the notion that upon an English marriage without an express settlement there is an implied contract that the expectations of the wife are to depend upon the domicile of the husband. Lord Eldon admits, and it was conceded at the Bar, that, if there had been a written contract dealing with the whole property of the spouses present and future, the principle of "*Lashley v. Hog*" could not apply. Now the effect of what took place on the occasion of the French marriage, so far as it amounted to a compact in respect to property, must, I think, be determined by French law, and it has been proved by the evidence in this case that what did take place was to all intents and purposes, according to the law of France, equivalent to a written contract. It appears to me, therefore, that the case is not governed by the decision in "*Lashley v. Hog*," and I think the appeal ought to be allowed.

LORD MORRIS and LORD SHAND concurred.

LORD BRAMPTON, in the course of his judgment, stated the facts, quoted at considerable length the relevant provisions of the Code Civil, and then continued thus:—It was under this system, which had been for nearly half a century a very familiar and approved form of settlement, the nature and provisions of which the parties as French subjects must be presumed to have had knowledge, they were married; and upon the faith and under the belief that its provisions would regulate the property of both so long as their married life continued, and that on the death of either it would be divided between the survivor and the representatives of the deceased, the wife placed in the possession of her husband as part of the capital of their "conjugal partnership" such little property as she could then call her own; and from that time until the death of her husband it was never suggested that with the change of domicile to England the rights of property the wife had acquired by her marriage in France vested in her husband as absolute owner, as if they had been married in England without any settlement at all. The Married Women's Property Acts do not, in my opinion, affect the present case. His Lordship then discussed at large the case of "*Lashley v. Hog*," and in concluding his judgment said:—It is conceded that, had the provisions of the system been embodied in the very words of the

Code in an instrument signed by the parties expressing their intention to marry under it, it would be unobjectionable, and as valid in an English Court as a special agreement of the parties made under Article 1,383. This may at least be taken as an admission that there is nothing in the system itself repugnant to the law of England, and this reduces the objection to one merely of form. What, then, is the weight of this objection if all required by the law of France has been observed? I have always been under the impression that the form required for a contract by the law of the place where it is made is both sufficient and requisite for its validity in England. In this case every form required by the Code Civil has been complied with, and I see nothing to prevent the operation of the rule that where there is a marriage contract or settlement the terms of such contract or settlement determine the rights of husband and wife in respect of all movables to which it applies. As a rule the rights of spouses conferred by the law of one country change with every change of domicile, for the law of one country can have no intrinsic force except within the territorial limits and jurisdiction of that country. But the comity of nations, with a view to the comfort and convenience of their respective subjects, has rightly conceded that there should be some exceptions to this strict rule of the territorial law. By one of such exceptions it is universally admitted that where, upon marriage, a marriage contract or settlement is made regulating the property of the spouses, such contract or settlement shall have effect given to its provisions, wherever the spouses may afterwards be domiciled. When "*Lashley v. Hog*" was decided in July, 1804, the Code Civil had only been promulgated about five months; this may account for no mention having been made of it. What might have been held had the question then arisen in an English Court, as to how far it should be allowed to operate under circumstances similar to those before us, I cannot of course say, for in itself it was an untried novelty. It seems strange that no such question has been raised and decided in an English Court hitherto. In dealing with it to-day, we have the benefit of nearly a century's experience before us of the cheerful and ready submission to and approval of this system and enactment so admirably calculated to satisfy the requirements of French spouses by millions of the subjects of a great and powerful country. I am sanguine enough under such circumstances to entertain a hope that your Lordships will, in declaring the law of this land, think it right to accord to this system and enactment a place with contracts and settlements as exceptions to the rule of territorial law—even apart from the question of contract, which I have discussed—and carry out the real wishes and advance the interests of the many subjects of France whose properties in their own country are, and in the future will be, regulated by it. Thinking as I do that this case falls within the exceptions engrafted by the comity of nations upon the strict rule of the territorial law, I am of opinion that the judgment of the Court of Appeal should be reversed, and that of Mr. Justice Kekewich restored, and that judgment should be entered for the plaintiff with costs.

The decision of the Court of Appeal was therefore reversed, and that of Mr. Justice Kekewich restored.

[Solicitors—Hicks, Arnold, and Mozley, for the appellant; Tyrrell, Lewis, Lewis, and Broadbent, for the respondents.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Dec. 16.

FRANCIS V. TURNER BROTHERS.*

Master and Servant—Master's liability to servant

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

—Workmen's Compensation Act, 1897, sec. 7, subs. 1.

The words employment "on, in, or about a factory" mean at the factory which is occupied by the employers, and do not include employment at another factory.

This was an appeal from the decision of the Newtown County Court Judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The appellant was a labourer in the employment of the respondents, who were the owners and occupiers of a factory. On November 14, 1898, the appellant was sent by the respondents with three other workmen to the cloth factory of the Severn Tweed Company to remove from the engine-shed an old disused steam engine which the respondents had purchased. According to the evidence the men had to remove two cog wheels and the shafting, and then the frame. There was a prop on the frame which ran up to some iron girders upon which two tanks rested. The prop had to be removed, and inquiry was made whether the prop supported anything, and the men were told that it could be knocked down. When the prop was knocked down the tanks came down and fell upon the respondents' men, killing two of them and seriously injuring the appellant. It appeared from the evidence that Mr. Turner, one of the respondents, came to the Severn Tweed Company's mills once or twice during the work. The Severn Company's machinery was driven by steam or gas, and their carding machine was working close to the respondents' workmen. In the back part of the engine-shed an engine was going and pumping water for steam power for the mills. It was admitted that the accident arose out of and in the course of the appellant's employment. The Severn Company's factory was 860 yards from the respondents' factory by the footpath, and rather further off by the road. The County Court Judge held that the employment of the appellant was not an employment on, in, or about a factory within the meaning of section 7 subsection 1 of the Workmen's Compensation Act, 1897, and he accordingly dismissed the application to assess compensation.

Mr. ELLIS GRIFFITH and Mr. H. C. DAVENPORT, for the appellant, contended that the Act applied to an accident happening to the appellant in the Severn Company's factory. It was not necessary that the accident should happen at his employers' factory, if the workman was sent on his employers' business to work at another factory. Section 7 subsection 1 of the Act of 1897 spoke of employment by the undertakers "on, in, or about a factory," not "the" factory. Secondly, the respondents were the occupiers for the time being of the engine-shed at the Severn Company's mills, and were, therefore, the occupiers of a factory within the meaning of section 23 of the Factory and Workshop Act, 1895. The word "undertakers" was defined by section 7 subsection 2 of the Act of 1897 as meaning the occupier of a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895. Section 93 of the Factory and Workshop Act, 1878, was also referred to.

Mr. Ruegg, Q.C., and Mr. A. Powell, for the respondents, were not called upon.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that there could be no doubt about the case. The respondents were the occupiers of a factory, and if the accident to the appellant had happened there the Act would have applied. The respondents had bought an engine which was in a factory about half a mile away from their own factory, and their workmen were sent to remove the engine to their factory. The first question was whether the

employment in which the accident happened was an employment by the undertakers "on, in, or about a factory" within section 7 subsection 1 of the Act. In his Lordship's opinion those words meant employment at the factory which was occupied by the employers and where the employers carried on their business. The words did not include employment at another factory. It was then said that the respondents were the occupiers of a factory within the Severn Company's mills within the meaning of the Act. They were clearly not the occupiers, of the factory in the ordinary sense. But the word "undertakers" was defined as meaning the occupiers of a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895. There was only one possible section in those Acts which could be relied upon—namely, section 23 of the Factory and Workshop Act, 1895. That section only said, so far as material to the present case, that certain provisions of the Factory Acts, relating to the fencing of machinery, &c., should have effect as if all machinery and plant used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse, and any premises on which machinery worked by steam, water, or other mechanical power was temporarily used for the purpose of the construction of a building or any structural work in connexion with a building, were included in the word factory, and the person so using the machinery should be deemed to be the occupier of a factory. That provision did not apply to the present case. It was a special legislative provision as to such machinery and such premises. The appeal must be dismissed.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS concurred.

Mr. F. H. MELLOR, who appeared for the Severn Tweed Company, said that a third party notice had been served on them by the respondents under section 6 of the Act of 1897, and he asked that their costs of the appeal should be paid by the respondents. They were bound to appear in the County Court to defend their rights.

Mr. RUEGG said that no notice to appear on the appeal had been served on the Severn Tweed Company, and

The Court thereupon said that the Severn Company were not entitled to their costs.

[Solicitors—Woosnam and Smith, for Martin Woosnam, Newtown, for the appellant; Hurd and Son, for Williams, Gittins, and Taylor, Newtown, for the respondents; Busk, Mellor, and Morris, for E. Powell, Newtown, for Severn Tweed Company.]

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.JJ.) } Dec. 16.

THE LONDON AND WESTMINSTER BANK V. THE COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamp duty—Exemptions—Sched. I., "Receipt" exemption 11—Stamp Act, 1891.

A duly stamped scrip certificate for £100 was issued upon payment of the allotment money, the balance being payable in two monthly instalments. At the foot of the certificate there were two blank forms of receipt for payment of the two instalments respectively. As the instalments were paid the receipts were filled in. *Held*, that the receipts were exempt from stamp duty under Exemption 11, Title "Receipt," in Schedule 1 to the Stamp Act, 1891.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

This was an appeal by the Commissioners of Inland Revenue from the judgment of the Divisional Court (Mr. Justice Day and Mr. Justice Lawrance), upon a case stated by the Commissioners of Inland Revenue, pursuant to section 13 of the Stamp Act, 1891; reported in 68 L.J., Q.B., 787. On May 10, 1899, two receipts, partly in print and partly in writing, appearing upon the face of a scrip certificate of the Cape of Good Hope Consolidated Three per Cent. stock, were presented on behalf of the London and Westminster Bank to the Commissioners of Inland Revenue under section 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which they were chargeable. The scrip certificate and the receipts respectively were in the following form:—

“Cape of Good Hope Consolidated Three per Cent. stock. Issue of £3,107,400. Scrip certificate for £100. The bearer of this scrip certificate is entitled to £100 Cape of Good Hope Consolidated Three per Cent. stock, 1933-1943, after payment to the London and Westminster Bank (Limited), Lothbury, of the instalments due thereon as under, viz.:—£40 on April 10, 1899, £40 on May 10, 1899. Payment in full may be made at any time, under discount at the rate of 2 per cent. per annum. If default be made in payment of the amounts at their due dates, the previous payments will be liable to forfeiture. This scrip certificate, when fully paid, must be lodged at the London and Westminster Bank (Limited), Lothbury, for inscription in the ‘books of the ‘Cape of Good Hope Consolidated Three per Cent. stock, 1933-1943,’ in such name or names (not exceeding four) as may be desired. The interest on the stock will be payable at the London and Westminster Bank (Limited) on February 1 and August 1 in each year, and the principal will be repayable there on February 1, 1943, the Government of the Cape of Good Hope having the option to redeem the stock at par on or after February 1, 1933, on giving 12 calendar months’ notice to the stockholders. Six months’ interest on the stock will be paid on August 1, 1899. The revenues of the colony of the Cape of Good Hope alone are liable in respect of this stock and the dividends thereon, and the Consolidated Fund of the United Kingdom, and the Commissioners of her Majesty’s Treasury are not directly or indirectly liable or responsible for the payment of the stock or of the dividends thereon, or for any matter relating thereto, 49 and 41 Vict., cap. 59, section 19.—For the London and Westminster Bank (Limited), J. A. BAKER, London, March 14, 1899.

“Received the 10th day of April, 1899, £40, being the instalment on the above scrip certificate, due April 10, 1899.—For the London and Westminster Bank (Limited), J. L. OVINGTON.”

“Received the 10th day of May, 1899, payment in full.—For the London and Westminster Bank (Limited), H. E. BILLINGE.”

The scrip certificate was duly stamped as such with the duty of 1d., and the London and Westminster Bank contended that by reason of exemption 11 under the head “Receipt” in schedule 1 to the Stamp Act, 1891, the receipts were exempt from duty. The Commissioners, being of opinion that the exemption was not applicable, assessed each of the receipts with the duty of 1d. The questions for the opinion of the Court were—(1) Whether the receipts or either of them were chargeable with the duty of 1d. in accordance with the assessment of the Commissioners; (2) if not, with what duty they were respectively chargeable. The Divisional Court held that the receipts were exempt. The Inland Revenue Commissioners appealed. The material provisions of the Stamp Act, 1891, are set out in the judgment given below

The Solicitor-General (Sir R. B. Finlay, Q.C.) and Mr. Danckwerts appeared for the Commissioners; Mr. McIntyre (Mr. Joseph Walton, Q.C., with him) appeared for the respondents.

The COURT, having taken time to consider, delivered judgment dismissing the appeal.

LORD JUSTICE COLLINS read the following judgment of the Court:—This is an appeal by the Crown from the decision of Mr. Justice Day and Mr. Justice Lawrance allowing an appeal from the Commissioners. The question is whether certain receipts endorsed on a scrip certificate for £100 Cape of Good Hope Consolidated Three per Cent. stock are liable to a duty of 1d. each under the Stamp Act, 1891, first schedule, or whether they fall within the exemption (11). The scrip certificate, so far as material, is in these terms. His Lordship read the material parts of the certificate and the receipts, and continued:—The following is the provision of the Stamp Act, 1891, Schedule 1:—“Receipt given for or upon the payment of money amounting to £2 or upwards, 1d.” Exemption 11 is as follows:—“Receipt endorsed or otherwise written upon, or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned.” The scrip certificate had been duly stamped as such, and on the date of its issue the first instalment, a sum under £20, had been paid in respect of it. We are of opinion that the decision of the Divisional Court was right. The scrip certificate is duly stamped, and the receipts are endorsed respectively or otherwise written upon it. Therefore if they “acknowledge the receipt of the consideration money therein expressed,” they fall within the exemption. What then is meant by the “consideration money therein expressed” of which the receipt is to be acknowledged? We think it is the money which it appears from the terms of the instrument is the consideration for the obligation undertaken by the issuer of the instrument—i.e., the Government of the colony. It is in return for the payment not of one, but of all the instalments, that the Government undertakes this obligation, and it can make no difference whether the consideration is paid in a lump sum, or by instalments, or with conditions of forfeiture on non-payment of an instalment or not. Neither is it material that the instrument can be transferred pending the payment of the instalments, so that each may be paid by a different person. The money consideration is the same by whomsoever it is paid, and whatever may be the conditions to which it is made subject. The point made by the Crown in the Court below, that the scrip certificate is not “an instrument” within the exemption, was not taken before us; but it was argued by the Solicitor-General that the consideration for the certificate was not the sums of £40, or either of them mentioned in the receipts, but the first instalment paid on the issuing of the certificate. We think, with deference, that there is a fallacy in this argument, in that it confounds that which is payable as a condition precedent to getting the custody of the certificate with that which is expressed in the certificate as the consideration, not for the handing over of the certificate with the inchoate rights arising therefrom, but for the acceptance of the final obligation which is only assumed when all the instalments are paid. Is the consideration expressed in an instrument as the total sum in return for which the obligation is accepted any the less the consideration because it is made payable by instalments, and the custody of the instrument is handed over in exchange for the first instalment? In our opinion the receipts on this instrument acknowledge the payment of the full sum in return for which, by the terms of the instrument,

the Cape Government undertake to treat the holder as entitled to 25% Cape of Good Hope Consolidated 3 per Cent. stock. The Crown also relied upon section 3, subsection 2, which enacts that "if more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable"; but this only applies if the instruments do not fall within exemption 11 above set out. We cannot say whether our reasons coincide with those of the Divisional Court, for they have given none; but on the grounds above stated, we are of opinion that this appeal should be dismissed.

Solicitors—Collector for Inland Revenue: Travers-Smith, Ed. Howarth, and E. J. Sims.

Court of Appeal (A. L. Smith, Collins,) 1899.
and Vaughan Williams, L.J.J.)) Dec. 16.

*WALKER V. WHITAKER BROTHERS LIMITED.**

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—"Accident arising out of and in the course of the employment."

This was an appeal from the decision of the Hull County Court Judge (Judge Raikes, Q.C.) in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, a boy of 15 years of age, was in the employment of the appellants, who were contractors in a large way of business, and who at the time of the accident were engaged in constructing a dock at Hull. There was a railway line used and worked by them for the construction of the dock. The respondent had been employed by the appellants as a signaller, but at the time of the accident he was employed to grease the wheels and axles of the railway trucks. On October 15, 1898, he had finished greasing the trucks that were ready for him, and had to wait for more trucks. He went to a fire which was a short distance away from the place where he had been greasing the trucks, the fire being close to a lever used for moving points. All trucks coming to him were passing that spot. The handle of the lever was away from the line, and the respondent sat on the handle to warm himself at the fire. He saw an engine with trucks coming along the line, up an incline, and, thinking that the points were against the engine, he began to pull the lever over to open them, when the engine came on and took the lever over with a jerk, the lever throwing him against the engine. He was so injured that his leg had to be amputated. The lever was in the middle of the line, and there was evidence that the points had been left so that the engine would have crossed them. The respondent had not been told not to touch the lever, but it was no part of his duty to do so. There was a boy whose duty it was to look after the points, but he was about 20 yards away at the time. The questions were (1) whether the accident arose "out of and in the course of the employment" within section 1, or section 1, of the Act of 1897; and (2) whether the injury was attributable to the serious and wilful misconduct of the respondent. The County Court Judge found in favour of the respondent. He said that the respondent was not neglecting any duty at the time of the accident; that he was only waiting for more trucks to come to be greased, and he was under no obligation to stay or stand in any particular place until the trucks arrived; and that he was in the course of

his employment when the accident happened. He also held that the respondent was not guilty of serious and wilful misconduct.

Mr. W. H. Owen appeared for the appellants.

Mr. H. T. Kemp, for the respondent, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the boy was engaged on the day of the accident in greasing the wheels of the trucks. He had greased all the trucks that were ready for him, and he had then to wait for others. What was he to do while waiting? There was a fire not far from the place where he had greased the trucks, and he sat down on a lever to warm himself by it. The County Court Judge came to the conclusion upon the evidence that the story told by the boy was true. An engine and trucks came along the line, and the boy was thrown against the engine and injured. The only question they had to decide was whether there was evidence upon which the County Court Judge could find that the accident arose out of and in the course of the boy's employment. It was the boy's duty to wait for the other trucks. In his Lordship's opinion there was evidence to justify the finding of the Judge. He would go further and say that he thought the County Court Judge was right. Again, upon the evidence the Judge was justified in finding that there was no serious and wilful misconduct.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—W. Roberts, Hull, for the appellants; A. M. Jackson and Co., Hull, for the respondent.]

Court of Appeal (A. L. Smith, Collins,) 1899.
and Vaughan Williams, L.J.J.)) Dec. 16.

*WALKER V. LITTLE HALL COMPANY LIMITED.**

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—"Accident," what is.

The word "accident" implies the happening of something fortuitous and unexpected. Therefore, where an engine-fitter was fixing steampipe joints for which purpose red lead was used, and in consequence of a blister on his finger the red lead poisoned the finger, it was held that the injury was not caused by an "accident."

This was an appeal from the decision of the Judge of the Bow County Court (Judge French, Q.C.), in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The appellant was an engine-fitter in the employment of the respondents, who were engineers and ironfounders. The appellant on April 17, 1899, was working for the respondents at the Abley Mills, West Ham, fixing some machinery there. He was working at steampipe joints for a machine, it being the duty of a labourer to put red lead on the joints, the appellant having then to screw the pipes into position. The appellant had in the previous week blistered one of the fingers of his right hand while chipping steel plates for a large engine at the same works. On the day of the accident the appellant showed the blister to the foreman and said that he thought it was hardly fit for him to do the job. The foreman replied that he must do it, as the engine had to work that afternoon. The appellant accordingly did the work. The next night the finger became inflamed from the red lead and oil, and was seriously injured. The County Court Judge

said that the appellant had received a serious injury whilst working in the respondents' employment in the ordinary way with the usual materials and appliances, and that there was no accident within the meaning of the Act of 1897. He accordingly decided in favour of the respondents.

Mr. Bassett Hopkins appeared for the appellant.

Mr. T. W. Chitty, for the respondents, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that to bring a case within the Act there must be, by section 1, subsection 1, personal injury by accident arising out of and in the course of the employment. The sole question here was whether there had been an accident. The personal injury was beyond question. But it arose when the workman was working in the ordinary way and with the usual materials. There were two cases, decided a fortnight ago, in which a similar question arose. In "Hensey v. White" (16 *The Times* L.R., 64) the workman was suffering from chronic inflammation of the stomach, which caused the blood-vessels to become congested, and the man died through the bursting of the blood-vessels while at his ordinary work, though at the time of his death the work was more arduous than usual. The County Court Judge found as a fact that the man died of inherent weakness of the blood-vessels and not from an accident, and this Court dismissed the appeal. Lord Justice Collins in that case said that "it was clear on the findings of the County Court Judge that the element of accident was entirely wanting. The injury arose in the ordinary course of the deceased man's work, though there might have been a little more exertion used by him in that work on the occasion in question than was usual. In 'Pandorf v. Hamilton' (12 App. Cas., 518, at p. 524) Lord Halsbury said that he thought that the idea of something fortuitous and unexpected was involved in the word 'accident.' That element was wanting in the present case. In the cases which had been cited a fortuitous and unexpected element existed which was the proximate and ultimate cause of death." He (the Lord Justice) entirely agreed with that view. The next case was "Lloyd v. Sugg and Co." (16 *The Times* L.R., 65), where the workman was holding a flatter on an anvil for another man to hit. The duty of the latter man was to hit the flat end of the flatter, but he struck the round part and jarred the other workman's hand. That was an injury caused by a mis-hit, and was therefore an accident. In his Lordship's opinion there was no accident in the present case.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS agreed.

[Solicitors—Edward Clarke, for the appellant; Hargreave and Heaton, for the respondents.]

Q.B. Div. (Lord Russell of Killowen,
C.J., Wills, Wright, Darling, and
Channell, JJ.) 1899.
Dec. 16.

REG. V. NEAT.*

Criminal Law—Larceny Act, 1868 (31 and 32
Vict., c. 116), sec. 1—Beneficial owners—Com-
mittee of friendly societies.

This was a case stated by Mr. Justice Wills for the opinion of the Court. The case was as follows:—
"Frank Neat has been tried and convicted before me at Maidstone Assizes on November 29, 1899, on an indictment containing two counts alleging—(1) That the prisoner being a beneficial owner with H. E. Millen and

others of certain moneys, to wit £194 4s. 8d., whilst he was such beneficial owner feloniously stole the said moneys, then belonging to such beneficial owners as aforesaid, against the form of the statute, &c. See 31 and 32 Vict., c. 116, section 1. (2) That the prisoner feloniously stole £194 4s. 8d. of the moneys of H. E. Millen and others against the form of the statute, &c. In August, 1897, a *fête* was held under the direction of what was called an amalgamated committee, consisting of 30 persons. Two of them were appointed by each of 15 registered friendly societies. The committee of each of the 15 societies guaranteed £3 towards the expenses. Tickets were sold to any persons who would buy them. Programmes also were sold, and there were various matters for which on the ground money was taken, as for refreshments, care of bicycles, and the like. The amalgamated committee (hereinafter called the *Fête* Committee) ordered the various items of expenditure in respect of the *fête*, engaged and paid the band, ordered the printing, advertising, and so forth. They received the proceeds, and at the close of the *fête* were in the possession of a sum of upwards of £200. Millen, named in the indictment, and the prisoner were both members of the committee, the prisoner being one of the two appointed by the committee of the Loyal Providence Lodge of Oddfellows, and Millen one of the two appointed by the Anglo-Saxon Lodge of the same order. Millen was also the treasurer and the prisoner was also the secretary of the *Fête* Committee. Neither of them had any banking account. Millen was going from home and did not wish to have so large a sum left in his house, and he asked the prisoner if he had a banking account. The prisoner had none, but proposed that they should ask one Cording, an advertising agent who had advertised the *fête* for the committee, to allow the money to be paid into his banking account for the use of the committee. Cording assented. Millen thereupon handed £210 17s. 2d. to the prisoner, who handed it to Cording, who paid it into his own banking account. The prisoner procured from Cording a cheque for £16 2s. 6d. for an account due to one Jewry in respect of advertisements. This account he paid. He then procured from Cording £15 in cash and two cheques of £100 and £89 4s., supposed to represent the balance of the £210 17s. 2d., alleging that the money was wanted for the purposes of the committee. By mistake Cording paid him about £10 above the balance of the sum deposited with him. The prisoner paid Cording a small account for advertisements, but absconded with the balance of about £180 and avoided apprehension for more than two years. The whole of the societies by whose committees the members of the *Fête* Committee were appointed were registered friendly societies. The provision of the *fête*, however, was entirely outside the purposes of the societies, and they were all aware of this and acted upon that view. Such *fêtes* were held from time to time, and an established practice had grown up with respect to them. Each of the 15 societies had its banking account, and only one account. The funds which properly belonged to the society, and the application of which was provided for by its registered rules, were paid into that account and were regularly dealt with in the books of account of the society. But into the same account were paid other moneys forming what was called the 'incidental fund,' of which a separate account was kept by each society. This incidental fund had no legal relation to the society, and the money was only paid into the society's banking account for convenience. It was used only for the purpose of providing entertainments, such as concerts and *fêtes*, in which the members of the society were interested. These might be either concerts, &c., for members of the particular society or such entertainments as the *fête* now in question in which other societies

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

joined, and the entertainments were sometimes merely for the purposes of personal enjoyment, sometimes in aid of some charitable object. Out of this incidental fund was paid the committee's contribution to the guarantee fund of a *Fête* Committee. Into it was paid any share of profits received from a *Fête* Committee, and out of it was defrayed any proportionate sum due from the society's committee in respect of any loss incurred by holding an amalgamated *fête*. In the administration of this fund the committee of the society acted, not on behalf of the registered society, which all concerned were aware could not sanction any such enterprise or expenditure, but as the managing body *ad hoc* for the members of the particular society; and it was entirely in the hands of the members of the society meeting for that purpose to say how the incidental fund should be applied, though in practice it never was applied except for the purposes I have mentioned; and it was undoubtedly the general understanding that the incidental fund of each society should be applied under the control of the members generally to the provision of entertainments of the character above mentioned. But for the misappropriation of the money taken by the prisoner there would have been in the present instance a considerable surplus divisible amongst the 15 contributing groups above described. It was objected by Mr. Hohler, of counsel for the prisoner, that there were no persons who, together with the prisoner, were the beneficial owners of the money in question. The section 1 of 31 and 32 Vict., upon which the indictment is based, is, so far as is material, as follows:—'If any person being one of two or more beneficial owners of any money shall steal or embezzle any such money belonging to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been one of such beneficial owners.' I was, of opinion that the term 'beneficial owner' was not a technical one and ought to receive a liberal construction, and that either the members of the *Fête* Committee, of whom the prisoner was one, or the whole of the members of the 15 societies (of whom also the prisoner was one), or both, had an interest in the fund of a character which made them 'beneficial owners' within the meaning of 31 and 32 Vict., c. 116, section 1. As to the second count I told the jury that there was evidence upon which they might find the prisoner guilty of larceny as a bailee. I was, however, under the impression that the property was laid as that of Cording. I do not think that a man can be said to be a bailee when he is one of the bailors, and probably the only question in reference to this count is whether the words of the statute that he shall be 'liable to be dealt with, tried, and convicted and punished as if he had not been one of the beneficial owners' render him liable to be indicted in the manner above set forth. The prisoner was convicted; separate judgments have been entered upon each count. He was sentenced to eight months' imprisonment in the second division and is undergoing that sentence. The question for the decision of the Court is whether the conviction can be sustained under either or both of the counts in the indictment."

Mr. Hohler appeared for the prisoner; no one appeared for the prosecution.

Mr. HOHLER, on behalf of the prisoner, submitted that the Act created no new offence, but took away defects. It provided that the fact of being a beneficial owner should be no defence.

The LORD CHIEF JUSTICE.—Who do you say was the beneficial owner?

Mr. HOHLER.—Assuming that there is a trust of some kind for the societies, that does not make the prisoner beneficial owner. The Act was meant to apply to the case where the man was entitled to a part of the fund.

There was no trespass in such a case and therefore the Act was passed. Millen was the owner. He was not bound to pay over the particular money to the societies.

The LORD CHIEF JUSTICE.—In this case we have to deal with one point only. I wish to make it clear that the Court is only considering the question which alone was raised by counsel for the prisoner at the trial—namely, that there were no persons who, together with the prisoner, were the beneficial owners of the money in question. [After stating the facts his Lordship proceeded.] Whether the prisoner was guilty of obtaining money by false pretences is not raised by the case. The prisoner was indicted under section 1 of the Larceny Act, 1868 (31 and 32 Vict., cap. 116). The question is whether the contention raised by counsel for the prisoner—that no persons were beneficial owners of the money in question—is sound. In my opinion the legislature intended by the statute to get rid of some perplexities which had surrounded the case where a person charged with larceny had a beneficial interest in the fund. Upon the facts of the present case it seems to me that the 30 members of the committee, including the prisoner, may well be said to have been the beneficial owners of the money. They had the control of the fund and the right to see to its appropriation in discharge of their liabilities. But it is not necessary to rest our judgment upon that ground. There were beneficial owners of this fund somewhere. An object cannot be a beneficial owner. The persons who benefit must be the beneficial owners. Either the beneficial owners must be the members of the committee or the members of the 15 societies. In either case the conviction was right. The prisoner was a member of both. As to the second count, Mr. Justice Wills was under the impression that the property was laid in Cording. That was not so. The conviction upon the first count will therefore stand, but upon the second it will be quashed.

MR. JUSTICE WILLS concurred.

MR. JUSTICE WRIGHT concurred, adding that the case must not be taken as deciding that larceny had been committed by the prisoner. In his opinion no larceny had been committed, but the prisoner could, even if the indictment were quashed, be prosecuted and punished for obtaining money by false pretences.

MR. JUSTICE DARLING and MR. JUSTICE CHANNELL were of the same opinion.

[Solicitor for the prisoner, H. J. Bracher, Maidstone.]

Q.B. Div. (Darling and Channell, JJ.) } 1899.
Dec. 16.

IN RE JOHN SCOTT, JUN., DECEASED.

Revenue—Estate duty—Beneficiary under will dying in testator's life time—Wills Act, 1837, sec. 33—Finance Act, 1894.

This was a petition by the executors of the will of Mr. John Scott, jun., against a claim made by the Commissioners of Inland Revenue for estate duty.

Mr. John Scott, jun., died on January 22, 1899, leaving a widow and daughter. By his will he left his property to the petitioners in trust for the widow and daughter, and after the death of the widow for the daughter absolutely. The total net value of the property passing on his death was £16,000. On May 12, 1899, Mr. John Scott, sen., the father of Mr. John Scott, jun., died, having made a will dated June 5, 1891, by which he left freehold property valued at £80,000 to his son, Mr. John Scott, jun. By virtue of the Wills Act, 1837, this disposition took effect as if the death of Mr.

—Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

John Scott, jun., had happened immediately after the death of Mr. John Scott, sen., and accordingly the freehold property passed to the petitioners as executors and trustees of the will of Mr. John Scott, jun. Estate duty was paid on this property in respect of the death of Mr. John Scott, sen. The question now was whether it could be aggregated with the rest of Mr. John Scott, jun.'s, property as property passing on his death within the Finance Act, 1894, and whether estate duty was chargeable upon the total amount accordingly in respect of such death. Section 33 of the Wills Act, 1837, enacts "That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear in the will."

Mr. Joseph Walton, Q.C., and Mr. Edwardes Jones appeared for the petitioners; and the Attorney-General, the Solicitor-General, and Mr. Vaughan Hawkins for the Crown.

The arguments of counsel, which were heard on December 11, are sufficiently indicated in the judgments. The COURT gave judgment for the Crown.

MR. JUSTICE DARLING, after stating the facts as above, said:—John Scott, jun., never had an interest in the estate devised to him, for he died before his father, but it is claimed that the estate of John Scott, jun., is liable to estate duty in respect to the property so devised to him by reason of the effect of the Finance Act, 1894, and section 33 of the Wills Act, 1837. It is plain that the devise of the estate devised to John Scott, jun., by his father did not lapse, but enures to be disposed of according to the trusts of the son's will. Hereupon arises the claim to further estate duty, and it is argued on behalf of the Crown that this estate is covered by the words of the Finance Act, 1894, because it is property which "passed on the death" of John Scott, jun., within the meaning of section 1 of that statute. As a matter of fact this estate never was the property of John Scott, jun., although it would have become so had he in fact died immediately after the death of his father. For the Crown it is, however, contended that the natural death of John Scott, jun., should be disregarded for this purpose, and that "constructive death" at a later date must be imagined, or in the words of the Solicitor-General, "the life of the son is projected forward and his death postponed, by the Wills Act." In my opinion the Wills Act has no such operation, and this contention must go the way of that in "Pearce v. Graham" (9 Jurist N.S., 568), where such a reading of the Wills Act was used to support the argument that coverture revived, so that a widow was reconstituted the wife of a man who had been dead some years. That contention, in itself sufficiently extravagant, might easily have led on to a doctrine of constructive bigamy and the present suggested fiction of "life projected forward" or "death postponed" might, if accepted now, soon be coupled with another doctrine, too readily adopted by some—that of constructive murder—with consequences too absurd to be even alluded to here. Having referred to "Woods v. Parker" (1 Swabey and Tristram, 525) and to "Winter v. Winter" (5 Hare, at pp. 312 and 313) his Lordship proceeded:—For my part I believe that the Act, having regard to parental affection, intended to recognize the truth expressed by Gray in his Elegy:—

"E'en from the tomb the voice of nature cries;
E'en in our ashes live their wonted fires."

and I think it meant no more. I cannot therefore hold that this was in fact property of the deceased, John Scott, jun., which passed on his death—meaning a fictitious death occurring months after his burial—by virtue of section 1 only of the Finance Act, 1894. But I have much greater difficulty in dealing with the contention that within section 2 (1) of that Act, it is liable to estate duty as being property of which the deceased was at the time of his death competent to dispose. I do not feel that I derive any assistance in construing these words from the terms of the Finance Act, 1894, section 22 (2) (a); but it is to be observed that the Wills Act does not give the devised property to the issue of the devisee, although failing such issue the devise will lapse; and, further, a devise of the residue of his estate will enable the son who dies in his father's lifetime, leaving issue, to effectually dispose of what never would be his own, even—as "Winter v. Winter" shows—of property left to him by a will made after his death. I come, therefore, to the conclusion that this estate was property of which John Scott, jun., was "competent to dispose." It remains still to consider whether "at the time of his death" he was so competent. And here, for the reasons I have given already, I understand by the words "his death" his real, natural death, and not any decease by fiction of law. Now, what disposed of the property? Clearly it was the will of John Scott, jun. When? Well, four months after that will first came into operation—four months after the death of the maker of it. Yet that will had no force of its own. All that it could do was what its testator did, and what he did was to make the will. He made it before his death. It spoke with his last breath, and what he could not then say by means of it that will cannot say now ever would. Still it had force to devise this estate. That is to say he who made it was competent to do what it in law effected. Therefore I think that the case comes within the Finance Act, 1894, section 2. But I have arrived at this opinion after much doubt, and by a train of reasoning in which I am conscious that there may perhaps be some defect. Still I think this conclusion is right; for my learned brother Channell has arrived at the same end by a different road. Estate duty must therefore be paid. How that duty shall be calculated remains to be determined. I am of opinion that this property is, by virtue of the Finance Act, 1894, sections 5 and 22 (1) (i), and by virtue of section 2 of the Settled Land Act, 1882, to be considered as settled property, and therefore is liable only to such duty as can be charged upon it having regard to those provisions. I understand that additional settlement duty is not in this case claimed.

MR. JUSTICE CHANNELL said:—The question we have to decide is whether estate duty is payable by the petitioners as upon the passing, or supposed passing, of the property on the death of John Scott, jun. During the argument of this case I certainly was of opinion that the question must be determined by ascertaining what was the true legal construction of the material provisions of the Finance Act. These provisions are extremely intricate, and when we came to apply them to the case before us it was very difficult to arrive at any clear conclusion as to their effect. I was, however, then, and I still am, unable to bring myself to the conclusion that the property really did pass on the death of John Scott, jun., even under the definition of property passing given by section 22 (1) (i), and certainly not without it. I think that is so whether "passing on the death" means passing in point of time on the death or "passing by reason of the death," as suggested by the Solicitor-General. It seems to me that after the death

of John Scott, jun., as before it, the freehold premises remained absolutely the property of John Scott, sen. Nothing had happened either to pass the property in them or to interfere with Scott, sen.'s, absolute right to dispose of them as he pleased. The property neither passed on the death in point of time, nor did it then or ever pass by reason of the death. It passed by reason of John Scott, sen.'s death and of his disposition of the property. The question whether John Scott, jun., was competent to dispose of the property within the meaning of section 2 (1) (a) is somewhat more difficult. It is said on the one hand that any man who dies leaving both a parent and a child living is made competent by the Wills Act to dispose of anything which the parent may happen afterwards, during the life of the grandchild, to leave to him by will. But, at most, the son only directs to whom the property shall go if his father chooses to adopt that mode of disposition, and it is really the father who disposes. Further, there is a doubt whether to bring the case within section 2 (1) (a) there must be power to dispose of the specific freehold houses in question, which is more difficult still to see. I have, however, come to the conclusion that this case does not turn so much upon the consideration of these clauses of the Finance Act as upon the question of the true construction of the Wills Act. What is the meaning of the devise "taking effect as if the son had died immediately after the father." *Kindersley, V.-C.* in "*Pearce v. Graham*" states the effect of the statute correctly when he says that the "Act simply prolongs the life of the legatee for a particular purpose—namely, to prevent a legacy given to a child, dying before but leaving issue which survived the testator, from lapsing, and does not prolong the life for any other purpose." But the Act does say just a little more. What the Act does say is that the devise is not to lapse, but is to take effect "as if the son had died after the father." Now, how is this to be carried out? If the son has died intestate his heir takes as he would if the son had in fact survived his father. If the son has made a will containing appropriate words, by residuary devise or otherwise, to carry the property, the devisees take. If the son has died insolvent, the creditors take. So far the matter is fairly clear. But what do they take in each case? And does the Crown take anything? If the son had in fact survived the father the beneficiaries of the son would have taken the property subject to the payment of duties to the Crown. The duties are a charge on the property. If those duties are not to be paid when the devisees get the property by virtue of the Wills Act the beneficiaries will take more than if the son had survived the father. Is this making the devise take effect as if the son had survived the father. It seems to me that it is giving the devise a different effect, and the only way to give it the same effect is to hold that, as the Wills Act gives the property to the devisees of the son as if he had survived his father, it gives it, subject to the same duties, as if the son had survived the father. His Lordship referred to the cases of "*Executors of Perry v. The Queen*" (L.R., 4 Exch., 27), "*Lord Advocate v. Bogie*" ([1894] A. C. 87), and "*Attorney-General v. Lloyd*" ([1895] 1 Q.B., 497), as supporting this view, and, after discussing the cases he proceeded. Estate duty is, in my opinion, payable, and, of course, upon the view I have taken the settlement question, which would have been one of some difficulty, does not arise. I think there was in fact a settlement by the combined effect of the two wills and of the Wills Act, but I think that effect must be given to it as if the son had survived—that is to say, that it takes effect as a settlement made by the

son. The duty out of this property must be the same as if the son had survived. The rate of duty on the property, therefore, will be arrived at by taking the rate applicable to the property when aggregated with the other property of John Scott, jun. I do not know whether the Crown claims any additional duty—that is to say, at a higher rate than paid on the £16,000, the property of John Scott, jun., by reason of the aggregation with it of this freehold property; but I do not think the Crown entitled to such a higher rate on the £16,000. The Wills Act gives the duty on the property passing by virtue of it; but it is difficult to see how it could give a higher duty on other property. This case should be dealt with as coming under section 7 (6) (a) and (b), which provision happens to fit this case. There must be judgment for the Crown.

[Solicitors—Crawley and Arnold, for the petitioner; The Solicitor for Inland Revenue, for the Crown.]

Chan. Div.
(Cozens-Hardy, J.)

1899.
Dec. 18.

BURDETT V. STANDARD EXPLORATION COMPANY
(LIMITED).*

Company—Shares—Certificate—Neglect of Company to issue share-certificates within a reasonable time.

This was an action of a very peculiar nature. The plaintiff, Mr. Frederick Burdett, a stock jobber and a member of the London Stock Exchange, sought a declaration that he was entitled to a certificate under the seal of the company, duly signed and countersigned, in respect of 1,763 shares therein, an order on the defendant company forthwith to issue the certificate, and damages for wrongfully refusing or neglecting to issue the certificate. Only nominal damages were, however, claimed at the Bar. The company was incorporated on February 11, 1898, with a nominal share capital of £1,500,000 in £1 shares. On May 12, 1899, the company issued a prospectus offering 500,000 of the shares for public subscription, 10s. being payable on application and 10s. on allotment. The plaintiff applied for 1,763 shares on May 18, 1899, and paid the application moneys (£881 10s.), and on May 20, 1899, received notice of allotment of all the shares applied for. On May 23, 1899, the plaintiff paid the other 10s. per share due on his shares, which were therefore fully paid up. Clause 10 of the articles of association provided as follows:—"The certificates of title to shares shall be issued under the seal of the company and signed by two directors and countersigned by the secretary or some other person appointed by the directors. Every member shall be entitled to one certificate for the shares registered in his name or to several certificates each for a part of such shares. Every certificate of shares shall specify the denoting numbers of the shares in respect of which it was issued and the amount paid up thereon." The plaintiff, being unable to obtain his certificate, commenced the present action on November 28, 1899. The defendants pleaded that they had proceeded with every expedition to prepare for the issue in the ordinary course of the certificates for shares to the persons entitled to the same, and that it was the duty of the defendants, in the special circumstances of the case, in the general interest of all entitled to certificates, to issue the certificates to all simultaneously, without any priority to any individual or section of individuals. In argument it was contended on behalf of the company that, as under certain contracts referred to in the prospectus paid-up shares were to be issued to the shareholders of nine amalgamating companies, which

*Reported by F. EVANS, Esq., Barrister-at-Law.

shares could not be issued for six calendar months (and which period might be extended), the certificates for the cash shares could not be properly issued before the other certificates, and that the directors could not be compelled to split their issue of certificates into two issues. A number of the Stock Exchange rules were referred to with reference to what was required to obtain a special settlement, &c. Several witnesses were also called to show the time occupied by other companies in getting out their certificates.

Mr. Warrington, Q.C., Mr. Rufus Isaacs, Q.C., and Mr. Stewart Smith were for the plaintiff; and Mr. Swinfen Eady, Q.C., Mr. Eve, Q.C., and Mr. Whinney for the company.

MR. JUSTICE COZENS-HARDY, in the course of his judgment, said that there were about 3,000 applicants under the prospectus. The plaintiff contended that under the articles he was entitled to his certificate. His Lordship said he must import into article 10 the words "within a reasonable time." The article could not mean that a person to whom shares had been allotted was only entitled to his certificate if and when the company was minded to give it. What was a reasonable time? The mere physical difficulty of issuing the certificates must have been got over long ago. But it was said, in effect, that the company was not bound to issue the certificates, or that a reasonable time for doing so had not elapsed when the action was commenced. The ground set up was that it appeared by the prospectus that the company was to take over a number of businesses to be paid for in shares, and that these shares amounted to over 700,000. Under the agreements shareholders in other companies had an option to take shares in the defendant company within a time which might be extended to six months and might be further extended by the company. It was contended that at any rate until the six months had expired no certificates of shares ought to be issued. The company was not bound to allot shares at once, but if allotments were in fact made it was bound to issue certificates for the shares allotted within a reasonable time; and, in considering what time was reasonable, the Court was not bound to take into account the fact that the prospectus referred to certain contracts under which the certificates in respect of other shares could not be issued for six months. The plaintiff was accordingly entitled to the declaration he asked for, and the company must issue the certificate to him on or before the 1st of January, and must pay the costs of the action.

[Solicitors—Morley, Shirreff, and Co.; Slaughter and May.]

Chan. Div. }
(Farwell, J.) }

1899.
Dec. 18.

ISAACS V. EVANS.*

Frauds, Statute of—Partnership, alleged contract of—Part performance.

This action related to an alleged partnership in a gold mine in Wales. One of the plaintiffs, Thomas Evans, alleged that he and the defendant, Meredith Evans, had had several transactions together as partners in joint adventures in relation to gold-mining properties in Wales and that in the month of April, 1898, they determined to acquire a certain property at Garthgell, in Merioneth, with a view to mining for gold. The owner of the property was one John Vaughan, and the plaintiff Evans alleged that he and the defendant

arranged with him for the grant of a lease to the defendant on behalf of himself and the plaintiff Evans, and such lease was accordingly granted, and further, that a Crown licence was granted to the defendant on behalf of himself and the plaintiff Evans. The defendant has worked the mine since the date of the lease and the licence. In November, 1898, the plaintiff Evans assigned to the other plaintiff, Godfrey F. Isaacs, his moiety of the term, with rights and powers under the said lease and licence. The plaintiffs alleged that the defendant had refused to recognize their title or interest, and that he wrongfully claimed to be himself fully entitled to all the benefit arising under the said lease and licence. They accordingly claimed (1) a declaration that the defendant is a trustee of one moiety of the property at Garthgell for the plaintiffs or one of them; (2) an account; (3) an injunction. The defendant denied the existence of a partnership, and pleaded the Statute of Frauds. In reply, the plaintiffs set up acts which they alleged to be part performance of the partnership agreement.

MR. JUSTICE FARWELL said that he would first deal with the plea of the Statute of Frauds.

MR. BADCOCK, Q.C. (Mr. E. Ford with him), on behalf of the plaintiffs, said that the Statute of Frauds could be got rid of on two grounds—(1) because there had been part performance, and (2) because the statute could not be made an instrument of fraud. On the first point, he submitted that acts had been done which constituted a part performance of the partnership contract, and that the Court should have parol evidence—"Forster v. Hale" (3 Vesey, 695, 5 Vesey, 308), and Lindley on Partnership, 5th Edition, p. 84. Parol evidence was admitted in "Forster v. Hale." "Carriek v. Skidmore" (2 de G. and J., 52) seemed to be against him, but that case was clearly distinguishable, as the land had been acquired before the partnership, whereas here the land was acquired after the partnership. On the second point, "Rochefoucauld v. Boustead" ([1897] 1 Ch., 196) and "Davis v. Whitehead" ([1894] 2 Ch., 133) proved that the statute could not be set up to cover a fraud. His case was that the defendant had here wrongfully appropriated the benefit of the lease and the licence, and ought not to be allowed to escape by simply pleading the statute. Lastly, the acts of part performance need not be referable to the actual contract set up by the plaintiff, but to some such contract (see Fry on Spec. Perf., sec. 582).

Mr. Hughes, Q.C. (Mr. Ingle Joyce with him), was not called on.

MR. JUSTICE FARWELL, in delivering judgment, said that in his opinion he would be going too far not to allow the plea of the Statute of Frauds. It was clear on the cases that, before evidence could be admitted as to the contract, it must be shown that there actually was a partnership—to show that a partnership existed was a necessary antecedent to parol evidence. In "Forster v. Hale," for example, there was a clear partnership between four persons as bankers. It was impossible to escape the statute by simply putting in the word partnership. If it were not so it would be enough for the pleader in each case merely to plead a partnership, and that would amount to a repeal of the statute. "Carriek v. Skidmore" seemed to him to be a case directly in point, and he must be bound by it. Then as to the cases cited by Mr. Badcock that the statute could not be used as an instrument of fraud, those were all cases dealing with trusts. But here there was no question of a trust till the partnership was proved, and the partnership had not been proved to exist. He took the law to be as stated by Lord Justice Cotton, in "Britain v. Rossiter" (11 Q.B.D., 123) and by Lord Selborne in "Maddison

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

v. Alderson" (8 App.Cas., 467). As to the acts being referable to "some such contract" he was of opinion that this was one of those cases in which all sorts of acts might be set up which were not referable to any contract of partnership at all. It was just one of those cases to which the statute, in his judgment, was meant to apply. The action must, therefore, be dismissed with costs.

Q.B. Div. (Darling and)
Channell, J.J.)

1899.
Dec. 18.

WELSH V. MAYOR, &C., OF WEST HAM.*

Local Government—Buildings—Contravention of
by-laws—Continuing offence—Liability for—
Builders—Public Health Act, 1875, sec. 158.

This was an appeal by case stated from a conviction by the deputy stipendiary magistrate of West Ham. An information was laid by the respondents against the appellants for that, having been convicted on November 30, 1898, of an offence committed on September 3, 1898, against one of the by-laws of the borough relating to buildings, they did continue such offence for 85 day after written notice, contrary to section 158 of the Public Health Act, 1875. The by-law was one providing for a sufficiency of air space about buildings to secure a free circulation of air. The appellants were builders, and in 1898 they rebuilt for the Commercial Brewery Company (Ltd.) the Dew-drop Inn, Arkwright-street, in the borough of West Ham. The conviction, on November 30, 1898, was admitted, but it was stated that after that date the appellants had not been in possession of the premises, and had no right, power, or authority to go upon them. The premises remained in the same condition as on September 3, 1898, and as on the date of the conviction. The notice given by the respondents, who were the urban authority, was served on the appellants on January 20, 1899. The magistrate held that the existence of the building in the condition above stated was a continuing offence, and convicted the appellants. Section 158 of the Public Health Act, 1875, after providing that an urban authority may, after notice, pull down any building not erected in accordance with their by-laws, enacts that:—"Where an urban authority may under this section pull down or remove any work begun or executed in contravention of any by-law, or where the beginning or execution of the work is an offence in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence, but a penalty shall not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the by-law was broken." The appellants' contention was that they could not be convicted of a continuing offence inasmuch as they were not owners of the premises and could not comply with the respondents' notice without committing a trespass. "Marshall v. Smith" (L.R., 8 C.P., 416), "Rumball v. Schmidt" (8 Q.B.D., 603), "Reay v. Mayor, &c., of Gateshead" (55 L.T., 92), and "Smith v. Legg" ([1893] 1 Q.B., 398) were cited.

Mr. Boydell Houghton appeared for the appellants; and Mr. Gwynne James (Mr. Asquith, Q.C., with him) for the respondents.

The COURT allowed the appeal.

MR. JUSTICE DARLING said that if the building was put up in contravention of the Act the local authority might have ordered it to be pulled down. The statute

went on to say that if the building remained in that condition there was a continuing offence. The question was, Who committed the continuing offence? The builders, the appellants in this case, had done wrong in the first instance, and had been convicted for it, but before the notice in respect of which these proceedings were taken was served they had gone away and had nothing more to do with the building. The local authority had it in their own hands to put an end to the offence either by pulling the building down or by proceeding against the person or persons who really continued the offence. The statute did not say that the person who first committed the offence was responsible for its continuance. Such a person was responsible for his own misfeasance; but it did not follow that another person might not be responsible for continuing the offence. That person need not be the original builder.

MR. JUSTICE CHANNELL said that he was of the same opinion. The latter part of section 158 was introduced to meet the case of "Marshall v. Smith," in which it was held that suffering a wall built in contravention of a by-law to remain unaltered was not a "continuing offence." As the offence was building the wall, not pulling it down was not a continuance of the offence. The question was, Who is the person guilty of the continuing offence in this case? The Act might have said that the original builder was the person guilty. The Court were asked to assume that the Act meant this because the section limited the penalties to one year. His Lordship, however, thought that the reasonable meaning of the section was that the person who was liable for the continuing offence was the person who actually continued it. If the local authority could not find out who that person was so much the worse for them. The Act, at all events, provided (in section 306) machinery for discovering the owner. There was nothing in the Act which obliged their Lordships to hold that there was here a continuing offence by the person or persons who originally erected the building. In "Reay v. Mayor, &c., of Gateshead" Mr. Justice Hawkins was reported to have used language which justified the decision of the learned magistrate. The words attributed to him were, "If this section had been passed before 'Marshall v. Smith' there would have been no doubt at all that the penalties there would have been properly imposed." But having regard to the actual decision in "Marshall v. Smith" this language was inaccurate and might have been incorrectly reported.

[Solicitors—Albert Saunders, for the appellant; Hillearys, for the respondent.]

Q.B. Div. }
(Bigam, J.)

1899.
Dec. 18.

THE DUKE OF WESTMINSTER AS CUSTOS ROTULORUM OF THE COUNTY OF LONDON AND THE LONDON COUNTY COUNCIL V. THE DUKE OF BEDFORD AS CUSTOS ROTULORUM OF THE COUNTY OF MIDDLESEX.*

Metropolis—Local Government Act, 1888, sec. 40
—Property liable to apportionment—Records of the County of Middlesex—Custody of.

The plaintiffs claimed a declaration that the records of the old county of Middlesex existing on April 1, 1889, and then deposited at the Guildhall, Westminster, were in the joint legal custody of the Custos Rotulorum of the County of London and the Custos Rotulorum of the county of Middlesex, or that such of the said records as related to the locality now known as the County of London were in the

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

*Reported by W. HUSKEY GRIFFITH, Esq., Barrister-at-Law.

legal custody of the Custos Rotulorum of the County of London, and that the said records existing on April 1, 1889, were property liable to apportionment between the present counties of London and Middlesex within the meaning of section 40, subsection 7 of the Local Government Act, 1888 (51 and 52 Vict., c. 41). An award under section 40 of that Act had been made, upon a submission of all matters between the parties, by Commissioners appointed under the Act, and that award had not dealt with these records. It was alleged that among these records were documents extending back to the time of Edward VI. A number of them were of purely local interest and related purely to that area now known as the County of London.

Sir Edward Clarke, Q.C., Mr. Avory, and Mr. Daldy appeared for the plaintiffs; and Mr. Cripps, Q.C., and Mr. Danckwerts, for the defendant.

MR. JUSTICE BIGHAM delivered a written judgment as follows:—All the documents in question came into existence before the passing of the Act of 1888. They may be divided into two classes; first, those which relate to local matters dealt with in quarter sessions under its administrative powers; and secondly, those which relate to the exercise of its criminal jurisdiction. Before the passing of the Act on which the plaintiffs rely, these documents were kept in the old Middlesex Sessions-house at Clerkenwell in the custody of the Clerk of the Peace of the county of Middlesex, and there they still were when the Act came into existence. Before examining the particular provisions of the Act which bear directly on the questions in this case, it is worth while to consider its general scope. The first part of the Act provides for the establishment of county councils throughout England and for the transfer to such councils of the greater part, if not the whole, of the administrative business of the quarter sessions of the counties (sections 1, 2, and 3.) The second part of the Act provides that the metropolis shall be an administrative county for the purposes of the Act by the name of the Administrative County of London, the "metropolis" being defined as comprising the City of London and certain parishes and places in Middlesex, Surrey, and Kent. It further provides that such portion of the Administrative County of London as formed part of the counties of Middlesex, Surrey, and Kent should be severed from those counties and form a separate county for all non-administrative purposes by the name of the County of London and that to such County of London a sheriff should be appointed, and a commission of the peace and a Court of quarter sessions granted and, subject to the provisions of the Act, all enactments, laws, and usages with respect to counties in England and to sheriffs, justices, and quarter sessions were, so far as circumstances would permit, to apply to the County of London (section 40, subsections 1 and 2). The third part of the Act deals with questions of boundaries, and provides a means of referring to Commissioners appointed by the Act certain matters for their determination. Part IV. deals with questions of finance and with matters affecting the property of county councils. Part V. deals with the appointment and duties of the officers of county councils, and Part VI. contains what are called transitory provisions. It will be seen from this short reference to the general scope of the Act, that one great object which the Act had in view, was the transfer of the administrative duties of quarter sessions to the county councils, the criminal jurisdiction of the sessions being left untouched. Referring particularly to section 40, subsections 1 and 2, it will be noticed that the Act created two new counties, one called the "Administrative County of London" and the other the "County of London," the former to be governed for administrative purposes by the London County Council and the latter

for criminal business by the Court of quarter sessions to be granted under this Act. The areas of these two counties overlap, but they are not co-extensive; the first includes the City of London, and the second does not. Thus the state of things created was as follows:—The City of London retained its ancient criminal jurisdiction, but its administrative jurisdiction passed to the County Council of the Administrative County of London. The Middlesex Quarter Sessions lost its administrative jurisdiction in that part of Middlesex which formed part of the "metropolis" within the meaning of the Act, and it also lost its criminal jurisdiction over the same area, the one jurisdiction being transferred to the County Council of the Administrative County of London, and the other being transferred to the newly-appointed quarter sessions for the County of London; but it retained its criminal jurisdiction over the part of Middlesex which was not transferred. The commission of the peace and the quarter sessions for the new County of London were granted on January 30, 1889, and on April 1 the plaintiff, the Duke of Westminster, was appointed Custos Rotulorum thereof. Some time afterwards an agreement was entered into by the London County Council and the Middlesex County Council, under which certain properties were apportioned between them. By this agreement the old county of Middlesex Sessions-house at Clerkenwell went to the County of London, and the Sessions-house, known as the Guildhall, at Westminster, went to the county of Middlesex. Thus, the actual possession of the Clerkenwell Sessions-house passed from the county of Middlesex. Thereupon the then Earl of Strafford, who was the Custos Rotulorum of the county of Middlesex, authorized the Clerk of the Peace of the county to remove all the records and documents to the Guildhall at Westminster, and they were accordingly taken there. The present defendant, the Duke of Bedford, is the successor to the Earl of Strafford, in his office as Custos Rotulorum, and as such, he claims to retain the documents. It appears to me that the documents are now lawfully in the custody of the defendant unless the Act of Parliament has deprived him of the right to hold them. He is the Custos Rotulorum of the county of Middlesex, and, as such, he is the keeper and guardian of the records of the county. Does it matter that since the documents in question came into existence the area of the county has been diminished, and the jurisdiction of the quarter sessions cut down? I think not, because, although these changes have taken place, the county still exists with its own quarter sessions and its own Custos Rotulorum as before; and the legal consequence of such a state of things is that the defendant is entitled to the possession of the documents. Then do the provisions of the Act make any difference? The plaintiffs say they do, and they rely particularly on sections 64 and 40. The first of these two sections is of general application—that is to say, it relates to all counties in England and Wales affected by the Act. The second applies only to the metropolis as defined by section 100 of the Act. Section 64 is in Part VI., which deals generally with matters of finance. It provides that all property of the quarter sessions of a county, or held by a clerk of the peace for any public uses and purposes of a county, shall pass to and vest in and be held in trust for the council of the county. By the definition clause, section 100, "property" is to include registers, books, and documents, and when used in relation to any quarter sessions or clerk of the peace it is to include any property belonging to or vested in or held in trust for such quarter sessions or clerk of the peace. Reading section 64 by the light of the definition clause it seems to me that all documents of the kind mentioned in the statement of claim would by its operation pass from the custody of the

quarter sessions of any county and of its clerk of the peace to the custody of the newly-constituted council of such county. But there is a proviso to the section which is in the following words:—"Provided that the existing records of or in the custody of the Court of quarter sessions shall, subject to any order of that Court, remain in the same custody as would have been if this Act had not passed." There is no definition of the word "records," but I see no reason for cutting down its meaning. The records which are to remain undisturbed are the existing records, and they are not only the records of the quarter sessions, but also those in the custody of the quarter sessions. Perhaps the draftsman had in his mind a distinction between those documents which are nominally in the keeping of the Custos Rotulorum and those which may be said to be in the keeping of the clerk of the peace, but anyway all are to remain undisturbed in the custody in which they were before the Act. If I am right in this view of the meaning of the proviso the effect of the Act in the case of any other county than that of Middlesex (and perhaps Surrey and Kent) would be that all the existing documents of quarter sessions would, on the transfer of the administrative business to the County Council, remain in the custody of the clerk of the peace as representing the Custos Rotulorum and the quarter sessions. No inconvenience would arise, for with two unimportant exceptions the offices of clerk of the County Council and of clerk of the peace are both held by the same person, who is, subject to the directions of the Custos Rotulorum, or the quarter sessions, or the County Council, as the case may require, to have charge of and be responsible for the records and documents of the county (section 83, subsections 1 and 3). Then, is Middlesex to be an exception? This turns on the meaning of section 40, subsection 6. I have already dealt with subsections 1 and 2 of this section, by which the Administrative County of London and the County of London were created. The sixth subsection of section 40 is in the following terms:—"The provisions of this Act with respect to the powers, duties, and liabilities of county councils and the transfer of property, debts, and liabilities of counties to county councils shall apply to the Administrative County of London in like manner so nearly as circumstances admit as if the quarter sessions justices and clerks of the peace of the counties of Middlesex, Surrey, and Kent had been, as far as regards the metropolis, the quarter sessions justices and clerk of the peace of the Administrative County of London." Now section 64 is a provision of the Act with respect to the transfer of property of counties to county councils. The words of section 64, "all property of the quarter sessions of a county or held by a clerk of the peace or any justice or justices of a county or treasurer or commissioners or otherwise for any public uses and purposes of a county," are compendiously summarized in section 40, subsection 6, as "property of counties." Therefore, when section 40, subsection 6, provides that the provisions of the Act with respect to the transfer of property of counties to county councils shall apply to the administrative county of London it means that, amongst other sections, section 64 is to be applied to the case of the Administrative County of London as nearly as circumstances may admit. Section 40, subsection 6, shows how. It is to be applied "as if the quarter sessions of Middlesex, Surrey, and Kent had been the quarter sessions" of the Administrative County of London. For the purpose of the case in hand one may discard Surrey and Kent. Then, if the quarter sessions of Middlesex had been the quarter sessions of the Administrative County of London, what would have happened upon the application to such a state of things of the provisions of section 64?

In my opinion what would have happened would have been that the property of the quarter sessions would have passed to the London County Council, but with the proviso that such property should not comprise the records of, or in the custody of, the quarter sessions, which would "remain in the same custody in which they would have been if this Act had not passed." Where would they remain if this Act had not passed? The answer is, In the custody of the clerk of the peace of the county of Middlesex as deputy of the Custos Rotulorum of the quarter sessions of Middlesex. It was said, however, on the part of the plaintiffs, that the proviso to section 64 should at all events not be held to apply to such documents as related to the administrative business of the quarter sessions done before the passing of the Act in connexion with the area transferred to the Administrative County of London. It was argued that the Legislature could not have intended to give the administrative business of that part of the county of Middlesex to the London County Council without at the same time giving to that body the control of the records and documents relating to the same kind of business transacted before the Council began its work; and it was suggested that I should direct the documents to be apportioned those which relate to administrative business to be delivered over to the plaintiffs, the London County Council, those which relate to the criminal business to be left with the defendant. I think, however, that the Legislature never intended that any such apportionment should take place. These records and documents go back to the time of Edward the Sixth, and if they were to be apportioned as the plaintiffs suggest some would have to go to the London County Council, some to the Middlesex County Council (for that body takes over the administrative business of so much of Middlesex as is not transferred to the Administrative County of London), and some would have to be left with the clerk of the peace. This would introduce inextricable confusion. I think it was intended that they should be kept together in one place and in the custody of one person. If it should now be necessary for the clerk of the County Council to inspect them he will, no doubt, be able to do so without hindrance. No doubt records and documents coming into existence in connexion with the business of the quarter sessions of the County of London after the passing of the Act are to be kept apart from those documents which come into existence in connexion with the Administrative County of London; for by section 83, subsection 11, the clerk of the peace for the County of London is to be a separate officer from the clerk of the County Council, and each officer is to have charge of the documents appertaining to his own office. But this does not seem to afford any reason for saying that the records before the passing of the Act should be apportioned. It is further to be observed that there is no Custos Rotulorum of the Administrative County of London, and that the Council, which it is said ought to have possession of the records and documents, or of some of them, represents for administrative purposes the City of London as well as the area transferred from Middlesex, Surrey, and Kent. I do not think the Legislature intended that any of the records and documents should pass out of the custody of the Custos Rotulorum of the county of Middlesex into the possession of the clerk of a council representing such an area. I come, therefore, to the conclusion that the records and documents in question are at present where they ought to be, and that there they ought to remain. As to the claim of the Duke of Westminster, it is sufficient to say that he is merely the Custos Rotulorum of the new County of London, and that as such he becomes entitled to the records and

documents of the new quarter sessions for that new county, and to nothing more. There is no provision in the Act affording any pretence for saying that any of the records and documents in question have been transferred to him. In the view I take of the rights of the parties under the Act, it becomes unnecessary to deal with the defendant's contention that the documents have passed to him by virtue of an award made under the provisions of the Act. I will only say that in my opinion, as the question of the right to the custody of these documents was not in the minds of any of the parties at the time of the submission and arbitration, and was not mentioned before the arbitrators, the award did not affect the matter in controversy.

His LORDSHIP in concluding said the case was not one in which any costs should be allowed and expressed the hope that the parties would not think it necessary to go further in the matter, as it was one of merely technical interest and of little real importance.

[Solicitors—W. A. Blaxland ; Sir Richard Nicholson.]

Court of Appeal (Lindley, M.R., Sir) 1899.
Francis Jeune, and Romer, L.J.) } Dec. 19.

GREENWOOD V. THE LEATHER SHOD WHEEL COMPANY.*

Company—Prospectus—Directors—Untrue statements—Waiver clause—Particularity—Companies Act, 1867, sec. 38—Directors' Liability Act, 1890 (53 and 54 Vict., c. 64), sec. 3, subs. 1.

A misleading statement in a prospectus may be untrue within the meaning of sec. 3, subs. 1, of the Directors' Liability Act, 1890. To ascertain whether a statement is, or is not, untrue within the meaning of that section it is important to consider—not the meaning of those who issued the prospectus, but the meaning it conveys to those who read it.

A waiver clause in a prospectus must give such notice as brings home to the mind of a reasonably intelligent and careful reader such knowledge as fairly and in a business sense amounts to notice of the contract. Therefore a waiver clause—which said that "there may be other agreements as to the formation of the company, the subscription to the capital, or otherwise, to none of which the company is a party, and which may technically fall within sec. 38 of the Companies Act, 1867, subscribers will be held to have had notice of all these contracts, and to have waived all right to be supplied with particulars" thereof—was held insufficient to prevent the liability under sec. 38 of the Companies Act, 1867, from attaching in respect of a contract under which the promoter obtained considerable benefits.

In this case there were four appeals against a decision of Mr. Justice Kekewich's (reported in *The Times* of February 24 last). The action was brought to obtain the rescission of a contract into which the plaintiff had entered to take 1,000 £1 shares in the above company, and the repayment of the £1,000 which he had paid for the shares, on the ground that the plaintiff had been induced to apply for the shares by misstatements contained in the prospectus issued by the company. The plaintiff also claimed damages or compensation from the directors of the company and the promoter, on the grounds that the misstatements were made fraudulently and without

a reasonable belief that they were true; that some agreements, which, by virtue of section 38 of the Companies Act, 1867, ought to have been disclosed in the prospectus, were not mentioned in it, and that consequently the directors and promoters were liable as for fraud; and that at any rate the directors had not shown that they had reasonable grounds for believing the statements in the prospectus to be true, and that, under section 3, subsection 1 (a) of the Directors' Liability Act, 1890, the directors and the promoter were liable to compensate the plaintiff for the loss which he had sustained. The claims against the directors and the promoter were made, because, even in case the plaintiff should obtain as against the company judgment for the rescission of his contract and the return of his money, it was doubtful whether the company would be in a position to pay. The prospectus stated that the company was formed "to take over the patent rights for the United Kingdom of the most important improvements in wheels of the century—namely, the leather tire invented by Messrs. Pierron and Klein in 1895, which should supersede all present forms of vehicle tires, as it is elastic, durable, quiet, cheap, light-running." It was further stated that "works were started in Vienna in 1895, and Messrs. Pierron and Klein state that the wheels met with universal approval." It was afterwards stated that "wheels for the trolleys in the House of Commons have been ordered and are now in use. The Secretary of State for War has given an order for wheels for military carriages, and wheels have been ordered by the Director of Clothing of the Royal Army Clothing Department. Instructions have been received to prepare trial sets of wheels for the General Post Office, the London Road Car Company, and others. The following may be specially mentioned amongst those who have already given orders in England with a view to their adoption," followed by the names of the Bank of England and many of the leading English railway companies, &c. The plaintiff complained that the prospectus was so worded as to lead to the belief that very substantial orders for the tires had been given, whereas the truth was that the orders actually given were merely "trial orders"—that is, orders for tires for trial or on approval, and not affording any foundation for the belief that the company would be able to commence business on a permanent basis. The prospectus stated that an agreement dated February 5, 1897, had been entered into between the Coris Syndicate (Limited), the vendors, and J. R. Sherman, as trustee for the company, for the sale to the company of the patents and rights at a profit. It was added, "there may be other agreements as to the formation of the company, the subscription to the capital, or otherwise, to none of which the company is a party, and which may technically fall within section 38 of the Companies Act, 1867. Subscribers will be held to have had notice of all these contracts and to have waived all right to be supplied with particulars of such contracts, and to have agreed with the company, as trustees for the directors and other persons liable, not to make any claims whatsoever or to take any proceedings under the said section or otherwise in respect of any non-compliance therewith." Mr. Justice Kekewich held that the prospectus contained material misstatements, and the plaintiff was entitled to have his contract rescinded and his money repaid by the company. His Lordship acquitted the directors of any fraudulent intention, and held that they had acted honestly and that they believed the statements in the prospectus to be true. But he held that the directors had not shown that they had reasonable grounds for believing the statements in the prospectus to be true, because they had not taken proper pains to look narrowly into the orders referred

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

to and ascertain their nature. Accordingly, his Lordship held that the directors and the promoter were, under the Act of 1890, liable to compensate the plaintiff for his loss. His Lordship also held that, even if the provisions of section 38 could be waived, the clause of waiver must be so expressed as to inform a reader of ordinary intelligence of the nature of that which was intended to be waived. In his Lordship's opinion the clause of waiver in this prospectus was not sufficient to prevent the liability under section 38 from attaching to the promoters.

The defendants appealed.

Mr. Swinfen Eady, Q.C., Mr. Warrington, Q.C., and Mr. Hans Hamilton were for Major Jameson, M.P., the chairman of the company; Mr. Buckley, Q.C., and Mr. Willes (three were for Messrs. W. Lambert, Baker, and Mace, three other directors; Mr. Bramwell Davis, Q.C., and Mr. Alexander were for the company; Mr. Edward Ford was for Mr. T. H. Lambert, the promoter; Mr. Warrington, Q.C., Mr. Renshaw, Q.C. and Mr. Norman Craig were for the plaintiff.

The appeals were heard on the 11th and 12th inst., when judgment was reserved. The COURT dismissed the appeal.

THE MASTER of the ROLLS read a judgment in which, after stating the effect of the judgment of Mr. Justice Kekewich, he continued:—That the prospectus was issued by the directors who are defendants and that T. H. Lambert was a promoter and that he took part in the preparation of the prospectus are facts not now seriously controverted. The attempt to satisfy us that the plaintiff did not take shares on the faith of the prospectus wholly failed. "*Arnison v. Smith*" (41 Ch.D., 369) shows what is meant by taking shares on the faith of a prospectus, and I need say no more on this point. The only matters which affect the whole case, and which require attention, are the meaning of the prospectus, the belief of the defendants in its truth, and the grounds which they had for that belief. There is another point raised by the defendant T. H. Lambert, turning on section 38 of the Companies Act, 1867, which I will refer to hereafter. The prospectus, in my opinion, is grossly misleading. The very first statement in it, printed in large type so as to attract attention, is that "orders for tires have been already received from (*inter alia*) the House of Commons." There is a subsequent statement that "wheels for the trillies in the House of Commons have been ordered, and are now in use." These are statements which it is impossible to justify. The evidence is that the person who supplies refreshments to the House of Commons had one trolley with these wheels. There was no other. It was not ordered by the House, nor by any committee or official on its behalf. The statement in the prospectus would convey to any one reading it a very different meaning from the truth. I can only regard the statement as clearly untrue. So as regards other orders. No single order had been obtained, except for trial and by way of experiment. The prospectus is fair enough as regards the statement as to trial sets. But the statement which follows as regards "orders already given with a view to their adoption" is of a very different kind. Any person reading this would understand that the persons who had given those orders had satisfied themselves that the wheels would answer their purpose, and intended to adopt them. But the fact is that no single order had been obtained, except for trial and by way of experiment. A good many of these, moreover, were ordered by persons who took care to incur no liability to pay for them. The statement in question is again, in my judgment, untrue. This is not the first time in which a misleading statement has been judicially held to be untrue. [His Lordship referred to "*Dring v. Dring*,"

Wood," [1849], 1 Ch. 333, 407, 15 *The Times L.R.*, 18.] The principle is sound, and ought not to be open to question. It was contended that a statement in a prospectus is not untrue, within the meaning of section 3 of the Directors' Liability Act, 1890, unless that statement is untrue in the sense in which it is used by those who issue the prospectus. This contention is, in my opinion, quite inadmissible. Considering the object of a prospectus, and the object of that Act, the meaning which is important is the meaning which the prospectus conveys to those who read it. The meaning of those who issue it becomes all-important when those persons are charged with fraud; for, if a statement is ambiguous, it may be misunderstood without any fraud on the part of the person who makes it. Upon this point I will refer to what I said in "*Smith v. Chadwick*" (30 Ch.D., at p. 79), and to which I adhere. But the object of the Directors' Liability Act, 1890, was to remove the defect in the law brought to light by the decision of the House of Lords in "*Derry v. Peek*" (14 App.Cas., 337), and to impose upon those who issue prospectuses the duty to take reasonable care not to make untrue statements. This object would be very inadequately attained if the Court held that a grossly misleading statement was not untrue within the meaning of the Act. As regards the care taken by the defendants not to make any untrue statement, the evidence shows that, although they took care to see that they had orders from the persons mentioned in the prospectus, they took no care at all to see that the prospectus as a whole was not misleading, which, as I have already said, in my opinion it clearly was. Upon the main part of the case the decision of the learned Judge was right, and the appeals fail. One part of the order, however, affects Mr. T. H. Lambert alone, and it raises a very important question as to the effect of what are called "waiver clauses" on section 38 of the Companies Act, 1867. The prospectus in this case omitted all reference to an important contract of December 3, 1896, by which Mr. T. H. Lambert was to obtain considerable benefits. There can be no doubt that this contract ought to have been disclosed in the prospectus. Mr. T. H. Lambert has been held to have infringed this section, and an order has been made against him as to costs, of which he complains. The other directors apparently knew nothing of the contract in question, and no similar order was made against them. Mr. Justice Kekewich's view was that the waiver clause could not avail Mr. T. H. Lambert because the plaintiff was not sufficiently informed of what he was waiving. I am of the same opinion, but, as this matter is one of great importance, I will state my reasons for my conclusion. The first part of section 38 enacts that every prospectus of a company, and every notice inviting persons to subscribe for shares, shall specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice. The second part of the section enacts that every prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract. A prospectus, therefore, which does not comply with the first half of the section is to be deemed fraudulent, as between the persons issuing it, on the one hand, and all persons taking shares on the faith of it, on the other, except only in one case—namely, if they have notice of the contract of which some particulars have to be given in compliance with the first part of the section. Considering the manifest object of this section, which is to compel the persons issuing prospectuses to afford to persons invited to take shares the information required

by the section, it is obvious that the words, "unless he shall have had notice of such contract" mean a great deal more than unless he shall have some vague information which, if followed up, will lead to such notice. Notice in the section means, not what is called "constructive notice," but actual notice, that is, notice which brings home to the mind of a reasonably intelligent and careful reader such knowledge as fairly, and in a business sense, amounts to notice of a contract. Any other construction would render the section perfectly useless. Again, what is to be deemed fraudulent is the prospectus as a whole. It may contain some true statements, but the introduction of these will not save the prospectus from being deemed fraudulent as a whole. The introduction into the prospectus of a tricky waiver clause, instead of preventing the prospectus from being deemed fraudulent, affords an additional reason for holding it to be so in fact. The waiver clause in the prospectus of this company is, in my opinion, clearly tricky and fraudulent on the part of Mr. T. H. Lambert. It is printed in small print, so as to escape attention; it is worded so as to conceal and not to afford notice of the contract of December 3, 1896, to which he (the promoter) was a party. The language "there may be contracts which perhaps ought to be referred to," when it was perfectly well known to Mr. T. H. Lambert, at all events that there certainly was one which ought to have been disclosed, stamps the clause as tricky and dishonest, so far as he is concerned. But then, it is said, that the application for shares contains another waiver clause. But the application for shares refers to the prospectus, and was sent out with it, and the waiver clause in the application for shares is as tricky as the other, and is even worse by reason of the words "or otherwise," which increases its scope beyond all reasonable bounds. Literally construed, it would, if effect were given to it, afford a defence to the whole action. If a company's prospectus is fraudulent at common law, or is to be deemed fraudulent under section 38 of the Companies Act, 1867, and an applicant for shares signs a contract which is intended to deprive him of his right to redress, he is not bound in equity by what he signs, unless his attention is called to the existence of facts which render the prospectus fraudulent. The introduction of a stipulation that an applicant for shares is to be deemed to have notice of what is in fact concealed from him is simply part of the trick had recourse to in order to evade the consequences of the improper concealment. Such a stipulation in a tricky waiver clause like the one before us affords no protection to the person who seeks protection from it. The principle of refusing to give effect to parts of documents so as to prevent successful deception by means of them is quite familiar in its application to general words in releases, and to catching conditions of sale. The refusal is based on ordinary principles of honesty, and is as applicable to tricky waiver clauses as to other tricky documents. I wish to guard myself against being supposed to go further than I intend. I have no doubt that a person who takes shares on the faith of a contract which is fraudulent at common law, or which is deemed to be fraudulent under section 38 of the Companies Act, 1867, may elect to keep his shares, and may agree not to enforce his right to damages. But, in order to bind him by election or agreement, he must be fairly dealt with; and his attention must be fairly drawn to the facts, or at all events the existence of facts, which confer the rights which he elects or agrees not to enforce. If his attention, instead of being drawn to such facts, is drawn from them, the attempt to catch him will fail. I am aware that, owing to the wide language of section 38, there is sometimes practical difficulty in determining whether all contracts, which apparently come within it,

are really such as to require notice in a prospectus; and to put in a long list of contracts, which no applicant for shares would care to know anything about, would frighten the public and do no good to any one. These difficulties have given rise to honest attempts to protect honest men by waiver clauses from the consequences of honest unintentional breaches of the law. General waiver clauses in prospectuses, applications for shares, articles of association, or other documents addressed to large numbers of persons are, however, always suspicious, and require careful scrutiny. When the Court has to deal with an honest case of the kind above mentioned the Court will, I have no doubt, be able to come to a just conclusion, and will, if necessary, uphold the clause. On the present occasion we have no such case to deal with. Mr. T. H. Lambert, the promoter, has ingeniously endeavoured to shield himself from the consequences of concealing a contract, to which he dared not allude, and his appeal, like the others, must be dismissed with costs.

The PRESIDENT of the PROBATE DIVISION concurred.

LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—Maddisons; Ashwell, Browning, and Tutin; Beyfus and Beyfus; Blackford, Riches, and Norton.]

Chan. Div. }
(North, J.) }

1899.
Dec. 19.

THE RHYMNEY RAILWAY COMPANY V. THE BRECON AND MERTHYR TYDFIL JUNCTION RAILWAY COMPANY.*

Railway Company—Agreement between two Companies for pooling traffic—Stipulation not to seek any new line—Breach entitling other Company to treat agreement at an end.

The trial of this action and counter-claim was concluded on the 10th ult., when his Lordship reserved judgment.

The proceedings relate to disputes as to traffic, particularly coal traffic arrangements. In the year 1864 both companies were seeking additional Parliamentary powers and opposing one another in Parliament. They came to an agreement, they both obtained additional powers, and heads of an agreement in 17 articles were settled and sanctioned by and scheduled to an Act promoted by the plaintiff company and passed in 1864. All the provisions contained in those heads have either been carried out or become inoperative except two, the subject of this litigation, which were as follows:—
“(11) After the opening of the Caerphilly and Cardiff line the receipts arising upon the traffic carried between the New Tredegar Works and Cardiff shall, as between New Tredegar and Caerphilly, be divided in equal proportions between the two companies after the deduction of 30 per cent. for working expenses, the mileage proportion between Caerphilly and Cardiff to belong exclusively to the Rhymney Company, the Brecon Company being allowed working expenses on the portion carried by them. . . .
(17) Except as herein mentioned, neither company shall either directly or indirectly seek any new line from one side of the valley to the other to take away the traffic of either company.” Since that time the mineral working and traffic of the district of the Rhymney Valley have enormously developed, and the powerful Barry Railway and Dock Company has sprung into existence and become a formidable rival to the local railways. In 1898 the Barry Company were promoting a Bill which was opposed vigorously by both the plaintiff and de-

*Reported by D. FITCHER, Esq., Barrister-at Law.

fendant companies, till the latter came to an agreement with the Barry Company and withdrew opposition. The Barry Company succeeded in obtaining an Act, the result of which was calculated to take away a considerable part of the plaintiffs' traffic; by withdrawing their opposition the defendant company, as the plaintiffs alleged and the Judge decided, had broken the agreement contained in article 17. On the passing of the Act the plaintiffs gave notice that the agreement was broken and would be considered determined, and on November 9, 1898, gave formal notice in writing to that effect. The plaintiffs claimed a declaration of their right to determine the agreement and that it had been determined. The defendants counterclaimed a declaration that article 11 was still in force and an account.

Mr. Buckley, Q.C., Mr. Moon, and Mr. Harold Bompas were for the plaintiff; Mr. E. C. Macnaghten, Q.C., and Mr. Sargant for the defendants.

MR. JUSTICE NORTH this morning gave judgment. After stating the facts he said that, according to his view of the evidence, he had felt some difficulty at first in seeing how the plaintiffs could maintain a mere declaratory action in such a case, but, finding that the defendants were themselves seeking a declaration that article 11 was still binding and for an account, that difficulty was removed. One point was made by the defendants going to the root of the whole matter—namely, that as the agreement of 1864 had been confirmed by Parliament it could not be determined by either party. He did not understand that argument. If it had been confirmed the refusal by the defendants to perform it in a vital matter would have given the plaintiff company a right to elect to treat it as at an end. He did not know how the fact of its having been confirmed by Parliament could make any difference. The parties could have agreed to alter the mode in which profits were divided without breach of agreement. But, in truth, the effect of such confirmation as was found here was merely to remove difficulties which might otherwise have stood in the way, and not to make all the provisions of the agreement absolute and irrevocably binding on both companies for all time. See "*Reg. v. Midland Railway Company*" (19 Q.B.D., 540), and cases there cited. The next point made by the defendant company was that they had not broken their contract contained in article 17 of the 1864 agreement. They contended that in 1864 they had the east side and the plaintiffs had the west side of the valley (with an exception), and that the meaning was that neither company should tap the coal traffic on the other side of the valley, which they said they had not done. If that had been intended as the meaning the article might have been so expressed. (His Lordship gave instances of conduct of traffic inconsistent with the defendants' construction.) What the article referred to was not a geographical partition at all; the question did not relate to traffic from particular pits, but was what was "the traffic" of either company. It applied to and included all traffic, minerals, goods, and passengers, not coal only. If that was the true construction, it was clear that article 11 had been broken. Indeed it was admitted; but it was said that even in that case the plaintiff company could not show that they had been injured by what the defendants had done, or that the defendants were the proximate cause of the Act passing. That did not seem material. The agreement was not to directly or indirectly seek a new line. His Lordship thought that when the defendant company joined the Barry Company in formulating the new line, they did seek a new line whether they succeeded or not. It might be that a mere unsuccessful attempt would not have been sufficient ground

for the plaintiffs treating the agreement as determined. But when the Bill became an Act the state of things was altered. The damage ensuing to the plaintiffs was clear and imminent; that it arose from the promotion and passing of the Act was clear also; and there was no ground for concluding that if the defendants had continued to oppose the Bill would have passed. The next question was whether the breach was so vital as to give the plaintiffs the right to treat it as at an end. This was a mixed question of law and fact. As to the law, he took it to be clearly settled that if one party to a contract refuses to perform that part of the contract which has to be performed by him, this does not indeed amount to a rescission of the contract, as for rescission the consent of both parties is requisite, but it does entitle the other party to say, if he chooses, that he will accept the situation by treating the contract as at an end and will not perform the part to be performed by him. His Lordship read authorities on this point, and continued,—It was not every breach that would give the right to treat the contract as at an end; the breach must be vital, going to the root of the contract. He was of opinion, having regard to the authorities, some of which his Lordship mentioned, that there had been a breach going to the root of the contract as it existed. The defendant company had wilfully repudiated the agreement and also incapacitated themselves from performing it. To hold otherwise would be to hold that while the defendants did not the plaintiffs did remain bound. His Lordship next rejected an argument on the ground of part performance as merely verbal and of no substance. He also held that the conduct of the plaintiffs in protecting themselves before the committee of the Houses of Parliament did not affect their right. He also rejected an argument that Parliament had compensated the plaintiffs so as to take away the right of action. He now dealt with a contention that there could be no right of action in respect of what was done by authority of Parliament. The proposition appeared to him true but irrelevant. If it meant that when the Bill became an Act the plaintiffs could not sue for breach of article 17, it only enhanced the importance of their other alternative to treat the whole as rescinded. But the action was not of such a character at all. In the result his Lordship made the declaration asked for by the plaintiffs. As to the counter-claim he held that the defendants were entitled to no account in respect of the period subsequent to July 7, and that, as there were no receipts before that date of which they had not had their share, the counter-claim failed altogether. He gave the plaintiffs costs.

[Solicitors—Bompas, Bischoff, and Co.; Beale and Co.]

Q.B. Div. (Darling and Channell, JJ.) } 1899.
Dec. 19.

CROSS AND OTHERS V. WEST DERBY UNION.*

Rating—Rateability—Exemption—Police-station—Residences of police officers.

The County Council of Lancashire erected a police-station which contained cells for prisoners, living accommodation for ordinary constables, charge officers, magistrates' room, and other offices. The premises also contained three unfurnished dwelling-houses exclusively occupied by a superintendent, an inspector, and a sergeant of the county police respectively, with their families, for their domestic use. These dwelling-houses might be visited and inspected at any time by members of the standing joint committee, the

*Reported by A. F. JENNIN, Esq., Barrister-at-Law.

chief constable, or the Government inspector. The front doors opened on to the street, but from the superintendent's house there was direct access to the station, and in one of the bedrooms there was a speaking tube to the charge office and day room. A deduction was made from the salaries as rent for the three houses. There was frequent communication passing between the officers and and those in charge of the prisoners, and no prisoner could be locked up, bailed, or remanded, unless one of the three officers was present. *Held*, that the three dwelling-houses formed part of the police-station, and were exempt from rating.

This was a special case stated by the quarter sessions of Lancashire on an appeal against an assessment to a poor rate made for the township of Seaforth. The appellants were a superintendent, an inspector, and a sergeant of the county police, who were assessed to the rate in question as the occupiers of three dwelling-houses. The facts stated in the case were in substance as follows. The premises the assessment of which was in question were erected by the county council of Lancashire in 1895 as residences for the members of the county police, together with other premises which the respondents did not claim to be rateable, the whole of the premises being vested in the county council. The premises erected in 1895, in addition to the cells for prisoners, living accommodation for the ordinary constables, charge offices, magistrates' room, and other offices constituting the Seaforth Police-station, comprised three dwelling-houses exclusively occupied by the respective appellants and their families for their domestic use. These dwelling-houses might be visited and inspected at any time by members of the standing joint committee, the chief constable, or the Government inspector. The front doors of the three houses opened into the street, but from the superintendent's house there was direct access to all parts of the station by passing into the yards of the houses and from the yards across an enclosed space. In one of the bedrooms of the superintendent's house there was a speaking tube communicating with the charge office and day room. In respect of the residences there was deducted from the salaries of the officers, as rent for the premises occupied by them, the sums following:—From that of the superintendent, £40 per annum; from that of the inspector, £7 10s. per annum; and from that of the sergeant, £6 10s. per annum. The officers might be required by the authorities to move elsewhere at any moment, but whilst they were attached to the Seaforth division it was necessary that they should be resident within or adjacent to the police-station for the due carrying on of the work of the place, and when appointed to their respective offices they were compelled by the authorities to reside in the dwelling-houses in question. In the year 1898 there were 475 prisoners brought to the station and confined there, and the police force resident there and in the three houses the assessment of which was in question consisted of eight constables and the three officers, and there was frequent communication passing between the officers and those in charge of the prisoners. No prisoner could be locked up, bailed, or remanded unless the superintendent, inspector, or sergeant was present. In none of the houses was there any room set apart for any purpose other than for the use of the appellants and their families respectively. The appellants respectively provided the furniture for the dwelling-houses. The case was not argued before the quarter sessions, as both parties were desirous of obtaining the decision of the High Court on

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the facts, as to which there was no dispute; but the quarter sessions gave formal judgment dismissing the appeal subject to the present case.

Mr. Pickford, Q.C., and Mr. A. G. Steel appeared for the appellants; and Mr. C. A. Russell, Q.C., and Mr. Collingwood Hope for the respondents.

In the course of the argument the following cases were cited:—“*Gambier v. Lydford Overseers*” (3 E. and B., 346); “*Reg. v. St. Martin's, Leicester Overseers*” (L.R., 2 Q.B., 403); “*Martin v. West Derby Union*” (11 Q.B.D., 145); “*Showers v. Chelmsford Union*” (60 L.J., M.C., 55); “*Leicestershire County Council v. Leicester Union*” (78 L.T., 463); and “*Bent v. Roberts*” (3 Ex. D., 66).

MR. JUSTICE DARLING said that it appeared to him that the question raised by the case—namely, whether certain premises built for the police of the Seaforth division of Lancashire were rateable or not—depended very much on the view taken of the facts as stated in the case. The premises comprising the dwellings to which the case related were all erected in 1895 for a police-station and residences for a superintendent, an inspector, and a sergeant. It was stated in the case that the premises erected in 1895, in addition to the cells for prisoners, living accommodation for the ordinary constables, charge offices, magistrates' room, and other offices constituting the Seaforth Police-station, comprised three dwelling-houses exclusively occupied by the respective appellants and their families for their domestic use; and that the dwelling-houses might be visited and inspected at any time by members of the standing joint committee, the chief constable, or the Government inspector. It was, therefore, clear that, although the houses were occupied by the officers for their domestic use, they were occupied subject to some conditions arising out of the officers' employment. The case further stated that in the year 1898 there were 475 prisoners brought to the station and confined there, that the police force resident there and in the three houses the assessment of which was in question consisted of eight constables and the three officers, and that there was frequent communication passing between the officers and those in charge of the prisoners. The case also stated that no prisoner could be locked up, bailed, or remanded, unless the superintendent, inspector, or sergeant was present. What sort of exception was it that was to be applied to these dwelling-houses, if any objection was to be applied to them at all? His Lordship thought it was to be collected from the judgment of Lord Justice Bowen in “*Showers v. Chelmsford Union*” (60 L.J., M.C., 55). The Lord Justice had said with reference to the premises there in question:—“But here there is no single building in the sense that it is one occupied as a bare trust for public purposes, for it is not a police-station as a whole.” That apparently laid down, and was intended to lay down, that if a building was occupied as a police-station as a whole then the whole building came within the exception. Lord Justice Fry also seemed to have treated that as a test; and Lord Esher said the question was very much one of fact. Here the three appellants did live in the houses, but the houses were all within the surrounding wall of the police station. There was frequent communication between the officers and those in charge of the prisoners. And it was clear that the reason for those frequent communications was that no prisoner could be locked up, bailed, or remanded unless one of the appellants was present. Could it be said, then, that the appellants' houses were not part of the police-station? If the houses were not part of the police-station, the police-station would be of a very imperfect character; there would be no one connected with

the place, or forming part of the establishment, who could look up, bail, or remand a prisoner. The proper conclusion of fact was that the whole building, including the officers' dwellings, was occupied as a bare trust for public purposes, and that it was a police-station as a whole. The appeal must, therefore, succeed.

MR. JUSTICE CHANNELL concurred, observing, however, that the case was very near the border line, and that a very slight alteration in the arrangement of the premises would have prevented the appellants from successfully claiming the exemption.

[Solicitors—Ridsdale and Son, for H. E. Clare, Preston, for the appellants; Sharpe, Parker, Pritchards, and Barham, for Cleaver, Holden, Garnett, and Cleaver, Liverpool, for the respondents.]

Prob., Divorce, and Adm. Div. } 1899.
(Prob.) (Jeune, P.) } Dec. 19.

CREDITORS' BONDS.*

Administration—Practice—Administration bond
—"Not preferring his own debt."

At the sitting of the Court,

The PRESIDENT said,—There is a matter of practice in the Probate Registry about which an alteration is going to be made and as to which it is thought desirable that I should give public notice. It is this. Up to the present time the ordinary form of administration bond has provided only that the administrator shall administer in due course of law and so on "not unduly preferring his own debt." It was understood, although, no doubt, wrongly, that the effect of that was to prevent an administrator appointed in the ordinary course of law from preferring himself, paying his own debt, even though the estate should be insolvent. Of course that is a very undesirable state of things, and lately, in the case of "*Davies v. Parry*" (15 *The Times* L.R. 186 and [1899] 1 Ch., 602; 68 L.J., Ch., 346; and 47 W.R., 429), Lord Justice Romer (sitting then as Mr. Justice Romer) decided, and, no doubt, rightly, that the effect of that provision was not what was ordinarily understood, but that the effect of it enabled the administrator to pay his own debt, because the words are "not unduly preferring," and therefore he was entitled to prefer himself, because it was not unduly, although, of course, it was a preference. In those circumstances it is desirable to alter the passage, and in future the administration bond will be granted with the substitution of the words "not, however, preferring," instead of "not unduly preferring." The consequence of that will be that the administrator will not have an injustice done to him upon which Mr. Justice Romer commented. That will take effect all over the country on January 1 next.

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.) } Dec. 20.

THE ATTORNEY-GENERAL V. LONDON COUNTY COUNCIL.†

Revenue—Income-tax—Interest on loans by County Council—Interest payable out of rents received—Income-tax already paid under Sched. A—Income-tax Acts, 1842 and 1853, Sched. D.

The London County Council borrowed moneys, part of which they re-lent to other local bodies. The fund out of which interest on the moneys borrowed was paid was partly made up of the

rents of their property and the interest payable by the various local bodies to whom the loans had been made. In paying the interest on the moneys borrowed by them the County Council deducted the income-tax payable thereon under Sched. D, and claimed to retain as against the Crown out of the sum so deducted by them the income-tax already paid on the rents of their property under Sched. A, and the income-tax on the interest on the loans to the local bodies already paid by the local bodies.

Held, that the County Council were entitled to retain the amount of the income-tax already paid by the local bodies under Sched. D, but not the income-tax on the rents already paid under Sched. A.

Decision of the Divisional Court (15 *The Times* L.R., 395) affirmed.

This was an appeal from a judgment of a Divisional Court, Mr. Justice Day and Mr. Justice Lawrance, on an information against the London County Council claiming an order for the payment of £19,963 9s. 3d. and £11,035 3s. 8d. in respect of income-tax under Schedule D. The case is reported in 15 *The Times* L.R., 395, and in [1899] 2 Q.B., 226.

The question arose in respect of the sum deducted as income-tax under Schedule D by the London County Council when they pay interest to the stockholders of the Metropolitan stock. The Crown claimed the whole of the sum so deducted. The County Council's view was that so far as the sum required for the payment of the interest was made up by the rents of their property, for which tax had been paid under Schedule A, they were not called upon to hand over to the Crown the amount deducted. Further, the County Council contended that so far as the sum required for the payment of the interest was made up by the payment of the interest due to them on loans to other authorities, from which income-tax under Schedule D had been deducted before the County Council received it, they could retain the amount deducted. The information set out the material provisions of the Metropolitan Board of Works (Loans) Act, 1869, which dealt with loans raised by the Board and the creation of the Metropolitan Consolidated stock. By section 5 the sums required for the redemption of the Consolidated stock and the dividends thereon were to be charged on the whole of the land, rents, and property belonging to the Board, and on all moneys which could be raised by rate. The London County Council have succeeded to all the functions and powers of the Metropolitan Board of Works. Section 22 created a Metropolitan Consolidated rate. Section 26 created a Metropolitan Consolidated Loans Fund. Section 27 provided that the Board should carry to the Consolidated Loans fund the moneys following:—(1) All moneys, whether in the nature of capital or otherwise, arising from the sale, lease, or other disposition of lands, rents, and property belonging to the Board, (4) such greater or less annual sum as the Treasury may from time to time approve as being in their opinion necessary in order to pay the dividends on and to redeem all the Consolidated stock in 60 years from the date of the creation thereof. Under section 28 the Board was to apply the Consolidated Loans Fund according to such regulations as might be approved by the Treasury. This section was repealed by section 15 of the London Council (Money) Act, 1889, which provided for the Consolidated Loans Fund being applied in payment of the dividends on Consolidated stock and then in purchasing and redeeming Consolidated stock

*Reported by J. H. MURPHY, Esq., Barrister-at-Law.

†Reported by F. G. RUCKER, Esq., Barrister-at-Law.

and in payment of certain other liabilities. The County Council from time to time raised large sums in accordance with the provisions of Acts of Parliament. They had also lent large sums to local authorities, the interest on which and parts of principal repaid were payable into the Consolidated Loans Fund. The total sum paid by the defendant Council by way of dividends and interest on loans during the year April 1, 1897, to March 31, 1898, was £1,142,884 6s. 9d., the income-tax on which at 8d. in the pound amounted to £38,096 2s. 10d. The defendant Council, in paying the said dividends, deducted and retained the income-tax payable thereon under Schedule D. The defendants had paid certain sums to her Majesty, but had left a balance of £19,963 9s. 3d. unpaid. During the half-year April 1, 1898, to September 30, 1898, the defendant Council paid by way of dividends and interest on loans made to them £587,058 3s. 8d., the income-tax on which under Schedule D at 8d. in the pound amounted to £19,568 10s. 1d. The defendants had paid to her Majesty certain sums, leaving a balance of £11,035 3s. 8d. unpaid. In the information the Attorney-General charged that all the sums deducted should be accounted for to her Majesty. In argument, however, he gave up the claim in respect of a rateable proportion of so much money as was repayment to the County Council of the interest of loans by other authorities who had deducted income-tax under Schedule D before paying the County Council. In section 11 of the information the Attorney-General alleged, by way of alternative, as follows:—That the Consolidated Loans Fund has only one constituent portion which is chargeable to the income-tax under Schedule D of the Income-tax Acts—viz., the said interest paid to the defendant Council by local authorities on the loans made to them, and no other constituent so chargeable, and that such Consolidated Loans Fund is by law applicable, in the first place, to the payment of dividends on Consolidated stock and loans to the defendant Council, and then in purchasing and redeeming Consolidated stock and the payment of the other matters enumerated in section 15 of the said Act, 1889; that a rateable portion only, and no more, of the said interest payable by the said local authorities is applicable and applied to the payment of dividends on the said Consolidated stock and loans to the defendant Council; and that, therefore, no part of the dividends paid by the defendant Council, excepting only an amount thereof equal to the said rateable proportion of the said interest, is payable out of profits or gains brought into charge to the income-tax under Schedule D, and that the defendant Council ought to deduct and to account to her Majesty for the whole of the income-tax on the said dividends, excepting only the tax on the amount equal to the said rateable proportion of the said interest. The defendants, in answer to interrogatories, stated that they had paid the sums mentioned in the information by way of dividends on Consolidated stock partly out of rents and profits of land charged with income-tax under Schedule A, partly out of interest on loans to local authorities, and other interest or annual payments charged with income-tax under Schedule D, and partly out of sums raised by rate. The defendant Council contended that, in so far as the said dividends were paid out of rents and profits of land or out of interest or other payments already charged with income-tax either by way of deduction as and when they were received or otherwise, the said Council were entitled to deduct and retain income-tax on dividends paid out of such rents and profits, interest, and payments already charged. They claimed to do this by virtue of the Income-tax Acts, 1842 and 1853, and the Customs and Inland Revenue Act, 1888, and especially the rules contained in section 60 of the Income-tax Act, 1842, in section 40 of the Income-tax

Act, 1853, and in section 24 of the Customs and Inland Revenue Act, 1888. By subsection 3 of the last-mentioned section, "upon payment of any interest of money or annuities charged with income-tax under Schedule D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income-tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to her Majesty and recoverable as such accordingly; and the provision contained in section 8 of 13 and 14 Vict., c. 97, now in force in relation to money in the hands of any person for legacy duty shall apply to money deducted by any person in respect of income-tax." The Divisional Court gave judgment for the Crown, holding that, so far as the sum paid by the County Council for interest consisted of rents received by them, they were not entitled to retain any of the deducted income-tax, and that, so far as it consisted of interest paid to them by other authorities, they were bound to account to the Crown for the deducted income-tax in accordance with section 11 of the information. The defendants appealed.

Sir Edward Clarke, Q.C., Mr. Bosanquet, Q.C., and Mr. Ryde appeared for the appellants; the Attorney-General (Sir Richard Webster, Q.C.) and Mr. Danckwerts for the Crown.

The COURT, having taken time to consider, delivered judgment, dismissing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—Two questions arise in this case—the one as to the true construction of section 24 (3) of the Customs and Inland Revenue Act, 1888; and the other, what, upon the facts proved when applied to this section, is the account to be rendered by the London County Council to the Crown. The London County Council has a stock, which is called consolidated stock, upon which they pay dividends to the stockholders amounting in round figures to the sum of 1,000,000 of money per annum. By section 24 (3) of the Act of 1888, it is provided that, before the London County Council pays this annual dividend to their stockholders, the Council shall deduct the income-tax payable thereon under Schedule D.—i.e., shall deduct one million of eightpences, and unless excused (about which hereafter) the Council is bound to render an account to the Crown of these eightpences, which it has thus deducted, and for this amount the London County Council is made debtor to the Crown. For the payment of these dividends and for the payment of the other expenditure of the London County Council the Council has a fund, called the Consolidated Loans Fund, which is supplemented by the many receipts of moneys which fall in to the London County Council. These receipts consist, amongst others, of rents, of interest upon loans, of profits made by borrowing and lending money, of profits made by purchasing and selling property, and of money raised by the levy of rates. These receipts are placed together in one fund, which forms the Consolidated Loans Fund. The rents which are received by the London County Council, and which are paid into this fund, amount in round figures to the sum of £100,000 per annum. The interest upon loans which are received by the London County Council, and which are paid into this fund, amounts in round figures to the sum of £500,000 per annum, and the total receipts paid into this fund, including the two sums above mentioned, amount to the sum of about £2,600,000 per annum. The first question is whether the rents of £100,000 per

annum thus received by the London County Council, and which have had the income-tax under Schedule A of the Income Tax Act deducted by the tenants before these rents were paid to the County Council, fall within the provisions of section 24 of the Act of 1888; and this depends on the true construction of that section. By section 23 of the Act of 1888, under the heading "Income-tax," it is enacted that there shall be collected and paid . . . in respect of all property, profits, and gains, the amounts therein prescribed chargeable under Schedules A, B, C, D, or E. Section 24, so far as it is material, is as follows:—"Upon payment of any interest of money charged with income-tax under Schedule D"—i.e., upon payment of the annual dividends of £1,000,000 per annum accruing due upon the consolidated stock to the stockholders—"the person"—i.e., the London County Council—"by whom such interest shall be paid, shall deduct thereout the rate of income-tax in force at the time of such payment"—i.e., income-tax payable under Schedule D—"and shall forthwith render an account thereof to the Crown, and for the amount so deducted the person rendering the account shall be a debtor to the Crown." What is the meaning of this? It seems to me plain that where a person pays interest or a dividend which is liable to income-tax under Schedule D, that income-tax—i.e., the income-tax under Schedule D—is to be deducted by the person paying that interest or dividend, coupled with the obligation of rendering an account to the Crown of the amount so deducted, and for which amount the person deducting that tax becomes a debtor to the Crown. If there were no exception in this action, which there is, the London County Council in my judgment would have to render an account to the Crown of the million eightpences which it had deducted before it paid the million of dividend to its stockholders, which deduction would be the income-tax payable under Schedule D and has nothing whatever to do with income-tax under Schedule A. But there is an exception, and what is it? It is that the person to account to the Crown is not to deduct the income-tax payable under Schedule D, and therefore is excused from rendering an account as to this to the Crown, if the dividend paid to the stockholders is paid out of "profits and gains" already "charged to such tax." What tax? Why, charged to the income-tax under Schedule D. This is my reading of this section 24, and in my opinion this section, as I have said, has nothing whatever to do with income-tax payable under Schedule A of the Income-tax Acts, whereas the County Council argues that it has. It is said by the London County Council that the meaning of section 24 is that the Crown in no case is to get income-tax twice over, and that it would do so if income-tax upon the £100,000 of rents is not deducted from the account rendered to the Crown; for, say the County Council, the tenants, before they pay their rents to the Council, have already deducted the income-tax under Schedule A, and paid it to the Crown; and, unless the London County Council is allowed to deduct this income-tax from the account to be rendered, the Crown will get income-tax twice over. As regards income-tax under Schedule A this apparently would be so, but where is it enacted in section 24 that it is not to be so? As regards income-tax payable under Schedule D it is so enacted; but I am clear that this section does not embrace income-tax payable under Schedule A. It is said that we should read section 24 in such a way as to make it apply to income-tax under Schedule A; but this I cannot do, for the two taxes—i.e., the tax under Schedule A and the tax under Schedule D—are entirely distinct, excepting that they are both taxes upon income, as are the taxes under the Schedules B, C, and E. The tax under Schedule A is a tax upon the gross annual value of property. The tax

under Schedule D is a tax upon "gains and profits," an entirely different tax from the tax under Schedule A. Whether the Legislature should have enacted otherwise is not for me to say. It suffices to say that it has not done so. The first point, therefore, taken by the London County Council—viz., that in the account it is to render to the Crown it may deduct the tax paid under Schedule A on the £100,000 of rents—in my opinion fails, and I pass on to the next question. I have already stated of what the Consolidated Loans Fund is composed. It is obvious that, though there is one component part upon which income-tax under Schedule D has been deducted before it was received into the fund, to wit, the tax under Schedule D upon the £500,000 of interest received by the Council upon loans made by it, on the others no such deductions have been made; for instance, upon the rents, the profits made by buying and selling property, and upon the rates levied by the Council. If the London County Council is to escape rendering an account to the Crown of the million of eightpences which it has deducted from the stockholders, it is for it to prove that the million of money paid to the stockholders has been paid out of money which has already paid income-tax under Schedule D. Do they prove this? In my opinion they do not; for it is impossible to say out of what moneys which constitute the Consolidated Loans Fund of £2,600,000 they do pay these dividends of £1,000,000 of money annually to their stockholders, whether partly out of the million of rents which have paid no income-tax under Schedule D or partly out of profits made by borrowing and lending money, or partly out of profits made by purchasing and selling property, or partly out of the rates, none of which have paid income-tax under Schedule D. If it is to be presumed that no part of the money received from rates and paid into the loans fund, together with the other receipts, was used to pay the one million of dividends, as Lord Justice Williams thinks should be presumed, though it is a mere presumption and in my opinion not proved, what then? The only effect will be that the loans fund, applicable to the payment of the dividends, will stand, not at £2,600,000, but at that sum less the amount received from rates, which will alter somewhat the rateable proportion mentioned in paragraph 11 of the information. But this is not the real point in the case, for what was really contended for by the learned counsel for the London County Council was that the interest of £500,000 paid to the London County Council was not the only sum in the loans fund which had already paid income-tax under Schedule D, but that the £100,000 of rent had also paid this tax, so that it came within section 24 of the Act of 1888. This I have held not to be so. In my opinion upon the facts proved paragraph 11 of the information has been established by the Crown. As the £500,000 of interest received by the Council will not pay the million of dividends to the stockholders, it is obvious to me that the dividends, in part at any rate, have been paid out of moneys which had not theretofore paid income-tax under Schedule D. I have not to decide whether, if the Crown pushed this case to its extreme limit, the London County Council would have to render an account of the whole of the million eightpences it has deducted from its stockholders; for the Crown does not insist upon this, and asks only for an account less such a rateable proportion as the £500,000 of interest received bears to the whole fund. In my judgment the London County Council cannot ask for more, and it is wrong as to this as also upon the construction of section 24 (3) of the Act of 1888. I think, therefore, that this appeal should be dismissed with costs.

LORD JUSTICE COLLINS read a judgment in which he arrived at the same conclusion.

LORD JUSTICE VAUGHAN WILLIAMS read a judgment in which he agreed with the other members of the Court on the construction of section 24 (3) of the Act of 1888, but differed on other points.

Court of Appeal (A. L. Smith, Collins, } 1899.
and Vaughan Williams, L.J.J.) } Dec. 20.

THE ATTORNEY-GENERAL V. DE PREVILLE.*

Revenue—Estate duty—Settled property—Surrender of life interest to remainderman—Death within 12 months of surrender.

Where a tenant for life surrendered his life interest to the remainderman and died within 12 months; *held*, that estate duty was not payable by the remainderman.

Decision of the Divisional Court (15 *The Times* L.R., 398) reversed.

This was an appeal from the judgment of a Divisional Court, Mr. Justice Day and Mr. Justice Lawrence, on an information by the Attorney-General claiming estate duty in respect of a life interest surrendered to the remainderman less than 12 months before the death of the tenant for life. The case is reported 15 *The Times* L.R., 398; [1899] 2 Q.B., 238.

The information set out that George Thomas Mowbray, of Grangewood-house, in the parish of Seals, in the county of Leicester, deceased, by his will, dated February 4, 1892, devised and appointed all the real estate to which he should be entitled at the time of his decease, or over which he might have any disposing power, to the use of his sister, Georgiana Anne, the widow of the late Pierre Richard de Preville, for her life, and after her decease to the use of his nephew, the defendant, André George Richard de Preville, the son of his said sister, and the heirs of his body; and in default of such issue to the testator's own right heirs. The said George Thomas Mowbray died on February 29, 1892. By an indenture of settlement dated October 10, 1845, the manor or lordship of Overseal, in the county of Leicester, and certain freehold messuages, &c., therein described, were limited to the use of trustees in trust to permit the said Georgiana Anne Richard de Preville, then Georgiana Anne Mowbray, during such part of her life as she should be single and unmarried, to receive the rents and profits of the said hereditaments, and during any coverture of the said Georgiana Anne Richard de Preville to pay the said rents and profits to her for her separate use, and from and after her decease to the use of her first and other sons successively, according to seniority in tail male with remainders over. By an indenture dated February 5, 1896, made between the said Georgiana Anne Richard de Preville, widow, of the first part, the defendant, André George Richard de Preville, of the second part, and David Hale of the third part, reciting *inter alia* the said indenture of October 10, 1845, and the said will of George Thomas Mowbray, and his death, and reciting (as the fact was) that the defendant, André George Richard de Preville, was the eldest and only son of the said Georgiana Anne Richard de Preville, and that they were desirous of barring the estate tail of the defendant in the hereditaments comprised in the said settlement and devised by the said will, and of limiting the said hereditaments as thereafter expressed to the intent that the life estate of the said Georgiana Anne Richard de Preville therein should be absolutely released

in favour of the defendant, it was witnessed that the said Georgiana Anne Richard de Preville as settlor, and the defendant, André George Richard de Preville (with the consent of the said Georgiana Anne Richard de Preville as protector of the settlement and will), thereby granted unto the said David Hale, first, all the manor or lordship, freehold messuages, &c., in the parishes of Overseal and Netherseal, or elsewhere, in the county of Leicester, comprised in the indenture of October 10, 1845; and, secondly, all the freehold messuages and hereditaments devised by the said will of the said George Thomas Mowbray, and also all other freehold hereditaments which had become subject to the uses or trusts of the said indenture of settlement or of the said will concerning the said testator's real estate and all moneys, stocks, funds, and securities (if any) which were subject to be invested in the purchase of hereditaments of which the defendant would be tenant in tail male or in tail, and the hereditaments to be purchased therewith, to hold the same unto the said David Hale and his heirs discharged from all estates in tail male or in tail of the defendant at law or in equity, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail to the use of the defendant, his heirs and assigns for ever absolutely released and discharged from the life estate therein of the said Georgiana A. R. de Preville. The indenture also witnessed that the said Georgiana A. R. de Preville thereby absolutely released under the defendant the power of appointing a life interest to any husband with whom she might intermarry and of charging portions for her children by the said indenture of October 10, 1845, given to her. The lastly stated indenture was enrolled on February 11, 1896. The said Georgiana A. R. de Preville died within 12 months after the execution of the said indenture—namely, on December 11, 1896—intestate. Letters of administration to her personal estate were granted to the defendant on August 9, 1897. The information alleged that on the death of Georgiana A. R. de Preville estate duty under sections 1 and 2 of the Finance Act, 1894, became payable in respect of the hereditaments and property comprised in the said indenture of February 5, 1896 (or alternatively in respect of the life interest at the date of the last mentioned indenture of the said Georgiana A. R. de Preville in the said hereditaments and property), as property passing on her death within the meaning of the Act. The defendants answered that estate duty under section 1 and 2 of the Finance Act, 1894, did not become payable on the death of the said Georgiana A. R. de Preville in respect of the hereditaments and property comprised in the said indenture of February 5, 1896, or in respect of her life interest at that date inasmuch as no such property was property passing on her death within the meaning of the said Act. The Divisional Court gave judgment for the Crown. The defendant appealed.

Mr. Butcher, Q.C., and Mr. Ashton Cross appeared for the appellant; the Attorney-General, the Solicitor-General, and Mr. Vaughan Hawkins for the Crown.

The COURT, having taken time to consider, delivered judgment allowing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—The real point upon which the decision of this case turns is whether section 2 of the Finance Act, 1894, imposes estate duty on a life estate which, prior to the passing of that Act would not have had to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, upon the death of the tenant for life. The facts are peculiarly short. On and prior to February 5, 1896, Georgiana Anne de Preville was tenant for life of real property situate in the county of Leicester, of which her son, the present appellant, was tenant in

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

tail, and upon the day above-named the mother and son executed a disentailing deed, by which the estate tail was barred, and the son thereupon became owner in fee of the property. On December 11, 1896—i.e., ten months after the execution of this deed—the mother died. The question is whether the life estate of the mother, which had passed to her son ten months before her death, is liable to estate duty upon her death. It has been held in this Court, affirmed in the House of Lords in the *Attorney-General v. Beech*'' ([1899] A.C., 53), that where the owner of a life estate has conveyed that estate to a donee more than 12 months before the death of the donor estate duty upon the life estate is not payable by the donee upon the death of the donor, for the reason that by the Finance Act it is only the estate which passes upon death which is liable to estate duty, and that when the donor, the tenant for life, died nothing passed upon which the estate duty could operate, for the life estate had already passed to the donee before the death of the donor. It is now said by the Crown that *Beech's* case does not apply, because in the present case the tenant for life died within 12 months of the gift, and not after 12 months of the gift, as in *Beech's* case, and it is argued that upon this ground, by reason of the provisions of the remarkable section 2 (1) (c) of the Finance Act of 1894, this case is different from *Beech's* case, and that estate duty is leviable upon the life estate upon the death of the tenant for life. The Crown admits that, if section 2 (1) (c) of the Finance Act, 1894, does not impose this duty upon the life estate upon the death of the tenant for life, there is no other section which does. Section 2 (1) (c) is as follows:—“Property passing on the death of the deceased shall be deemed to include property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were in this Act enacted and extended to real property as well as personal property, and the words ‘voluntary’ and ‘voluntarily’ and a reference to a ‘volunteer’ were omitted therefrom.” In the case of “*Attorney-General v. Earl Grey*” ([1898] 2 Q.B., 534) I expanded this composite section, and I will do so again so far as material to this case. It then reads as follows:—“Property passing on the death of the deceased shall be deemed to include property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, which, as amended, enacts that real or personal property to be included in an account shall be property of the following description—viz., any real or personal property taken under a disposition by a person dying on or after June 1, 1881, purporting to operate as an immediate gift *inter vivos*, which shall not have been *bona fide* made 12 months before the death of the deceased.” This section 38 of the Act of 1881 is one of a group of sections under the heading “Stamps,” which relates to the taking out of probate and letters of administration to the estate and effects of deceased persons—i.e., of property which deceased persons die possessed of, or leave behind them—and it seems to me that this group of sections has nothing to do with property a deceased person has not left behind him, excepting cases in which a deceased person would have left property behind him had he not given it away before he died. It is only as regards such cases that an account is to be rendered. Section 38 being one of the sections in this group, what is its true reading? Does it mean that a life estate—which of necessity comes to an end on the death of the tenant for life, and which

never under any circumstances can come into an account upon the death of the tenant for life—is nevertheless to be brought into an account if the deceased has given it away less than 12 months before death, or is its true reading that, if there be property which would come into an account upon death if it had not been given away, that property must be brought into an account if the deceased has given it away less than 12 months before death? Considering that the group of sections in the Act of 1881 is dealing with the property of which deceased persons in fact die possessed, or should have died possessed if they had not given it away, in my opinion it is not the true reading of section 38 that property must be brought into an account no matter whether it would or would not have had to be brought into an account if it had not been given away within 12 months of the death. It is only to be brought into an account if it would have had to be so brought but for the gift. In my judgment this section is to prevent persons giving away property less than 12 months before death which otherwise would have to be included in an account, and thus escaping the duty. It is not disputed by the Crown that the life estate in the present case could never have been included in an account, for upon the death of the owner of this life estate, even if it had not been given to the son, it *ipso facto* came to an end, and there was therefore nothing whatever to bring into an account. For those reasons section 2 (1) (c) in my judgment does not bring about what is contended for by the Crown, and, as before stated, there is no other section which does so. I need not discuss Lord Cowley's case ([1899] A.C., 198), for it has no bearing upon the point I have to decide, and I think the Crown is wrong, and I cannot agree with the Divisional Court, though upon what ground that Court decided in favour of the Crown I do not know, for it has not told us. I think this appeal must be allowed, with costs.

LORD JUSTICE COLLINS delivered a judgment in which he came to the conclusion that the appeal should be allowed.

LORD JUSTICE VAUGHAN WILLIAMS read the following judgment:—The decision in this case depends, it seems to me, upon the meaning of the word ‘property’ in subsection 2 (a) of section 38 of 44 Vict., c. 12. Does property there mean any property, irrespective of the interest of the deceased therein? Or is it limited to property in which the deceased had an interest which by its nature might continue after the death of the deceased—i.e., property capable of devolution as estate of a deceased—or, in other words, an interest not limited to determine with the life of the deceased? Now Lord Cairns in “*Partington v. Attorney-General*” (L.R., 4 E. and I., at p. 122) says, speaking of the construction of revenue statutes:—“The principle of all fiscal legislation is this. . . . If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. . . . In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.” On the other hand, a taxing Act is to be construed upon the same principle and by the same rules as any other Act. “*Mersey Docks v. Lucas*” (51 L.J., Q.B., 118, per Lord Justice Brett.) For instance, I suppose that, if upon the ordinary rules of construction general words would be limited on the *ejusdem generis* doctrine by preceding particular words, this construction would be applied in a taxing statute equally with any other statute. Now in the present case there is nothing to be found in the statute itself limiting the ordinary

legal meaning of the word "property"; but the statute refers to antecedent legislation, that is to say, to the statutes beginning with 55 Geo. III. and coming down to 43 Vict., c. 14, granting the Crown certain duties, in respect of the value of the estate and effects of deceased persons, and provides for an inventory or account being made by the executor or administrator of such estate and effects, and section 38 deals with what shall be included, and says in effect that it shall include not only property forming part of the estate and effects of the deceased at his death, but also property which he has parted with within three (now twelve) months before his death. Now, must not this mean, according to the ordinary rules of construction, property of the same kind as that dealt with in the antecedent legislation? That is to say, property in which the deceased had such an interest that if he had not parted with it by a gift within 12 months before his death, it would have been estate and effects of a deceased, and therefore have been included in the property on the value of which the duty was granted? It is clear in the antecedent legislation that no duty was granted in respect of property the interest of the deceased in which terminated with his life, for the duty was in respect of property as being estate and effects of a deceased; and must not the word "property" in subsequent legislation be read in the same sense? On the whole I think it must, and I find nothing in the Finance Act generally or in section 2 (1) (c) to enlarge the sense in which the word "property" is used in the probate duty legislation and the account to be rendered thereunder. The Probate Duty Acts prior to 1881 dealt with property capable of devolution as part of the estate and effects of a deceased at death; for it dealt with property which in fact devolved as such estate at death. Then comes the statute of 1881, which says that the tax shall apply to property which does not in fact devolve at death but shortly before death is transferred by what purports to be a gift *inter vivos*, but which property, the statute says, shall be taxed in the same manner as property in fact devolving at death. Surely, according to the ordinary rules of construction, the word "property" in the statute of 1881 must be limited to property in its nature capable of devolution as part of the estate and effects of a deceased. Thus to construe the word "property" in subsection 2 of section 38 of 44 Vict. is only to apply the ordinary rule of construction, that words in the same and in cognate connected lists must be presumed to have the same meaning.

Chan. Div. } 1899.
(Stirling, J.) } Dec. 20,

BARBER V. MEXICAN LAND, & C., COMPANY.*

Jurisdiction—American Courts—Order authorizing action in this country—Code of Civil Procedure of California, secs. 714, 720.

This case raised a question as to the jurisdiction of an American Court to make an order authorizing a person, who had recovered judgment in that Court against an American company to bring an action in the name of that company in this country against an English company. It was a summons on behalf of the International Company of Mexico, one of the plaintiffs, that the writ and subsequent proceedings in the action might be amended by striking out the name of that company as plaintiffs, on the ground that such name had been used without due authority. The plaintiff company was in-

corporated under and in accordance with the laws of the State of Connecticut, U.S.A. The defendant company was an English company registered under the Companies Act, 1862. By an agreement in writing dated May 4, 1889, made between the plaintiff company of the one part and the defendant company of the other part, the plaintiff company agreed to sell and transfer all the property and undertaking of the plaintiff company to the defendant company; and the defendant company thereby undertook to pay and satisfy all the obligations, debts, engagements, and liabilities of the plaintiff company and to indemnify the plaintiff company in respect thereof. On June 10, 1889, one F. E. Bates commenced an action in California against the plaintiff company, to which the plaintiff company duly appeared; and on November 29, 1892, Bates recovered judgment in that action for a sum equivalent in English money to £24,751, which still remained unsatisfied. On December 12, 1892, Bates assigned to the plaintiff Barber his judgment and all sums to be recovered in respect thereof. On March 16, 1896, in certain proceedings in the Californian Court, an order was made whereby Barber was "authorized and empowered to institute any and all necessary and proper action or actions against the said Mexican Land and Colonization Company (Limited), in any and all proper Courts, in his own name, or in the name of the said American company, to his use for enforcement of the said agreement of May 4, 1889, and the recovery of the said judgment and the moneys due and to become due on the said judgment and claim"; and the order further appointed Barber receiver of the International Company of Mexico, with full power to bring all actions and take all proceedings necessary and proper for the collection of the said judgment. The writ in the present action was issued on June 15, 1896, Barber and the International Company of Mexico being the plaintiffs and the Mexican and Colonization Company being the sole defendant. The statement of claim was delivered on June 23, 1896, and thereby the plaintiffs claimed specific performance by the defendant company of the agreement of May 4, 1889, so far as might be necessary to enforce payment by the defendant company to the plaintiff Barber of his judgment debt; payment of the debt with interest; and damages for breach of the agreement. On March 12, 1897, the plaintiff company gave notice of motion in the American action for an order vacating and setting aside the order of March 16, 1896, on certain grounds, *inter alia* that the Court had no jurisdiction to make it. On January 12, 1898, the motion was refused, and no further proceedings had been taken in the American action.

Mr. Jenkins, Q.C., and Mr. Danckwerts were for the summons; and Mr. Upjohn, Q.C., and Mr. Eustace Smith for the defendant Barber.

MR. JUSTICE STIRLING, in giving judgment, said that on the facts it must be taken that the order of March, 16, 1896, was properly made, and it was on that that the plaintiff Barber relied in opposition to the summons. The order, however, did not in terms empower the plaintiff Barber to bring an action in the name of the plaintiff company in an English Court; and the contention of the plaintiff company was that if a construction were placed on the order which would so authorize the plaintiff Barber then it was not within the powers of the Court in California, and that a more limited meaning ought to be given to it. In support of that contention reliance was mainly placed on the reasons given by the learned Judge who made the order in the judgment delivered by him on the application of the plaintiff company to set it aside. The learned Judge then relied upon sections 714 and 720 of the Code of Civil Procedure of California as conferring on him authority to make the order of March 16, 1896. Those sections fell under Title IX. of the Code, "On

*Reported by G. A. STANTON, Esq., Barrister-at-Law.

the Execution of the Judgment in Civil Actions." That title was divided into two chapters—(1) "The Execution"; (2) "Proceedings Supplemental to execution." Sections 714 and 720 were found in the second chapter. An examination of those two chapters showed that (as might be expected) they contained provisions as to the mode of obtaining execution of a civil judgment through Courts and officers of Courts whose proceedings were regulated by the Code—that was to say, the Courts of the State of California, the district Courts of the United States of America having jurisdiction within the State of California, and possibly other Courts of the United States or of the individual States. It seemed to his Lordship that section 720, when carefully considered applied only to such Courts. The concluding sentence—"Such order may be modified or vacated by the Judge granting the same or the Court in which the action is brought, at any time, upon such terms as may be just"—appeared to show that the section was to be read with such a limitation as his Lordship had indicated. If that were so then the order of March 16, 1896, would be perfectly valid and operative in all American Courts whose proceedings were regulated by the Code of Civil Procedure of California; and it ought not to receive such a construction as would give it an effect beyond that authorized by the very enactment in pursuance of which it was made; and his Lordship thought that the "proper Courts" mentioned in the order ought to be read as meaning Courts in respect of which the Court of California could properly make the order, and not as including English Courts. It was to be observed that the learned Judge nowhere stated that he had power to authorize the plaintiff Barber to sue in the name of the plaintiff company in an English Court; indeed, his language appeared to indicate that he at least entertained doubts on the subject. His Lordship (Mr. Justice Stirling) then referred to the opinion of several American lawyers, and, continuing, said it was not contended that the plaintiff Barber could, according to the practice of the English Courts, maintain this action in his capacity as receiver. If effect were given to the contention on behalf of Barber remarkable results might follow. In his Lordship's opinion an order ought to be made in accordance with the summons.

(Solicitors—J. Broad; H. S. Holt.)

Q.B. Div. (Lord Russell of Killowen, } 1899.
C.J., Bigham and Darling, JJ.) } Dec. 21.

ARMSTRONG V. LONDON COUNTY COUNCIL.*

Metropolis—Streets—Laying out street—Sanction of County Council—London Building Act, 1894, sec. 7—Street, what is—Entrance to blocks of flats.

This was a special case stated by magistrates raising a question under the London Building Act, 1894. The facts sufficiently appear from the judgment.

The case was argued on November 16, when Mr. Macmorran, Q.C., and Mr. R. Cunningham Glen appeared for the appellant; and Mr. Avory and Mr. Daldy for the respondents; and judgment was reserved.

The LORD CHIEF JUSTICE of ENGLAND delivered the written judgment of the Court as follows:—This was an appeal against the decision of the magistrates convicting the appellant upon an information charging him with having commenced to form and lay out a street for carriage traffic without having first obtained the sanction of the Council pursuant to the 7th section of the London Building Act, 1894. The question was

whether the carriage-way proposed to be formed by the appellant would, when formed, be a street within the meaning of section 7, and the magistrates found that it would. The facts are as follows:—The appellant owns some three acres, three roods, and 39 perches of land adjoining a public carriage-way called the Grove. The Grove communicates by a carriage-way 15ft. wide with the Highgate-road. No public right of way exists over the land of the appellant, and the only access from any public way is from the Grove. There is a private right of way for foot passengers through a gateway 3ft. in width in the boundary fence at the back of the land on to a public footpath in Parliament-hill. The appellant had originally applied to the respondents for their sanction to form and lay out a street for carriage traffic on the site in question. It was intended that the street should run from the Grove through the site to, and to communicate with, the footway referred to upon Parliament-hill. As a carriage-way it would have been a *cul de sac*. It was intended to be open and without gate or barrier at the Grove end. The respondents refused their sanction because the proposed street would not afford direct communication between two streets formed and laid out for carriage traffic. Section 9 (4) of the Act of 1894 gave to the respondents the right to refuse their sanction in such a case. The appellant then proceeded with the plan now in question without seeking the sanction of the respondents. That plan is described as follows in the case stated by the magistrates, paragraphs 3, 4, and 5:—“(3) It is proposed by the appellant to remove certain old buildings shown on the plan, and to lay out the said piece of land and erect new buildings thereon in the manner shown upon the plan annexed to this case marked A—that is to say, the appellant proposes to erect 20 new buildings or blocks of flats, each block containing eight flats, of which 16 blocks will be erected in a quadrangular form with an ornamental garden in the centre of the quadrangle formed by such blocks. The approach to the said buildings will be by means of a carriage-way from the Grove running round the said garden, and upon each side of such carriage-way between the Grove and the said garden will be erected two or more of the said blocks. Each of the said blocks will have a separate entrance from the said carriage-way. The said approach from the Grove and also the carriage-way around the said ornamental garden will be 40ft. in width, and such approach and carriage-way will be of a total length of 600ft. (4) The drainage plans for the said buildings had been submitted by the appellant to the said vestry of St. Pancras, upon which were shown the levels of a sewer it was proposed to construct running along and round the said carriage-way with the intended levels of the connecting drains from each of the said buildings. The said plan also showed the position of the manholes and gullies, similar to street gullies, which it was intended to construct in connexion with the sewer, and the mode in which it was intended to connect the said sewer with the sewer belonging to the said vestry in the Highgate-road; and also showed that the said carriage-way would be formed and sewered in all respects in the way in which a carriage-way of an ordinary street would be formed and sewered. It was admitted, however, that gullies similar to those shown on the said plan would be required for draining a stable-yard or any other yard. (5) The appellant does not propose to dedicate any right of way to the use of the public over the said piece of land, but intends to erect gates at the entrance to the said approach and to keep a porter at such entrance to open such gates when necessary to allow persons going to or from any of the said flats to pass, so that the public will not be entitled to enter the said approach. There will be no entrance or

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

exit to or from the said flats into the said public park called Parliament-hill, and the said carriage-way will be for the use only of the tenants of the flats in the said proposed new buildings and the tradesmen and others visiting them on business or pleasure with or without carriages; but the appellant is not under any covenant to maintain the said gates or the said porter." It is to be noted that it is not stated that the appellant is under any legal obligation to erect or to maintain the gates, or to keep the porter mentioned in paragraph 5. It is to be further noted that, if, without the respondent's sanction, the appellant can now do what is proposed, the objects intended to be secured by section 9 will be defeated. Where sanction, as in this case, has been withheld under section 9 all the owner would have to do, if the appellant is right, would be to resort to such a plan as the present, and thus reach practically the same end by a different route. It seems desirable before considering the sections of the Act, which apply to this particular case to notice the general scope of the Act. It involves a large measure of interference with the rights of private owners: they cannot do what they like with their property. They cannot make or even widen streets except in conformity with the provisions of the Act. They must observe certain lines of building frontage. They must have a certain specified space at the rear of the domestic buildings they erect. The buildings constructed must be built in conformity with certain detailed requirements as to height, thickness of walls, openings, &c. It is clear that this legislation materially interferes with the action of owners in the use and disposition of their property, and it must be assumed that this has been permitted by the Legislature for reasons of public policy affecting the health, safety, and convenience of the public. The question in this case turns upon the true construction of section 7, which provides that before any person can commence to form or lay out any street, whether for carriage traffic or for foot traffic, he must obtain the sanction of the respondents. Would the way which the appellant has commenced to lay out and form be, when formed, a "street" within the meaning of that section? Unless the context otherwise requires, the interpretation section (section 5) shows the wide meaning to be given to the word "street." It means and includes highway, road, bridge, lane, mews, footway, square, court, alley, passage whether a thoroughfare or not, and also a part of any of these. No description can be wider. Why, then, is the contemplated way not a street? It is not the less a street because, after proceeding straight for a certain distance, it is continued inside or around the proposed square, for "square" is expressly mentioned in the interpretation section. It was admitted in argument, and it seems clear, that it is not less a street because it is intended to be used as a private way, for the interpretation section in no way so limits street. If so, it is not less a street because the traffic for which it is intended is limited to what may be called private traffic to and from the houses to be built along its course. Indeed, it is clear from the wording of the interpretation section (section 5; 3, 5) that the traffic there mentioned includes both public and private traffic, for there is no trace of any intended limitation to the former of these. No doubt the controlling word in the 5th section is "street." It does not follow that everything enumerated in the interpretation clause is a street for all purposes and in all circumstances within the meaning of the Act. For example, the drive to a private house is not a street, nor an approach by a courtyard to one or two blocks of buildings or houses; see section 8. Nor is a bridge a street unless it is, or may be, a link in, or continuation of, a street. There is involved in the idea of street the presence of houses or buildings more or less continuous,

and in greater or less proximity to one another along it—"Reg. v. Fulford" ([1864] 33 L.J., M.C., 125). But this description is not complete or exhaustive for the purposes of the Act in question. Section 8 (which it is not easy to construe) would seem to treat as the commencement of a street, amongst other things, the mere forming of the foundations of a house in such a manner and position that it might become one of three or more houses abutting on or erected beside land on which a street might thereafter be laid out. But the facts of this case present no difficulty. Taking the broad description of what a street is as expressed in the judgment in "Reg. v. Fulford," we think that what the appellant here began to lay out was a street even within that description. I have already dealt with the contention that because it was intended for private and not for general public traffic the way or road in question was not a street. What remains? The appellant began to lay out and form a road, in part straight, intending to build houses or blocks of buildings on each side of that straight part and facing into it, which road ran into a square and formed a boundary of such square, round which again it was intended to build a continuous line of houses facing into the square, the length of the entire road being 600ft. We are clearly of opinion that, in these circumstances, the appellant had commenced to form and lay out a street within the meaning of section 7, and as he did so without having obtained the sanction of the respondents he committed the offence of which he has been convicted. We think that the magistrates would have decided wrongly had they decided differently. The appeal will, therefore, be dismissed with costs. We have examined, but do not think it necessary to refer to, the cases cited during the argument. Each case depends on its particular circumstances. It is, indeed, worth noting that the question of street or no street is uniformly treated in these cases as largely a question of fact. The decisions, except in the case of "London County Council v. Wood" ([1895] 64 L.J., M.C., 276), upheld the views taken by the magistrates, and in our opinion that case was wrongly decided.

[Solicitors—Newman, Paynter, and Co., for the appellants; Blaxland, for the respondents.]

Q.B. Div. (Lord Russell of Killowen,) 1899.
C.J., Bigham and Darling, JJ.) } Dec. 21.

LOGSDON V. BOOTH.*

Metropolis—Common Lodging Houses Acts, 1851 and 1853—Registration of houses—Common lodging-house, what is—Salvation Army shelters. That class of lodging-house in which persons of the poorer sort are received for short periods, and although strangers to one another are allowed to inhabit one common room, are common lodging-houses.

"Booth v. Ferret" (25 Q.B.D., 87) overruled.

This was a special case stated by the chief metropolitan magistrate on the hearing of an information laid by the appellant against the respondent charging the latter with keeping an unregistered common lodging-house in contravention of the Common Lodging Houses Act, 1853. The house or building alleged to have been so kept was a Salvation Army shelter known as the "Harbour," Stanhope-street, St. Clement Danes. The learned magistrate dismissed the information on the authority of "Booth v. Ferret" (25 Q.B.D., 87) in which another such shelter had been held not to be a common lodging-house. The case was argued on November 16, when Mr. Jelf, Q.C., and Mr.

*Reported by A. F. JENKIN, Esq., Barrister-at-Law

Ryde appeared for the appellant, and Mr. Pollard for the respondent, and judgment was reserved.

THE LORD CHIEF JUSTICE of ENGLAND delivered the judgment of the Court, allowing the appeal. After stating the manner in which the case came before the Court, he said:—The questions which arose for our determination are as follows—(1) Is “Booth v. Ferret” in principle distinguishable from this case; (2) if not, was that case rightly decided; and (3) if not rightly decided, ought we now to review it? His Lordship then discussed minutely the facts of the case, and stated that in the opinion of the Court the present case was not distinguishable in principle from “Booth v. Ferret.” He then proceeded:—The next inquiry is, Was that case rightly decided? The learned Judges in “Booth v. Ferret” came to the conclusion (but with hesitation) that a similar house and similarly conducted to the present was not a common lodging-house, on two grounds—(1) that it was not carried on as a business for the sake of profit, but as a humane or charitable enterprise, and (2) that it was not open to all comers as (it was stated) a common lodging-house was. Before examining these grounds of decision more closely it will be well to examine the scheme of legislation on this subject and endeavour to get a clear conception of its object. His Lordship, after referring in some detail to the provisions of the Common Lodging Houses Acts, 1851 and 1853, and pointing out that they must be regarded as measures of sanitary protection, continued:—Applying these considerations to the first ground on which the decision in “Booth v. Ferret” was based, it seems impossible to admit that the fact that the house or building in question was carried on for charitable objects and not for gain would take it out of the measure of sanitary protection if otherwise it would be within it. The question is not with what object or prompted by what motive the house is carried on, but whether the house is such, and is so carried on as a lodging-house as to be within the provisions of the Act, as it is clearly within the mischief aimed at by the Act. It is to be observed that the learned Judges in “Booth v. Ferret” differentiate the house in that case from a common lodging-house only on the two grounds I have mentioned. If large numbers of the most wretched class are lodged in common sleeping rooms insanitary conditions are, in the absence of inspection, supervision, and control, likely to arise, and it was the object of the law to secure that inspection, supervision, and control. We fail to see the relevance in this connexion of the motive actuating the keeper of such a house whether it be philanthropic or mercenary. But the second ground of the decision is that the “Harbour” is not within the statute on the ground that a common lodging-house is open to all comers in this sense that the keeper of such a house cannot refuse admission to any applicant. Is this so? To give to a common lodging-house this character is to attach to its keeper obligations analogous to that of a common carrier or a common innkeeper. We are unaware of any authority for this proposition. The language of Mr. Justice Lindley in “Langdon v. Broadbent” (37 *L.T.*, 434) is referred to where he speaks of a common lodging-house as one “open to all comers”—that is, as we understand the language, where practically all comers are received without discrimination; but that is a very different thing from saying that the keeper is under an obligation to receive all comers. We see no reason to doubt that the keeper of a common lodging-house might refuse to admit drunken or disorderly or uncleanly men or men of known evil reputation, as thieves and the like, or indeed any persons whom he chose to exclude. Further it seems to us on the facts before us that the “Harbour” might properly be described as

open in the same sense to all comers. The very “outcasts of society” are objects of the humane solicitude of the respondent. Even verminous subjects who are willing to submit to cleansing operations are admitted, and in the case before us it is stated that the occupants of the “Harbour” are of the same class as those who frequent common lodging-houses, but that into the “Harbour” are received persons who would usually be refused admission into registered common lodging-houses. The only restrictions on admission which may suggest a difference between the “Harbour” and registered common lodging-houses are the regulations (1) that men who are able to pay for better accommodation are not allowed to make the “Harbour” their permanent home, and (2) that the “Harbour” is not to be used to assist idle men to live a lazy life. We cannot assent to the view that this is sufficient to differentiate the two classes of houses. We know of no better description of a common lodging-house than that given many years ago by the Law Officers, Sir Alexander Cockburn and Sir W. Page Wood, to the effect that a common lodging-house was that class of lodging-house in which persons of the poorer class are received for short periods, and, although strangers to one another, are allowed to inhabit one common room. If this be the proper description of a common lodging-house, as we think it is, we cannot see in what material respect it differs from the respondent’s shelter. His Lordship then, after intimating that the Court was prepared to overrule “Booth v. Ferret” and dealing with an argument of the respondent based on the Public Health (London) Act, 1891, concluded as follows:—The result is that the appeal will be allowed, and that the case will be remitted to the learned magistrate with an intimation of our judgment upon it. Under the circumstances there will be no costs of the appeal, and, having regard to the decision of “Booth v. Ferret,” on which the respondent was justified in acting, the learned magistrate will, no doubt, think that the smallest nominal fine will meet the justice of the case. We desire to say that we should regret if the result of our decision were seriously to interfere with the humane work of the respondent. We do not think it will or can, but whether it does or not the law must be observed. We have read the careful regulations framed for the good government of the “Harbour” and the respondent’s other similar houses, and noticed the anxiety manifested in those rules, not only to ensure observance of all conditions necessary to secure cleanliness and good health and to prevent the growth and spread of disease, but also to observe the law, whatever that law may be. Indeed, the regulations expressly provide that every shelter shall be fitted up in accordance with the requirements of the sanitary authority of the district. On the other hand, we trust that those who are charged with the enforcement of the law will do all they can consistently with their duty and consistent with effecting the objects of the law to avoid anything like harshness or unreasonableness in its enforcement.

[Solicitors—Blaxland, for the appellants; Ranger, Burton, and Frost, for the respondents.]

Q.B. Div. }
(Bruce, J.) }

1899.
Dec. 21.

GREENWELL AND ANOTHER V. HOWELL AND ANOTHER.*
Practice—Costs—Public Authorities Protection Act, 1893—Action defended by clerk of the peace and the county surveyor by instructions of County Council—Solicitor and client’s costs.

*Reported by H. O. BUCKLE, Esq., Barrister-at-Law.

In this action, which was heard at great length in the earlier part of this term, the defendants alleged and the plaintiffs denied that a certain road in the parish of Godstone, Surrey, was a public highway.

Mr. Neville, Q.C., Mr. Hume Williams, Q.C., and Mr. McSwinney appeared for the plaintiffs; Mr. Jelf, Q.C., and Mr. George Humphreys for the defendants.

MR. JUSTICE BRUCE gave judgment. His Lordship reviewed the evidence (which began with a presentment of 1799) in detail and came to the conclusion that it was impossible to reconcile the evidence offered by the opposing parties, and that the balance was in favour of the existence of the highway.

Judgment was accordingly given for the defendants, with costs.

Mr. JELF asked that the order should be for costs as between solicitor and client under 56 and 57 Vict., cap. 61, section 1 (6) (the Public Authorities Protection Act, 1893). The defendants were the clerk of the peace and the county surveyor, acting upon the instructions of the county council. Under 56 and 57 Vict., cap. 73, section 26 (the Local Government Act, 1894), it was the duty of the council to protect rights of way.

Mr. NEVILLE objected. The county council was not a party to the case. If the plaintiffs had succeeded they could only have got a judgment against the individual defendant, not against the council.

MR. JUSTICE BRUCE thought this case came within the Acts. The council had a duty to protect rights of way, and it was within their discretion to use this method. Costs would be granted as between solicitor and client.

Q.B. Div. }
(Bigham, J.) }

1899.
Dec. 21.

BROWNE V. PETO.*

Mortgage—Mortgagor in possession—Leasing power—Lease comprising chattels and shooting rights—Conveyancing Act, 1881, sec. 18—Lease held valid against mortgagee.

In this case Alexander Browne, the plaintiff, claimed possession of Knowlton-court and 45 acres of land, parcel of the Knowlton estate, near Dover, in the county of Kent, held by the defendant under a lease granted on November 26, 1890. Notice to quit expiring on March 25, 1899, had been given on February 21, 1898. The defendant contended that under his lease he was entitled to remain in possession until the year 1904. The questions in the case were—first, whether this lease was binding on the plaintiff; secondly, whether the plaintiff had so conducted himself as to become bound by its terms; and, thirdly, whether, if not, the notice to quit was given by the person legally entitled to give such notice. The material facts were shortly as follows. In the year 1897 Captain L. N. H. D'Aeth mortgaged Knowlton-court and the Knowlton estate to three persons, trustees of the estate of Henry Forman, deceased, to secure a sum of £30,000 and further advances. Captain D'Aeth, being mortgagor in possession, granted to the defendant a lease of Knowlton-court mansion-house, 45 acres of the Knowlton estate, eight acres of meadow land, and the right of shooting and sporting over the Knowlton estate, for a term of 14 years from March 25, 1890, at the yearly rents of £315 10s. for the mansion-house, furniture, and sporting rights, £55 for the 45 acres, and £13 for the meadow land. There was a covenant by the tenant to spend £746 18s. 6d. on the property in internal repairs, which

sum he was to be allowed to deduct from the rent at the rate of £50 each quarter. The tenant also covenanted to keep the interior and also the furniture in good repair, and it was provided that the tenant should not be entitled to require the lessor to do any internal repairs unless the same should be rendered necessary by the neglect of the lessor to keep the outside in repair. The lessor covenanted to do the outside repairs. There were provisos for the termination of the lease in certain events and also for re-entry in case of breach of the lessee's covenants. The furniture in the mansion, and let therewith, was stated to be of the value of £1,100. The defendant was in possession under this lease when the notice to quit was served upon him. In April, 1891, after the mortgagees had notice of the lease they made a further advance of £2,500. In January, 1893, the estate of Henry Forman, deceased, was resettled and conveyed to trustees to the use of A. H. Browne, father of the plaintiff, for life, after his death to the use of the trustees for a term of 1,000 years to secure a jointure to the widow of A. H. Browne, and subject thereto to the use of the plaintiff for life, remainder to his first and other sons in tail. In 1894 the interest under the mortgage was falling into arrear, and on the 23rd of September, 1896, the interest being still in arrear, proceedings for foreclosure were commenced, which resulted in a foreclosure decree made on November 11, 1896. In December, 1896, the trustees repudiated the lease, the plaintiff insisting on his rights under it. The defendant, however, regularly paid rent to and got receipts from the trustees of the resettlement, and not the tenant for life, and correspondence passed between the defendant and the solicitors to the trustees referring to the repairs to be done under the lease. On June 1, 1897, a summons was taken out in the Chancery Division before Mr. Justice Stirling, who made an order that the mortgagees should convey Knowlton-court and the Knowlton estate to the trustees of the resettlement of the 18th of January, 1893, to the uses and upon the trusts declared concerning the freehold hereditaments therein comprised. In pursuance of this order the mortgagees conveyed the Knowlton-court and estate to one Gray to the use of A. H. Browne for life, then to the use of the trustees of the settlement for a term of 1,000 years, and subject thereto to the use of the plaintiff for life. On the 21st of February, 1898, a notice to quit was served on the defendant couched in the following terms:—“To William Herbert Peto, of Knowlton Court, near Dover, in the county of Kent, Esquire,—I, the undersigned Charles Dorman, of 23, Essex-street, Strand, in the county of London, as the agent for and on behalf of your landlord, A. H. Browne, hereby give you notice to quit and deliver up possession of Knowlton Court, and the premises above mentioned, including the right of shooting, on the 25th day of March, 1899, or at the expiration of the year of your tenancy, which will expire at or next after the end of one half-year from the time of your being served with this notice.—CHARLES DORMAN.” On April 11, 1898, Mr. A. H. Browne died. The plaintiff became tenant in tail in possession, and the notice to quit expiring, he issued the writ in this action for possession.

Mr. DICKENS, Q.C., and Mr. MORTON SMITH, for the plaintiff, contended that the lease, as it included furniture in the mansion and sporting rights over the estate, was not a lease under section 18 of the Conveyancing Act, 1881; “*Tolson v. Sheard*” (5 Ch.D., 19); “*Dayrell v. Hoare*” (12 A. and E., 356); consequently it was not binding on the plaintiff or the trustees, and that therefore the defendant held, as tenant, from year to year, and that his tenancy was liable to be determined by notice to quit. Secondly,

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

that the plaintiff was, under the deeds of January 18, 1893, and January 1, 1897, legal owner of the reversion expectant on the determination of the lease. If this were not so, the trustees of the resettlement were the legal owners. In either event, the notice to quit was good as having been given by the plaintiff either in his own right or on behalf of the trustees—"Jones v. Phipps," (L.R. 3, Q.B. 567).

Mr. BRAY, Q.C., and Mr. J. R. ATKIN, for the defendant, argued that the lease was none the less a lease under section 18 of the Conveyancing Act, because besides the land it conveyed furniture and sporting rights. Section 18 of the Conveyancing Act, 1881, allowed a lease of the "land." Land was defined by section 2, subsection 2, and included incorporeal hereditaments, of which a right of shooting was one. [MR. JUSTICE BIGHAM.—May not a lease under this Act include a right of way?] As to the furniture, the rent issued out of the land, and not out of the furniture—"Read v. Lawnce" (2 Dyer 212 b.), "Farewell v. Dickenson" (6 B. and C. 251)—every lease of a house includes the lease of some chattels. Further, if not a valid lease under the statute it must be taken as an agreement to execute a valid lease (12 and 13 Vict., c. 26, s. 2). Counsel also argued that if as between the mortgagor and mortgagee the latter has adopted the lease made by the former the lease would become binding as between the mortgagee and the leasee. In numerous letters and affidavits the mortgagee had recognized the lease and could not now repudiate it—"Keech v. Hall" (Smith, L. C., 494), "Marquis of Donegal v. Greg" (13 Ir. Eq. Rep. 12, Sugden on Powers Ed. [1861], p. 766); "Taylor v. Stibbard" (2 Ves. 437); "Corbett v. Plowden" (25 Ch.D., 687). The receipts for rent clearly confirmed the lease (13 Vict., c. 17, s. 2). By making a further advance with notice of the lease the mortgagees were *pro tanto* at all events mortgagees after the date of the lease and bound by its terms.

Mr. DICKENS, in reply, referred to "Reg. v. Wood" (1 F. and F., 407), to establish that there could be no occupation of a right of shooting. A lease under the Conveyancing Act must be an occupation lease. He also referred to 37 and 38 Vict., c. 54, section 3, which first made sporting rights rateable. The statute 13 and 14 Vict., c. 26, only applied as against those who were successors in title to the grantor of the lease. Mortgagees were not successors in title to a mortgagor as regarded a leasee holding under a lease after the date of the mortgage. That statute had no application to such a case as this. "Dowager Duchess of Sutherland v. Duke of Sutherland" ([1893], 3 Ch., 169). Mere knowledge of the existence of a lease was not enough to bind the mortgagee. Nothing short of a new agreement would have that effect "Towerson v. Jackson" ([1891], 2 Q.B., 484).

MR. JUSTICE BIGHAM first decided the question as to the validity of the notice to quit, and in giving judgment said that even though the notice to quit was given by a person in whom the legal estate was not vested it was a good notice, as it was given by the authority and on behalf of the persons who had the legal estate: that the defendant knew that the plaintiff was the only person beneficially interested and had received the notice as given on behalf of the landlords whoever they might be. Upon the other points his Lordship delivered a written judgment as follows:—The next question in this case is whether the lease of November 26, 1890, comes within the meaning of section 18 of the Conveyancing Act, 1881, so as to make it a good lease, as against the mortgagees, although they were not parties to it. Before that Act a lease made by a mortgagor alone did not bind the mortgagee, but it bound both the mortgagor and the

tenant by estoppel; it was a good lease as between the parties to it, but it did not affect the mortgagee. This rule of law produced hardship, particularly in cases where the mortgagor had been left in possession and the tenant had taken a lease without notice of the existence of the mortgage. To remove this hardship and to enable persons in possession of land more freely to deal with it, the Act in question was passed. By section 18 it is provided that a mortgagor of land, while in possession, shall as against every encumbrancer have by virtue of the Act power to make any such lease of the mortgaged land as in that section described and authorized. The leases authorized are an agricultural or occupation lease, for any term not exceeding 21 years, and a building lease for any term not exceeding 99 years. It is said on the part of the plaintiff in the present case that the lease which the defendant relies on does not come within the meaning of this section; first, because it is not "a lease of the mortgaged land or any part thereof" and, secondly, because it is not "an occupation lease." Now, by the terms of the lease the house and furniture with the sporting rights are let for one lump sum of £315 10s., the other two properties being let for £55 and £13 respectively. It is said that the lease is not a lease of the mortgaged land because it comprises a lease of the furniture, the two together being let at one rent; it is said that it is a lease of chattels as well as of land, and that therefore it is not a lease within the section. I was referred to "Tolson v. Sheard" (5 Ch.D., 19) in support of this argument. That case merely decided that the trustees of two different trust estates, the properties of which happened to adjoin, could not grant a lease of both properties at one rent; it was said, and no doubt rightly said, that such a lease would be a breach of trust. That was the only point decided. I do not think the case is of any value for the purpose of interpreting the meaning of section 18 of the Conveyancing Act. There is no doubt in my mind that this is a lease of part of the land mortgaged; it is none the less such a lease because it comprises in addition certain chattels; nor were the mortgagees in any way injured by the addition, for, in my opinion, the whole rent must be taken as issuing out of the land and as being, therefore, recoverable by the mortgagees when they come to take possession "Read v. Lawnce" (2 Dyer, 212b), "Farewell v. Dickenson" (6 B. and C., 251). Then it is said that this lease is not good because it comprises the right to shoot over a part of the land in mortgage which is not included in the demise. This raises a more difficult question. It was held in the case of "Dayrell v. Hoare" (12 A. and E., 356) that a power to lease several "estates, hereditaments, and premises, or any part or parts thereof" did not authorize a lease of part of the lands with a right of shooting over the rest. It was said that if part was demised it must be demised in its entirety, and that it was outside the power to subject the land not demised to a servitude. But what kind of lease does this Act authorize? It is such a "lease of the mortgaged land or any part thereof as in this section described and authorized." The kinds of leases described and authorized are an agricultural or occupation lease and a building lease. These expressions are not defined, but I believe it is a common practice for the landlord to reserve the sporting rights when granting an agricultural lease. A lease with such a reservation would be an agricultural lease within the meaning of this Act. If after the making of such a lease the mortgagee in possession were to grant an occupation lease of the mansion with those reserved sporting rights, would such occupation lease be outside the power granted by the Act? I think not. If it would be outside the power, then the only way of letting the sporting rights would

be by some deed in which both mortgagor and mortgagee would have to join. It must be remembered that "land" is defined in the Act (section 2, subsection ii.) to include "hereditaments corporeal or incorporeal," and that it is any part of land so described that the mortgagor has power to lease. On this part of the case I was referred to the judgment of Mr. Justice Romer, in the case of "Dowager Duchess of Sutherland v. Duke of Sutherland" ([1893] 3, Ch., 169). The case, however, does not appear to me to be of any importance in this connexion. It was decided with reference to the supposed exercise of powers under the Settled Land Acts, 1882 and 1890, the provisions of which are quite different from those in the Act I am now considering. But then it was further said that this was not an occupation lease within the meaning of section 18, because sporting rights could not be the subject of any occupation. I am not sure that sporting rights may not be the subject of occupation; the owner of sporting rights is rated as the "occupier" of them. But whether that be so or not, the fact (if it be a fact) that sporting rights cannot be the subject of occupation does not, in my opinion, render this lease any the less an occupation lease. I come, therefore, to the conclusion that the lease is a lease within the meaning of the Act, and that it is therefore binding on the plaintiff. Assuming, however, that it is not, it was said for the defendant that the alleged deviations from the statutory form were such as could be cured with the assistance of the provisions of the statute 12 and 13 Vict., c. 26, section 2. But I do not think it can be said that the inclusion of the furniture and the sporting rights amounted to a mistake or inadvertence within the meaning of the preamble to that Act, and I am of opinion that to rectify this lease by severing the furniture or the sporting rights from the land and by apportioning the rent between them would be to make an entirely new lease and not to rectify the already existing lease. Upon the question whether the plaintiff had confirmed the lease so as to bind himself by its terms, his Lordship held that, but for the Conveyancing Act, nothing had occurred to prevent the plaintiff or his predecessor from asserting that the tenancy of the defendant was merely a yearly tenancy. He gave judgment for the defendant upon the ground that the lease was a lease under section 18 of the Conveyancing Act, 1881, and gave leave to amend the pleadings by adding any parties who might be necessary in any further proceedings.

Prob., Divorce, and Adm. Div. } 1900.
(Bucknill, J.) } Jan. 11.

COSSEY V. COSSEY AND OTHERS.*

Probate—Will—Destruction—*Animus revocandi*—
Doctrine of dependent relative revocation.

Probate of a will granted on the ground that the testator had destroyed it with the sole intention of reviving an earlier will, and that there was, therefore, no *animus revocandi*.

This probate suit, arising out of the testamentary dispositions of the late Francis William Arthur Cossey, who died on May 31, 1899, was before the Court on December 12 last. The plaintiff was the sole executor of the deceased's last will, dated April 6, 1899, and he asked for probate of a draft of that will on the ground that the testator had never revoked that will, but had destroyed it, meaning to revive an earlier will. The defendants were the widow and sisters of the testator.

* Reported by J. H. MURPHY and W. O. WILLIS, Esqs., Barristers-at-Law.

The sisters pleaded that the will had been destroyed by the testator *animo revocandi* and asked the Court to pronounce for an intestacy.

Mr. Inderwick, Q.C., and Mr. Barnard were for the plaintiff; Mr. Kisch for the defendants.

Mr. BARNARD, in opening the plaintiff's case, said that the deceased duly executed a will on April 6, 1899, under which the plaintiff was appointed sole executor. On May 24, 1899, the testator, in the presence of his wife and a servant, said that he was going to destroy his will, because he desired to revive an earlier will which benefited his wife and her niece more than the last one did.

Evidence was called in support of counsel's opening statement.

At the end of the evidence his LORDSHIP said that he was satisfied (subject to anything that Mr. Kisch might say) that the testator destroyed his will, because he thought that what he had done had revived the earlier will.

Mr. KISCH intimated that he was not in a position to rebut the evidence put forward on behalf of the plaintiff.

Mr. BARNARD then submitted that this was a case of dependent relative revocation and cited the case of "Powell v. Powell" (L.R., 1 P. and D., 209). The learned counsel also referred to Tristram and Cooke's "Probate Practice," 11th Edition, p. 464, and Williams on Executors, 9th Edition, p. 126.

Mr. KISCH relied on the cases of "Evans v. Dallow" (31 L.J., P. and M., 128), and "Dickenson v. Swatman" (30 L.J., P. and M., 84).

Judgment was reserved.

MR. JUSTICE BUCKNILL, in delivering a considered judgment, said,—In this case I find the facts to be as follows. On April 6, 1899, the deceased person, Francis W. A. Cossey, called on Mr. Ernest Edward Chapman, a solicitor, about some legal proceedings with which he was threatened by his sister-in-law. He produced on that occasion a will made by him, and dated May 1, 1897, which he said he was anxious to alter. By that will his sister-in-law would be benefited. He then gave instructions to Mr. Chapman to prepare another will, which he wished to execute at once. That was done, and it was duly executed and attested in the presence of the testator, who called again on April 11, and took it away with him. On May 31, 1899, the testator died. By the will of May 1, 1897, he had left his property to his wife for life, and after her death to the sister-in-law already referred to, with power of appointment to her children. That will is not among the scripts, but its contents are proved by Mr. Chapman. By a will dated December 16, 1887, the testator had left his property to his wife, subject to a legacy of £2,000 to a niece, whom he and his wife had brought up, they having no children. On May 24, 1899, it being his wedding day, the testator told his wife that it should not pass without the destruction of the will of April 6, 1899, in which he told her he had been unjust to her; and he said he wished his property to go by the first will he had made, that is, the one dated December 16, 1887, by which she and her niece alone benefited. By his order the servant girl was summoned that she might be present when the will was destroyed, and in her presence he tore it up and gave her the pieces to burn, repeating to her first of all what he had previously said to his wife. On these facts I have to decide with what intention the testator destroyed that will. Was it done with a determination simply to cancel it, or was it done with the sole intention, wish, and expectation that the result of the destruction of the one will would be to revive and set up the will by which his wife and niece would benefit? In other words, does the doctrine of dependent relative revocation apply here? I cannot better define this

doctrine than by repetition of part of the judgment of Sir James Wilde in "*Powell v. Powell*" (L.R., 1 P. and D., 212) :—" This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done *animo revocandi* it is no revocation. What, then, if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the *animus revocandi* had only a conditional existence, the condition being the validity of the paper intended to be substituted, and such has been the course of decision in the various cases quoted in argument." The declaration alleging the intention of the testator must be clear and free from doubt, and not vague and unreliable; *vide* "*In the Goods of Weston*" (L.R., 1 P. and D., 633), where a testatrix after the destruction of a will told her daughter, who had been absent from home and who saw the will lying torn to pieces in the fireplace, that she had destroyed it intending that a former will might take effect; *vide* also "*In the Goods of Gentry*" (L.R., 3 P. and D., 80), where Sir James Hannen held that he could not construe the language of the testator at the time of the cancellation of his will so as to apply the doctrine of dependent relative revocation. But in the case which I am now deciding I find no such difficulty, and, repeating the language of Sir James Wilde in "*Powell v. Powell*," that in studying the act done by the light of the circumstances under which it occurred and the declarations of the testator with which it was accompanied, I find that the act of destruction was done with the sole intention of setting up and establishing the will of December 16, 1887, for which the destruction of the will of April 6, 1899, was only designed to make way. The case of "*Dickenson v. Swatman*" (30 L.J., P. and M., 84) was cited by the learned counsel appearing for the defendant, but it is not necessary to say more about it than that, so far as it is inconsistent with "*Powell v. Powell*," I follow the latter case. I find, therefore, that this is a case in which the doctrine of dependent relative revocation applies, and I pronounce therefore for the will of April 6, 1899, as contained in the draft thereof produced and sworn to by Mr. Chapman, who made it.

[Solicitors—Hewitt and Chapman; Gowing and Co.]

Court of Appeal (A. L. Smith, } 1900.
Rigby, and Collins, L.J.J.) } Jan. 12.

SCOTT V. CARRITT.*

Metropolis—Buildings—General line of buildings
—Consent of County Council—Exemptions—
Land "lawfully occupied" by buildings—
London Building Act, 1894, sec. 22.

This was an appeal from a judgment of a Divisional Court, consisting of Mr. Justice Ridley and Mr. Justice Darling, on a special case stated by a metropolitan police magistrate on the hearing of an appeal against an objection, served by a district surveyor on the appellant under section 150 of the London Building Act, 1894 (57 and 58 Vict., c. CCXIII.), to the proposed

erection by the appellant of certain buildings at Nos. 180 and 182, Pentonville-road, in the county of London, beyond the general line of buildings, contrary to section 22 of the London Building Act, 1894. The appellant was the owner of Nos. 180 and 182, Pentonville-road, and, being desirous of rebuilding the premises, he applied to the London County Council on July 5, 1898, for their consent to the erection of the buildings to the line of frontage of certain existing buildings one storey high which had been erected on the forecourt of the premises. On August 4, 1898, the London County Council informed the appellant that they refused their consent to the erection of the buildings to the said line of frontage. In September, 1898, the appellant caused plans to be prepared, showing the extent of the then existing buildings, and submitted the same to the respondent, under section 43 of the Act, who certified the plans to be correct. On September 5, 1898, the appellant applied to the London County Council to sanction the proposed new buildings as deviations from the certified plans under section 43, subsection 2. of the Act. The County Council on November 16, 1898, declined to consider or give any decision on the application on the ground that the proposed deviations from the certified plans were not such as were contemplated or referred to in section 43, subsection 2. of the Act. On November 30, 1898, the superintending architect of the County Council certified the general line of buildings in that part of Pentonville-road in which the buildings were situate. The general line so certified was the main front of the buildings standing back from the forecourts. On January 6, 1899, the appellant served on the respondent notice that he was going to build on the forecourts, and on February 10 the respondent served notice of objection to such building under section 150 of the Act, stating that the work would be in contravention of the Act on the ground that it was proposed to erect the buildings without the consent of the County Council beyond the general line of buildings, contrary to the provisions of sections 22 and 200 of the Act. The old buildings at Nos. 180 and 182, Pentonville-road consisted of houses of three storeys with forecourts in front abutting on Pentonville-road, the houses being built 50ft. back from the road. The forecourt of No. 180 had been built over and occupied by a publichouse of one storey since about 1858, and the forecourt of No. 182 had been built over and occupied as a shop since 1877. The forecourt in front of No. 182 had been so built over and occupied under licences or consents from the Metropolitan Board of Works dated August 21, 1876. The forecourt in front of No. 180 had been built over without any consent or licence. There had been no certificate defining the general line of buildings in that part of Pentonville-road prior to the certificate of the superintending architect of November 30, 1898. It was contended by the appellant that the intended buildings came within section 43 of the Act of 1894, and that the County Council, upon compliance with that section, were bound to certify under subsection 2; and, further, that section 22, subsection 2, applied, inasmuch as the land was "lawfully occupied" by buildings within the meaning of that subsection, and that, therefore, the superintending architect had no power to certify the building line, and that such certificate afforded no objection in law to the appellant's rights under section 43. It was contended by the respondent that by the joint effect of the Act 7 Geo. IV., c. CXLII., which prohibited the erection of any building within 50ft. of the side of the Pentonville-road, and of section 75 of the Metropolis Management Act, 1862, the land forming the forecourts of the old buildings was not at the commencement of the Act of 1894 and had not been within seven years previously "lawfully occupied" by a

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

building within the meaning of section 22, subsection 2, of the Act; that the building on the forecourt of No. 180 was without any licence or consent, and was therefore illegal, and that the building on the forecourt of No. 182 was erected under a consent which was subject to a condition that the building should not be at any time altered or raised without the consent of the Metropolitan Board of Works, and that by section 216 of the London Building Act, 1894, such condition was still binding on the appellant; and that section 43 related only to open spaces at the rear of buildings and had no application to the case. Upon appeal to a metropolitan police magistrate from the objection of the London County Council to the proposed new buildings, the magistrate held that the respondent's contention was well-founded, and dismissed the appeal, subject to the present case. The Divisional Court affirmed the decision of the magistrate. The appellant appealed to the Court of Appeal. By section 22 of the London Building Act, 1894 "(1) no building or structure shall without the consent in writing of the Council be erected beyond the general line of buildings in any street. . . . (2) This section shall not apply to any building or structure erected after the commencement of this Act upon land which, either at the commencement of this Act or at any time within seven years previously, has or shall have been lawfully occupied by a building or structure."

Mr. Macmorran, Q.C., and Mr. Germaine appeared for the appellant; Mr. Horace Avory appeared for the respondent.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that it was conceded that the case was stated with the view of ascertaining the rights of the appellant as building owner in respect of the forecourts of Nos. 180 and 182. Different considerations applied to each of those forecourts. The general line of buildings was certified to stand back from the forecourts of the houses in this part of Pentonville-road, so as to run along the line of the main buildings. In front of the main buildings the vacant land in the forecourts had been built upon from time to time. On the forecourt of No. 180 a publichouse of one storey had been built. The publichouse came up level with the foot pavement of the street. The forecourt of No. 182 was built upon for the purpose of a shop, and the building was erected with the consent of the Metropolitan Board of Works upon condition that the building should only be a low building according to the plans submitted to the Board of Works. The licence, therefore, was given on the condition that the only building erected should be the one put up according to those plans and now upon the forecourt. The appellant desired to build, without the consent of the County Council, high buildings upon both forecourts in the place of the one storey buildings now there. He failed to get their consent under section 22 of the Act of 1894, and he then tried to bring himself within section 43, which, in his Lordship's opinion, did not apply to the case. The appellant then contended that he did not want the consent of the County Council, because, so far as No. 180 was concerned, by subsection 2 of section 22 of the Act of 1894, the section was not to apply to any building erected after the commencement of the Act upon land lawfully occupied by a building, and that the forecourt of No. 180 was "lawfully occupied" by this publichouse. That contention brought them back to 7 Geo. IV., c. CLXII., which by section 140 prohibited the erection of any building within 50ft. of the side of the Pentonville-road, and enacted that any building erected contrary to the Act should be deemed a common nuisance. The publichouse was erected after the passing of that Act, and

it was clear that it sinned against the provisions of section 140. In other words, it was a common nuisance. Apart from any question of subsequent legislation it could not be argued that the forecourt of No. 180 was "lawfully occupied" when the building erected thereon was a common nuisance. It was said, however, that, as section 75 of the Metropolis Management Act, 1862, repealed section 140 of the Act of George IV., the publichouse no longer unlawfully occupied the forecourt, inasmuch as the prohibition in the earlier Act was gone, and that, therefore, the land was "lawfully occupied" in 1894. But by section 108 of the Act of 1862, except as therein specially provided, nothing therein contained was to in any way prejudice or affect any act, matter, or thing made, done, or commenced prior to the passing of the Act. That meant that, though section 140 of the Act of George IV. was repealed, to put a concrete case, any house which was a common nuisance under the earlier Act was not affected by the repeal of that section. It did not make that lawful which was not lawful before. Then section 215 of the London Building Act, 1894, repealed section 75 of the Metropolis Management Act, 1862, but the repeal was not to affect the past operation of any enactment thereby repealed, nor any thing done or suffered under any enactment thereby repealed. Therefore, those two Acts kept alive that which was done in contravention of the Act of George IV. It seemed to him, therefore, that at the passing of the Act of 1894 the ground was not "lawfully occupied" within the meaning of subsection 2 of section 22 of the Act of 1894. Therefore, as regards the publichouse, No. 180, the consent of the County Council was necessary. Next, with regard to No. 182, the erection of the shop on the forecourt did not come within the prohibition in the Act of George IV., because the consent of the Metropolitan Board of Works had been obtained for the building of the shop. The ground was "lawfully occupied" upon a condition, but if the condition were broken it would be unlawfully occupied. Inasmuch as this litigation was instituted for the purpose of ascertaining what were the rights of the parties, in his opinion as soon as the appellant commenced to build in contravention of the condition the County Council could stop him upon the ground that their consent had not been obtained. For those reasons the appellant could not build on either plot without the consent of the County Council. The appeal must, therefore, be dismissed.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—H. C. Morris, for the appellant; W. A. Blaxland, for the respondent.]

Chan. Div. }
(Stirling, J.) }

1900.
Jan. 13.

PAYNE V. THE CORK COMPANY (LIMITED).*

Company—Winding up—Sale of company's undertaking—Dissentient shareholder—Purchase of interest—Companies Act, 1862, sec. 161.

In the event of a proposed sale of a company's undertaking in a voluntary liquidation a dissentient shareholder cannot be deprived by the articles of association of the rights conferred by sec. 161 of the Companies Act, 1862.

This case raised the important question whether a company can by its articles of association deprive dissentient shareholders of the rights conferred upon them by section 161 of the Companies Act, 1862, in the

*Reported by G. A. STREETER, Esq., Barrister-at-Law.

event of a proposed sale of the company's undertaking under a voluntary liquidation. It was a motion by the plaintiff, who was the holder of 200 shares, for an injunction to restrain the company and its voluntary liquidator from carrying into effect certain resolutions and agreements, which had been passed and confirmed by general meetings of the company, for the purpose of reconstructing the company on the footing of a sale of its undertaking and property to a new company in consideration of partly-paid shares in such new company. The plaintiff had given notice to the liquidator of his dissent from the resolutions, and required him either to abstain from carrying the resolutions into effect or to purchase the interest of the plaintiff at a price to be determined in the manner specified by section 161 of the Companies Act, 1862. The liquidator took up the position that the plaintiff was precluded by articles 130 and 131 of the company's articles of association from acquiring the rights given to dissentient members by section 161. The plaintiff thereupon commenced these proceedings. Section 161 of the Companies Act, 1862, provides that where any company is proposed to be or is in the course of being wound up voluntarily, and the whole or a portion of its business or property is proposed to be sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution, receive in compensation for such sale shares or other like interests in such other company for the purpose of distribution amongst the members of the company being wound up, and any sale so made by the liquidators shall be binding on the members of the company, subject to the proviso that a dissentient shareholder may, by giving notice to the liquidators in manner prescribed by the section, require the liquidators either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined as thereafter mentioned. Articles 130 and 131 of the company's articles of association were as follows:—

" 130.—Any such liquidator may (irrespective of the powers conferred upon him by the Companies Acts and as an additional power), with the authority of a special resolution, sell the undertaking of the company, or the whole or any part of its assets, for shares fully or partly paid up or the obligations of or other interest in any other company, and may by the contract of sale agree for the allotment to the members direct of the proceeds of sale in proportion to their respective interests in the company, and in case the shares of this company shall be of different classes, may arrange for the allotment in respect of preference shares of this company, of obligations of the purchasing company, or of shares of the purchasing company with any preference or priority over or with a larger amount paid up than the shares allotted in respect of ordinary shares of this company, and may further by the contract limit a time at the expiration of which shares, obligations, or other interest not accepted or required to be sold shall be deemed to have been refused and be at the disposal of the liquidator or the purchasing company.

" 131.—Upon any sale under the last preceding article or under the powers given by section 161 of the Companies Act, 1862, no member shall be entitled to require the liquidator either to abstain from carrying into effect the sale or the resolution authorizing the same or to purchase such member's interest in this company; but in case any member shall be unwilling to accept the shares, obligations, or interest to which under such sale he would be entitled, he may, within 14 days of the passing of the resolution authorizing the sale, by notice in writing to the liquidator, require him to sell such shares, obligations, or interest, and thereupon the same shall be sold in such manner as the liquidator may

think fit, and the net proceeds shall be paid over to the member requiring such sale."

Mr. Rowland Whitehead appeared for the plaintiff; and Mr. W. F. Hamilton for the defendants, the company and its liquidator.

MR. JUSTICE STIRLING, in giving judgment, said that the question was whether the plaintiff was precluded by article 130 and 131 of the company's articles of association from asserting his rights under section 161 of the Companies Act, 1862. His Lordship referred to the section and continuing said that a power to sell meant, in the absence of any context to the contrary, a power to sell for money, and a person who exercised such a power was bound to sell for money. But the Legislature had thought fit by section 161 to extend the powers of a voluntary liquidator by giving him power to accept shares as a consideration for the sale of the property of the company. But that power was not absolute: it was subject to a proviso in favour of dissentient members. The object of the section was very clearly expressed by Mr. Justice Chitty in the case of "*Cotton v. Imperial, &c., Investment Corporation*" ([1892] 3 Ch., 454). Supposing this was a sale exclusively under section 161, would article 131 bind the plaintiff so as to deprive him of his rights under that section? His Lordship thought not. The article would be *ultra vires* for that purpose. The Legislature had conferred upon a voluntary liquidator the power of selling in a particular way, and had attached a proviso for the protection of dissentient shareholders, and it was not competent for a company by its articles of association to deprive the shareholders of that protection. The language of Mr. Justice Byrne in the case of "*In re Peveril Gold Mines (Limited)*" ([1898] 1 Ch., 122) with reference to another section was applicable to the present case. That learned Judge there said:—"I am of opinion that the company had no right, having regard to the Act of Parliament, to enter into such contract as a condition and part of the general contract binding upon all shareholders, whatever separate or distinct bargain they might have the power to make with an individual who happened to be or to desire to become a shareholder. This article appears to be one more attempt to remove a statutory safeguard of the inexperienced intending shareholder. Not one per cent. of intending shareholders read the articles before applying for or accepting a transfer of shares, and a shareholder does not expect to find that he has entered into a special contract waiving his statutory rights." But then it was said that this was a sale which the company had power to authorize and did authorize by its articles irrespective of section 161; and doubtless article 130 did purport to confer a power to do this irrespective of section 161. Had the company authority to confer such an additional power on a liquidator? The articles purported to confer a power to sell without regard to the safeguards of section 161. It was not, in his Lordship's opinion, within the powers of the company to say that the liquidator should do the thing without regard to those safeguards. It must be done in the way pointed out by the Legislature and in no other way. Supposing that the earlier part of article 131 were omitted (and in his Lordship's opinion it was *ultra vires*), the latter portion could not bind the plaintiff. The case fell within what was said by the Master of the Rolls in "*Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*" ([1899] 2 Ch., 90):—"I come to the conclusion that there was no agreement between the company on the one side and Mr. Baring-Gould on the other which could deprive him of his rights as a dissentient member under section 162. Any contrary interpretation of that section would come to this—that the company could by the articles of association made beforehand, before there

was any dispute with a dissentient member, bind all the members, and deprive them of the benefits conferred on them in the event of their becoming dissentient members under section 162. I do not think this can be done by the articles of association." The Master of the Rolls was of opinion that it was impossible by articles of association to deprive dissentient shareholders of the benefit of their rights under section 161. In the case of "*Cotton v. Imperial, &c., Investment Corporation*" ([1892] 3 Ch. 454) the sale was not in a winding up, but by the company as a going concern under the powers of the memorandum of association. That did not apply here. In his Lordship's judgment, therefore, the plaintiff was entitled to the relief for which he asked, and, unless the liquidator would give an undertaking, there must be an injunction in the form of that granted in "*Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*."

[Solicitors—Fraser and Christian; Ashurst, Morris, Crisp, and Co.]

Q.B. Div. (Grantham and } 1900.
Channell, JJ.) } Jan. 12.

THE SCHOOL BOARD FOR LONDON V. THE ASSESSMENT COMMITTEE OF THE WANDSWORTH AND CLAPHAM UNIONS.*

Rating—Rateable value—School buildings—Mode of assessment—Rent which a tenant could be found to give.

This was a case stated by the justices of London sitting in quarter sessions. It involved an important point as to the rating of the school buildings of the London School Board. One of these, the New Park-road School, was inserted in the supplemental valuation list for the parish of Clapham at a gross value of £1,074 and a rateable value of £895. The gross value was arrived at by adding 4 per cent. of the sum given by the Board as the value of the land on which the school was built to 5 per cent. of the sum given by the Board as the capital value of the buildings. It was found by the case that the buildings were more suitable for educational purposes than for any other, and that, though they might be occupied for purposes other than those of a school, they would not be so convenient for any such purpose without alteration, but that if the buildings were vacant a tenant or tenants could be found to give on an annual letting a rent sufficient to support the assessment. The case further found that the Board had borrowed the money for building the school and purchasing the land on which it stood from the County Council at the rate of £2 13s. per cent. The quarter sessions upheld the assessment.

Mr. R. C. GLEN, who appeared for the School Board, contended that, as there was no evidence that any one would give a greater rent for the school than the School Board, the proper principle of assessment was to take as the gross value the rate per cent. of the capital value of the land and buildings at which the School Board would be able to borrow money for the purpose of purchasing such land and erecting such buildings because that was the utmost amount which they would be prepared to pay as rent. In the present case that rate per cent. would be £2 13s. per cent., not 4 per cent. or 5 per cent. He referred to the "*London County Council v. the Churchwardens of Erith*" ([1893] A.C., at page 592).

Mr. J. C. Earle, for the respondents, was not called.

MR. JUSTICE GRANTHAM said that the case was

unarguable. It might just as well be said that, if a person interested in education were to lend money for a school to the School Board at 1 per cent., then the gross value of such a school would be arrived at by taking 1 per cent. of the capital value; or that if money were lent for that purpose free of interest altogether then the school would be valued at nothing at all.

MR. JUSTICE CHANNELL said that the appellants had been stated out of Court, because it was found in the case that if the schools were vacant a tenant could be found to give a rent sufficient to support the assessment.

The appeal was accordingly dismissed.

[Solicitors—C. E. Mortimer, for the appellant; W. W. Young and Son, for the respondents.]

Q.B. Div. (Phillimore } 1900.
and Bucknill, JJ.) } Jan. 12.

IN RE AN ARBITRATION BETWEEN THE LONDON COUNTY COUNCIL AND LEWIS.*

Local Government—Factory and Workshops—Means of escape from fire—Arbitration.

In an arbitration under sec. 7 of the Factory and Workshop Act, 1891, to determine the means of escape to be provided in a factory which formed part only of a building, the award directed work which would necessitate entering upon the rest of the building, which was in the possession of third persons: *held*, that the award was bad.

This was a motion to set aside an award made by an umpire in an arbitration under section 7 of the Factory and Workshop Act, 1891. Messrs. Lewis were the owners of a building, No. 21, Moor-lane, in the City of London, of which the basement, ground floor, and first floor were let on leases for different terms of years as cloth and toy warehouses, the second, third, and fourth floors containing printing works, which are "non-textile factories" within the meaning of section 93 of the Factory and Workshop Act, 1878. The London County Council, as the sanitary authority of the district in which No. 21, Moor-lane was situate, conceived that these factories were not furnished with adequate means of escape in case of fire. By the Factory and Workshop Act, 1878, section 93, a part of a factory may for the purposes of the Act be taken to be a separate factory. Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory, such place shall not be deemed to form part of that factory, but shall if otherwise it would be a factory be deemed to be a separate factory and be regulated accordingly. The Factory and Workshop Act, 1891, section 7, provides that every factory constructed after the date of the Act is to be furnished with a certificate from the sanitary authority of the district that the factory is provided on the storeys above the ground floor with such means of escape in case of fire as can reasonably be required under the circumstances of each case, and a factory not so furnished is deemed not to be kept in conformity with the Act of 1878. Further, with respect to all factories to which the foregoing provisions do not apply (including in that description the factories at the top of 21, Moor-lane), it is the duty of the sanitary engineer of every district from time to time to ascertain whether all such factories within their district are provided with such means of escape as aforesaid, and, in case of any factory not so provided, to serve on the owner of the

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.
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*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

factory a notice in writing specifying the measures necessary for providing such means of escape, and requiring him to carry out the same before a specified date, and thereupon such owner is, notwithstanding any agreement with the occupier, to have power to take such steps as are necessary for complying with the requirements, and, unless such requirements are so complied with, such owner is made liable to a fine not exceeding £1 for every day that such non-compliance continues. In case of a difference of opinion between the owner of a factory and the sanitary authority the difference is, on the application of either party, to be referred to arbitration, and the award is made binding on the parties thereto. The London County Council, being of opinion that these floors were not provided with proper means of escape in case of fire, served upon Messrs. Lewis a notice calling upon them to make such structural alterations in the building as should be requisite to provide the upper storeys with proper means of escape. Messrs. Lewis not agreeing with the demands of the London County Council, the matter was referred to arbitration. The arbitrators appointed an umpire who made an award directing among other things that a new staircase should be provided from the basement to the top floor, such staircase to be connected with all the floors by means of doors not less than 3ft. 3in. wide; that a proportion of not less than half of the windows facing Moor-lane on each floor should be made to open of sufficient height and width to allow a full-grown person to pass through in case of need. The award further contained particulars of the materials and manner of and in which the work was to be executed.

SIR B. T. REID, Q.C., Mr. MACMORRAN, Q.C., and Mr. J. R. ATKIN, for Messrs. Lewis, contended that the award was bad in that it required the owner to enter upon tenements in the possession of third persons with or without their leave or licence. The arbitrator had no jurisdiction to make any such award. "*Turner v. Swainson*" (1 M. and W., 572). It might be that unless the alterations were made the fine of £1 per day must be paid, but that was not the question here. The question was whether the owner could be compelled to enter and commit trespasses upon the premises of other persons in order to execute alterations. The Act of 1895 gave power to the owner to enter upon a factory or several factories where several existed in the same building; but where part of a building was and part was not a factory there was no power given to the owner to enter upon the part which was not a factory.

Mr. DALDY and Mr. EDWARDES JONES (Mr. Avory with them), for the London County Council, contended that the award was merely a statement of what was necessary for the safety of the building. By the Factory Acts the whole building was made a factory. They further contended that the only alterations to be made were such as were reasonable under all the circumstances of the case, and that the award should not be set aside, but remitted to the arbitrators that they might consider whether, under the circumstances, the alterations in question were reasonable.

The COURT held that the arbitrators or umpire had no jurisdiction to order the owner to enter upon the tenements unless the whole house were a factory. In this case there were two factories at the top of the house, but the rest of the building was not a factory. The award, however, would not be set aside, but remitted to the arbitrators with a direction to them to consider what alterations, if any, were reasonably requisite under all the circumstances of the case. As, however, the question of the arbitrators' jurisdiction had not been raised earlier, the award was remitted without costs.

Q.B. Div. }
(Mathew, J.) }

1900.
Jan. 15.

BANCROFT V. HEATH.*

Insurance—Fire policy—Warranty—Breach—
Material misdescription.

This was an action to recover a loss under a Lloyd's fire policy for £500 effected with the defendant and others, underwriters at Lloyd's, on the plaintiff's stock for 12 months from May 15, 1898, at certain premises in Manchester. The policy contained the following clause:—"Warranted same gross rate, terms and conditions, as and to follow the British Law which company has £1,750 on the block of brick buildings in which this risk is a portion of the same." During the currency of the policy a fire occurred at the premises, doing damage to the stock. The underwriters refused to settle the loss, on the ground that there had been a breach of the above clause. The fact was the buildings had formerly been insured with the British Law Office for £1,750. At Lady-day, 1898, the lease of part of the premises terminated, and a new policy for £1,350 was then effected with the British Law Office on the part of the buildings still held. Neither at the date of the acceptance of the risk nor at any time during the currency of the policy sued upon were the buildings insured for more than £1,350 with the British Law Office.

Mr. Pickford, Q.C., and Mr. George Rhodes appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. Theobald Mathew for the defendant.

MR. JUSTICE MATHEW, in giving judgment, having referred to the terms of the policy and having read the clause in question, said that the clause was not very scientifically framed, but it clearly indicated the intention of the parties. Such clauses were common in Lloyd's fire policies. The underwriters were not in a position to make inquiries as to the risk, but they were always willing to follow in the wake of other companies. As a general rule the clause covered the same interest and risk as the original policy, but in the present case the underwriters had been content with the stipulation that the existing insurance on the buildings should be applied to this risk, and the clause therefore ran "to follow the British Law which company has £1,750," not on the identical subject-matter and risk, those words having been struck out of the policy, but on the "block of brick buildings in which this risk is a portion of the same." Now, when this insurance was effected the buildings were not insured for £1,750. A lease of one portion had terminated, and a fresh policy for £1,350 had been taken out in respect of the portion remaining. During the currency of the policy sued upon, a fire occurred, and the underwriters objected to pay on the ground that the facts constituted a breach of a condition of the insurance, and this action was then brought. In the first place, it was contended on behalf of the plaintiff that the reference to the form of the insurance was only intended to secure the portion of the building where the plaintiffs' goods were—that the language was descriptive only, and that the misdescription was of no importance. His Lordship could not adopt that construction of the clause. The clause was a condition of the insurance, containing an allegation of existing facts bearing on the risk. According to the principle governing the question, there must be a strict compliance with the terms of the condition. The risk now sought to be covered by the policy was not that which was described in the policy. It was said that the difference was immaterial; in other words, that if the underwriters

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

had known the real facts they would still have accepted the risk. But no question as to the materiality of the misstatement arose, and therefore the underwriters had on this point a good answer to the claim. Then it was said that the clause was qualified by the reference to the conditions of the British Law Office policy. The first condition of that policy provided that any material misdescription of any of the property insured or of the buildings containing the property, or any misstatement of a material fact affecting the risk, rendered the policy void. It was said that there was no material misdescription in this case, and that the stringent language in the clause in question was qualified by this condition in the original policy. In his Lordship's opinion the two policies were independent and stood apart, and it was not intended that the terms of the Lloyd's policy should be in any way qualified. Then it was said that the defendants were, in the circumstances of the case, precluded from relying on the clause. It appeared that an insurance agent at Bury, named Jackson, had been instructed by the plaintiffs to renew the insurance on their goods. The former policy contained a clause similar to the one in question, and Jackson, having made inquiries and having been informed that the insured buildings were the same, copied the clause from the former policy. Neither the plaintiffs nor the underwriters had been informed as to Jackson's inquiries. It was said that Jackson became the defendant's agent because his commission was deducted from the premium paid to the underwriters; that this method of payment stamped him as their agent. This method was adopted in the ordinary course of business for the convenience of all parties, and although the plaintiffs did not pay Jackson directly, they did so indirectly, and he was their agent. On all these points the plaintiffs' case failed, and there must be judgment for the defendant with costs.

[Solicitors—Pritchard, Englefield, and Co., for Earle, Soms, and Co.; Manchester; Waltons, Johnson, Bubb, and Whetton.]

Q.B. Div. (Grantham and Channell, JJ.) 1900.
Jan. 16.

PHARMACEUTICAL SOCIETY V. WHITE.*

Pharmacy Acts—Sale of poison—Seller, who is—
Pharmacy Act, 1868, sec. 15.

A shopkeeper who transmits an order, from a customer for the purchase of a poison, to a properly registered vendor, receiving 25 per cent. of the price as commission, *held* not to be a seller within the meaning of the Pharmacy Act, 1868.

This was an appeal from the County Court Judge of Worcestershire. The action was brought under section 15 of the Pharmacy Act, 1868, to recover a penalty from the defendant White for selling a two-gallon drum of a certain weed-killer, which was admittedly a poison within that section, he not being a duly registered pharmaceutical chemist or chemist and druggist. It appeared that the defendant kept a florist's shop in Worcester, and that his practice with reference to the sale of the weed-killer, which was manufactured by the Boundary Chemical Company (Limited), of Liverpool, was this:—The defendant would take an order for the weed-killer from any one who came to his shop, receive the money, and give a receipt for it. He did not, however, keep the weed-killer in stock, but would send the order on to the Liverpool company, and the company would deliver the weed-killer. The defendant received 25 per cent. of the price of the weed-killer as

his commission, accounting to the company quarterly for his receipts from the sale of the weed-killer and deducting the 25 per cent. It was admitted that the course of business above explained had been pursued with reference to the drum of weed-killer in question in the present case. According to the defendant's evidence, which the County Court Judge accepted, the defendant, on being asked for the weed-killer, had said that the purchaser might order the weed-killer direct from the company or that he, the defendant, would transmit the order. The learned County Court Judge gave judgment for the defendant, holding that under the circumstances the defendant was not the seller of the weed-killer within the meaning of section 15 of the Pharmacy Act, 1868.

Mr. CRUMP, Q.C., and Mr. GREY argued on behalf of the appellants that the defendant, though he was not acting as a principal, was the seller of the weed-killer within the meaning of the Act. They cited "Templeman v. Trafford" (8 Q.B.D., 397); "Pharmaceutical Society v. Wheeldon" (24 Q.B.D., 683); and "Pharmaceutical Society v. London and Provincial Supply Association" (5 App. Cas., 857).

Mr. Cavanagh appeared for the respondent.

The COURT, without hearing counsel for the respondent, dismissed the appeal.

MR. JUSTICE GRANTHAM said he had no doubt the learned County Court Judge was right on the facts in the case. The defendant was not the person who was managing the sale, but was merely a conduit pipe to introduce one person to another. The nature of the case might be illustrated by what might take place in a shop. Suppose a person went into a chemist's shop to buy rat-killer, that he saw a boy serving in the shop and told him what he wanted. The boy might then direct the purchaser to go to his master, who was serving at another counter, or offer to tell the master himself what the purchaser required. Then if the master, a qualified man, supplied the poison, it could certainly not be said that the boy was the seller. If so, how could it be said that a person who does not make the article, and keep it, but merely sends on orders for it, came within the section?

MR. JUSTICE CHANNELL delivered judgment to the same effect.

[Solicitors—Flux, Thompson, and Flux, for the appellants; Timbrell and Deighton, for Dobbs and Hill, Worcester, for the respondent.]

Q.B. Div. (Grantham and Channell, JJ.) 1900.
Jan. 16.

CHARNOCK V. MERCHANT.*

Criminal Law—Practice—Evidence—Criminal Evidence Act, 1898, sec. 1 (f)—Asking person charged as to previous conviction.
Conviction quashed.

This was a special case stated by justices, before whom the appellant, who was the master of a public elementary school at Leintwardine, in Herefordshire, was charged under section 1 of the Prevention of Cruelty to Children Act, 1894, with assaulting a pupil at the school. On the hearing of the case the appellant was called as a witness on his own behalf, and in cross-examination the respondent's solicitor asked him whether he had been previously convicted of a similar offence. The appellant's counsel objected to the question being put, relying upon section 1 (f) of the Criminal Evidence Act, 1898, but the justices overruled the objection, and the appellant admitted that on a previous occasion he had been convicted of an assault on a boy under his charge. In

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

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the result the justices convicted the appellant. The justices stated that the answer of the appellant to the question above mentioned in no way affected their minds, as the fact of the conviction was well known to all of them, three of their number having adjudicated on the occasion when the appellant was so convicted. The questions for the Court were, first, whether the question as to the previous conviction was admissible; and, secondly, if not, whether the admission of the question invalidated the conviction.

Mr. Lynn and Mr. Organ appeared for the appellant; and Mr. Cecil Walsh for the respondent.

The COURT allowed the appeal.

MR. JUSTICE GRANTHAM said it was clear that the Act of 1898 applied to the case, although the Act of 1894 had itself provided for the calling of the defendant as a witness. The magistrates had therefore unfortunately allowed a question to be put to the accused which ought not to have been put. It might be that it did not affect the magistrates' minds; but that was not precisely what they said. The conviction must therefore be quashed.

MR. JUSTICE CHANNELL delivered judgment to the same effect.

[Solicitors—Baker and Nairnes, for the appellant; Chester, Broome, and Griffiths, for Corner and Co., Hereford, for the respondent.]

Q.B. Div. }
(Mathew, J.) }

1900.
Jan. 17.

EWING AND LAWSON V. HANBURY AND CO.*

Contract—Mistake—Contract in writing—Mistake of one party as to price—Rectification refused.

This was an action to recover the price of work done. The plaintiffs were boilermakers carrying on business in Glasgow. The defendants were the owners of a patent for the construction of an instrument used in the business of malting, called a malting-drum. The defendants, being desirous of having some plates fashioned and drilled for the purpose of their instrument, approached the plaintiffs with a view to their undertaking the work. The plaintiffs were supplied with a specification, and they wrote to the defendants offering to do the work "at the rate of 30s. per cwt.," the plates to be supplied by the defendants. The defendants answered by letter referring to the plaintiffs' quotation of 30s. per cwt. and accepting the offer. The plaintiffs commenced the work, and when they had completed rather more than half they sent in their bill. On receipt of the bill the defendants said that there had been a mistake, that they had never intended to agree to pay 30s. per cwt., that they had meant to pay 30s. per ton. Negotiations were commenced with a view to making a fresh contract, but nothing came of them, and eventually this action was commenced, in which the plaintiffs claimed payment at the rate of 30s. per cwt. The defendants made a payment into Court on the basis of what they considered a reasonable price for the work, and they counterclaimed to have the contract rectified by substituting the word "ton" for "cwt." The plaintiffs gave evidence to the effect that their offer of 30s. per cwt. was based upon calculations made by them as to the cost of the work. Their price was high, but that, they said, was due to the fact that they were very busy at the time, and that the specification required extraordinary accuracy. Expert witnesses were called to speak as to what would have been a reasonable price.

Mr. Joseph Walton, Q.C., and Mr. A. H. Spokes

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

appeared for the plaintiffs; Mr. Abel Thomas and Mr. H. Tindal Atkinson for the defendants.

MR. JUSTICE MATHEW, in delivering judgment, said that the evidence showed that a reasonable price to charge for the work would have been from £6 to £8. The price quoted by the plaintiffs was most extravagant, but the figure which the defendants insisted that they were thinking of—namely, 30s. a ton—was preposterous. The plaintiffs had acted in good faith in making their offer; they knew they were asking a high price, but they thought that they would have to cut it down. The defendants, however, accepted the offer on the very terms in which it had been made. In so doing they no doubt made a mistake. What then was the position? On behalf of the plaintiffs it was said that although the parties might not be *ad idem* as to value, they were *ad idem* as to the terms of the contract, and that the defendants had not been misled by a misrepresentation of the plaintiffs', who were therefore, it was contended, entitled to recover the price named in their letter. The defendants said that if the plaintiffs knew or had the means of knowing that the defendants were not meaning to pay 30s. a cwt., the contract ought to be set aside. But even supposing that the plaintiffs did know that, they were entitled to assume that they were dealing with some one who knew as much about the business as they did. The defendants themselves were uncertain as to how far the plaintiffs' charges were excessive. A number of cases had been cited in which the Court of Chancery had rectified deeds or contracts on the ground of mistake. But in those cases the Court was able to ascertain what was the actual contract which the parties had intended to enter into, and the Court had then rectified the instrument which did not carry out the parties' intention. In this case, however, the only contract was that contained in the plaintiffs' letter and in the defendants' acceptance of the plaintiffs' offer. The authority which contained the law applicable to this case was "*Smith v. Hughes*" (L.R., 6 Q.B., 597), and his Lordship had no hesitation in saying that the plaintiffs were entitled to recover on the basis of the contract price. There would therefore be judgment for the plaintiffs.

[Solicitors—Kenyon and Bransbury; Flux, Thompson, and Flux.]

Q.B. Div. (Channell and }
Bucknill, JJ.) }

1900.
Jan. 18.

DAVIS V. HARRIS.*

Landlord and Tenant—Distress—Exemptions from—"Bedding"—Law of Distress Amendment Act, 1888.

A bedstead held to be included in the word "bedding" in sec. 147 of the County Courts Act, 1888, and to be therefore exempt from distress.

This was a case stated by a metropolitan police magistrate upon a complaint preferred to him by the appellant. The question was whether the word "bedding" in section 147 of the County Courts Act, 1888, which is incorporated in the Law of Distress Amendment Act, 1888, included the bedstead so as to make that article exempt from distress. The section, so far as is material to the case, is as follows:—"Excepting the wearing apparel and bedding of such person or his family and the tools and implements of his trade to the value of £5 which shall to that extent be protected from such seizure." The complaint was that

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the respondent unlawfully took from the appellant a bedstead by unlawful distress. The magistrate dismissed the complaint, holding that the bedstead was not within the meaning of the exception in the Act.

Mr. FOA, on behalf of the appellant, contended that "bedding" included the bedstead. He cited Dr. Johnson's dictionary, and read passages from Chaucer, Shakespeare, and Dryden, and a passage from Mr. Rudyard Kipling's latest poem, "The Absent-Minded Beggar" — "They put their sticks and bedding up the spout."

Mr. RANDOLPH, for the respondent, contended that bedstead meant the frame-work on which the bedding was supported and that it could not therefore be considered as part of the bedding. He cited Webster's dictionary.

MR. JUSTICE CHANNELL said that the question in this case was not whether the bedstead was commonly included within the meaning of the word bedding. The word bedding was far more frequently used in a sense not including the bedstead. The question, however, was in what sense the word was used in the Act. The Act excepted from liability to distress the wearing apparel and the bedding of the tenant. That meant the bedding of the particular person in question, whatever it was and however inappropriate it might be for the purpose. It meant the sleeping accommodation of the person in question, that was to say, whatever he used for that purpose. If the person used a mattress only, that would be his "bedding" within the Act. So also if he used a bedstead in addition to a mattress or even without a mattress, that, too, would be included in his bedding. The Act was fairly capable of that construction. As the man in this case used a bedstead as well as a mattress, the bedstead formed part of his sleeping accommodation and was privileged from distress.

MR. JUSTICE BUCKNILL concurred.

The appeal was accordingly allowed, and the case was sent back to the magistrate with an expression of their Lordships' opinion.

[Solicitors—Vandamm and Terry, for the appellant; Pritchard and Englefield, for the respondent.]

Q.B. Div. (Bruce and) 1900.
Phillimore, JJ.) Jan. 19.

THE LONDON COUNTY COUNCIL V. THE EAST LONDON
WATERWORKS COMPANY.*

Waterworks—Metropolis—Hydrants and fire-plugs—User.

Waterworks companies are under no statutory restriction to use the hydrants, fire-plugs, and other apparatus, which they are bound to provide, for the purpose only of the supply of water for extinguishing fires.

This was a special case stated in an action brought by the London County Council, the plaintiffs, against the defendants for a declaration that the hydrants, fire-plugs, and apparatus provided or to be provided by the defendants pursuant to section 32 of the Metropolitan Fire Brigade Act, 1865, and section 34 of the Metropolitan Water Act, 1871, or either of them, ought not in the absence of any agreement under section 4 of the London County Council (General Powers) Act, 1894, or, alternatively, ought not without the consent of the London County Council, to be used for any purpose other than the supply of water for extinguishing fires, or, alternatively, for any purpose other than the supply of water for extinguishing fires and the purposes specified in section 37 of the Waterworks Clauses Act,

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

1867, and for an injunction. Section 32 of the Metropolitan Fire Brigade Act, 1865, provides that every waterworks company to which the Act applies "shall provide at the expense of the (Metropolitan) Board (of Works) (of whom the London County Council are the successors), in any mains or pipes within the metropolis, plugs (declared in the Metropolitan Water Act, 1871, to include hydrants and other apparatus for a supply of water from the company's pipes in case of fire) for the supply of water in case of fire at such places, of such dimensions, and in such form as the Board may require, and the Fire Brigade shall be at liberty to make such use thereof as they may deem necessary for the purpose of extinguishing any fire." Section 4 of the London County Council (General Powers) Act, 1894, provides that "it shall be lawful for the Council to enter into and carry into effect any agreement with the companies supplying water in London and the vestries and district boards of works in London, or any of them respectively, with respect to the use of fire hydrants for flushing and other purposes," and that the company owning the main or pipe with which the hydrant is connected and the local authority (if any) to whom the hydrant belongs shall be a party to such agreement. Section 37 of the Waterworks Clauses Act, 1847, provides that the waterworks companies shall, "in all the pipes to which any fire-plug shall be fixed" "provide and keep constantly laid on, unless prevented by frost, unusual drought, or other unavoidable accident, or during necessary repairs, a sufficient supply of water for the following purposes (that is to say) for cleansing the sewers and drains, for cleansing and watering the streets, and for supplying any public pumps, baths, or washhouses. . . ." The hydrants to which the actions more particularly referred were situated in Dalston-lane, Queen's-road, Downs-road, Wells-street, and Brooksby's-walk. In and between the months of July and September, 1897, these streets were in course of being paved and channelled, and the defendants from time to time, without having asked for, or obtained, the consent of the Council, used and allowed those who were engaged in paving and channelling the streets to use the hydrants for the purpose of obtaining from the defendants' main a supply of water for the operations. The hydrants were provided by the defendants under the provisions of section 32 of the Metropolitan Fire Brigade Act, 1865, and were repaired at the expense of the Council or their predecessors, and they were of a pattern specially selected by the Council or their predecessors to meet the requirements of the fire brigade. The questions for the opinion of the Court were :—(1) Whether hydrants, fire-plugs, and apparatus provided by the defendants pursuant to section 32 of the Metropolitan Fire Brigade Act, 1865, and (or) section 34 of the Metropolitan Water Act, 1871, or pursuant to either of those sections, may in the absence of any agreement under the London County Council (General Powers) Act, 1894, lawfully be used for any purpose or purposes in addition to the supply of water for extinguishing fires. And if the Court should answer the preceding question in the affirmative, (2) whether such additional user is limited to the purposes specified in section 37 of the Waterworks Clauses Act, 1847, or 'to any and what other purposes; (3) whether such additional user may take place without the consent of the London Council thereto; (4) whether such right of user is confined to the defendants themselves, or may with the permission of the defendants be exercised by persons other than the defendants.

Mr. ENGLISH HARRISON, Q.C. (Mr. J. H. Dugdale with him), for the Council, contended that the Council were entitled to the exclusive user of the hydrants for the purpose of extinguishing fires, and referred to

sections 38 to 43 of the Waterworks Clauses Act, 1847, in support of his proposition, as well as to the section set out above.

MR. CRIPPS, Q.C. (Mr. R. B. D. Acland with him), for the defendants, contended that there was nothing in any of the Acts referred to which restricted the powers of the defendants with regard to the use of the hydrants. He cited a passage from the judgment of Lord Esher, M.R., in "*Moore v. Lambeth Waterworks Company*" (17 Q.B.D., 462, at p. 465).

MR. JUSTICE BRUCE said that he was clearly of opinion that the first of the questions they were asked to decide ought to be answered in the affirmative. The section of the Waterworks Clauses Act, 1847, and other Acts referred to in the argument imposed certain obligations upon the waterworks companies, but there was nothing in them limiting the powers of the companies in respect to the use of their own water. With regard to the remainder his Lordship answered (2) in the negative, (3) in the affirmative, and (4) in the negative.

MR. JUSTICE PHILLIMORE said that he was of the same opinion. Various obligations were imposed upon the waterworks companies, one of which was to provide plugs (now hydrants) at the expense of the Metropolitan Board of Works (now the London County Council). They were bound to allow water to be drawn from their pipes by means of such hydrants free of charge. There was a further obligation to allow the hydrants to be used for the purpose of flushing the sewers and cleansing the streets. All these were obligations, and the only inference that could be drawn from the provisions was that there were no other obligations imposed on the waterworks companies, the whole matter being created by statute. It was sought by the plaintiffs to say that there was implied a further highly burdensome obligation upon the companies—that they were not to be allowed to use the hydrants for any other purpose than that of extinguishing fires. He did not agree with that proposition. There was nothing in the case which suggested that any mischief would arise by reason of the use by the defendants of the hydrants for the purpose for which they had used them. The hydrants belonged to the waterworks companies subject to their user by others. Independently of the statutes the companies would have control over them. There being no restriction in the statutes with regard to their right to use them the plaintiffs' claim failed.

Judgment was accordingly given for the defendants.
(Solicitors—W. A. Blaxland, for the plaintiffs;
Bircham and Co., for the defendants.)

Q.B. Div. (Channell and Bucknill, JJ.) 1900.
Jan. 19.

NEWPORT UNION ASSESSMENT COMMITTEE V. YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD.*

Rating—Sewers—Sewer partly above partly below ground—Whole sewer held rateable.

This was a special case stated by the quarter sessions of Monmouth on an appeal by the sewerage board (the respondents in this Court) against an assessment to a poor-rate made for the parish of Rumney in the appellants' union. The facts were as follows:—The respondents are the governing body of a united drainage district consisting of part of the urban district of Ystradyfodwg and the urban district of Pontypridd constituted by a provisional order of the Local Government Board, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1885, for the purpose of carrying into effect a system of drainage for the above-mentioned urban districts.

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

Pursuant to the powers vested in them by the provisional order, the respondents designed and constructed and have since always maintained a sewage carrier for the use of the two districts and have erected, made, maintained, and worked such works, machinery, and plant as were required for conveying the sewage of the districts to the sea. The total length of the sewage carrier is about 17½ miles, whereof nearly 2½ miles passes through or over land in the parish of Rumney, which land (excepting such part as forms part of the foreshore of the Bristol Channel) was, previously to the construction of the sewage carrier, and still is, rated to the poor-rate. The construction of the sewage carrier within the parish of Rumney is as follows:—182 yards of iron pipes carried on concrete arches above the surface of the ground, 1,021 yards of pipes laid below the surface and ordinary level of the ground, 1,890 yards carried below the surface of the ground but covered by an artificial embankment of varying height which rises above the level of the adjacent lands, and 1,246 yards of pipes (hereinafter called the outfall) passing partly over and partly beneath the surface of the foreshore of the Bristol Channel. In connexion with the outfall, certain works have been erected by the respondents. For the purpose of obtaining money for making and maintaining the sewage carrier and the necessary works appurtenant thereto, the respondents, in accordance with the provisions of the Public Health Act, 1875, borrowed the sum of £156,000, to be repaid with interest by equal annual instalments extending over 30 years. Under the Local Government Board's Provisional Orders Confirmation (No. 8) Act, 1896, the respondents obtained powers enabling them, with the consent of the Local Government Board, to agree to allow the sewers of the council of any county borough or district to communicate with the sewage carrier vested in the respondents. In pursuance of these powers agreements had, previously to the date of the assessment appealed against, been made with the Dinas Powis Urban District Council, the Caerphilly Urban District Council, and the Cardiff Corporation, whereby the sewage of the districts under the control of the said local bodies was to be received in and carried away by the sewage carrier of the respondents upon payment to the respondents by the said local bodies of sums levied upon the respective rateable values of their districts. The respondents were assessed to the rate appealed against in respect of that portion of the sewage carrier, with the outfall and appurtenances thereof, which is situate in the parish of Rumney, at £800 gross estimated rental and £700 rateable value. It was proved before the quarter sessions that, as far as the parish of Rumney is concerned, the sewage carrier conveys the sewage from distant towns, places, or houses through the parish, and that there is no connexion to or with the sewage carrier from any lands, houses, or buildings in the parish. It was also proved that the embankment varied in height from 18in. to 6ft. above the ground through which it passed; that it was covered throughout by a mound of earth which was grassed over except where a footpath runs over the top of the mound and where manholes are placed; that it was not separated by any fence from the adjoining land, and that cattle had full access upon and across it throughout its entire length. It was also proved that the land upon which the embankment lies was previously to the formation of such embankment assessed to the poor rate, and that the land remained so assessed, no change having been made by reason of the making of the embankment in such assessment. The quarter sessions held that such portions of the sewage carrier as lay under the surface of the ground or in the embankment were not liable to be rated, but that the gross estimated rental of the other portions of the

carrier in the parish of Rumney was £145 (of which £40 was the gross estimated rental of the outfall and works in connexion therewith), and that the rateable value was £105. The quarter sessions accordingly allowed the appeal subject to the present case.

Mr. Bosanquet, Q.C., and Mr. Morton Brown appeared for the appellants; and Mr. Cripps, Q.C., Mr. Boyle, Q.C., and Mr. Ram, Q.C., for the respondents.

The COURT allowed the appeal.

MR. JUSTICE CHANNELL said that he had come to the conclusion that the appeal ought to be allowed. The subject was one of some difficulty, and there was some difficulty about the facts. The way was, however, to some extent cleared by the judgment of Lord Herschell in "*London County Council v. West Ham Overseers*" (L.R. [1893], A.C., 562). It appeared from that judgment that the exception with regard to sewers was quite anomalous. It had to be considered whether or not the construction in question in the present case came within that exception. It was necessary, therefore, to consider first the nature of the exception, and, secondly, whether the facts brought the particular construction within it. The exception was spoken of in "*Leicester Corporation v. Barrow-on-Soar Union*" (63 L.J., M.C., 176) by Mr. Justice Wright as being an exception in favour of "ordinary underground sewers" or "simple sewers." It seemed, so far as could be gathered from the language of Lord Herschell, that where the surface remained rateable just as it was before the sewer was laid, but there was an underground structure not at all affecting the surface or the rateability or value of the occupation of the surface, then, if that underground structure was used as a sewer, it might not be rateable. It was therefore important to see if the structure did interfere with the surface. It was found in the present case that the surface was still occupied, that it was still rated, and, in fact, rated at the same value as before the structure was made. There was, however, no finding that the structure did not affect the occupation, and from the nature of the thing it could not be that the structure, though grassed over, did not interfere at all with the occupation of the land and did not at all lower its rateable value, though there might be various reasons why the rating had not in fact been altered. It must therefore be taken that there had been some interference with the surface, and that was one of the tests as to whether the case came within the exception. To put it shortly, he was not prepared to hold that this was an ordinary underground sewer. Further, this contrivance was one continuous structure; at one part of its course it consisted of iron pipes on concrete arches, at other parts it consisted of a mound grassed over. The part on concrete arches was so similar to the structure in question in the *West Ham* case that the quarter sessions very naturally found themselves unable to distinguish it from that structure, and they accordingly held it rateable. That being so, what Mr. Justice Collins, as he then was, said in "*Leicester Corporation v. Barrow-on-Soar Union*" was applicable. He said:—"It is impossible to discover a special part and say that as to that part alone it is to be taken as an independent sewer." So here, as this structure was above ground in some places and underground in others, it could not be held that in one man's field it was rateable and in another's not. His Lordship was therefore prepared to hold that this structure did not come within the exception in favour of ordinary underground sewers or simple sewers, or whatever the anomalous exception might most exactly be described as being. The order of quarter sessions would be quashed, and the rate would therefore stand.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—Warriner and Co., for Davis, Lloyds, and

Wilson, Newport, for the appellants; Wrentmore and Son, for Walter Morgan, Bruce, and Nicholson, Pontypridd, for the respondents.]

Court of Appeal (A. L. Smith, } 1900.
Rigby, and Collins, L.JJ.) } Jan. 20.

HADDOCK V. HUMPHREYS.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897, sec. 7—"Factory"—Factory and Workshop Act, 1895, sec. 23—"Wharf," what is.

This was an appeal from an award of the Judge of the Lancashire County Court, sitting at Liverpool, in an arbitration under the Workmen's Compensation Act, 1897. The applicant was the widow of a workman who had been killed by an accident in the course of his employment. The employers were Messrs. W. and T. Humphreys, who were carters. At the time of the accident the deceased man was engaged in the work of removing a log of timber from a pile of logs and loading it on one of the respondents' carts, the respondents having arranged with a firm of builders, who had bought the log, to remove it from the place where it was stored. The only question in the case was whether the place where the timber was stored was a wharf, so as to come by virtue of section 23 of the Factory and Workshop Act, 1895, within the definition of "factory" contained in section 7 of the Workmen's Compensation Act. The *locus in quo* was a timber-yard, which was distant about 150 yards from the water of the Canada Dock, at Bootle. Alongside the water was a large space called the timber-quay, which stretched back from the water for a distance of nearly 150 yards, and beyond this, running parallel with the water, was a cart-road, which was used by the public. On the further side of this road was a line of offices, to each of which was attached a yard. These offices and yards were leased by the Mersey Docks and Harbour Board to various timber merchants. It was in one of these yards that the timber in question was stored. The area comprising these offices and yards was enclosed by a wall and gates. On the further side of this area ran a highway called Regent's-road, and beyond this again there were similar offices and yards. The County Court Judge held that the *locus in quo* was not a wharf, and made an award in favour of the employers. The applicant appealed.

MR. BLACKWOOD WRIGHT appeared for the appellant, and urged that the learned County Court Judge in effect treated "wharf" and "quay" as being identical. But section 23 of the Factory and Workshop Act, 1895, spoke of "every dock, wharf, quay, and warehouse"; and each of these words ought to have a distinct meaning given to it. He contended that a quay was a place for discharging cargo and a wharf was a place for storing cargo. He referred to "*Hall v. Snowden, Hubbard, and Co.*" ([1899], 2 Q.B., 136).

MR. JOSEPH WALTON, Q.C., and Mr. LESLIE SCOTT, for the respondents, argued that the County Court Judge was right in holding that this place was not a wharf. A wharf might be a store, but a store need not be a wharf. A wharf, according to its ordinary meaning, was a place alongside water used for unloading. The only difference between "wharf" and "quay" was that "quay" was a species of "wharf." They referred to the Century Dictionary, in which "wharf" is defined as follows:—"A platform of timber, stone, or other material built on a support at the margin of a harbour or a navigable stream, in order that vessels may be moored alongside, as for loading or unloading, or

*Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

while at rest. A wharf may be parallel with and contiguous to the margin, when it is more especially called a quay; or it may project away from it, with openings underneath for the flow of water, when it is distinctively called a pier."

The COURT (LORD JUSTICE RIGBY dissenting) dismissed the appeal.

LORD JUSTICE A. L. SMITH said the question was whether this place was a wharf or a timber yard. The County Court Judge held that it was a timber yard and not a wharf, and he thought the County Court Judge was right. In his opinion the word "wharf" implied some connexion with water, and he could not think that it could include a yard which was cut off from a quay in the way in which this yard was cut off. If it could, then he saw no reason why it should not also be held to include the yards on the further side of Regent's-road. He thought the appeal should be dismissed.

LORD JUSTICE RIGBY said he was unable to arrive at the same conclusion as his learned brethren. In his opinion the word "wharf" did not necessarily imply anything to do with water. It was derived from an Anglo-Saxon word, and there were similar words in cognate languages. It seemed to mean a place for the reception of goods, and not specially a place for the unloading of goods. He thought that the place in question was a wharf.

LORD JUSTICE COLLINS said he was of opinion that the County Court Judge was right. He thought the only safe standard to apply to the interpretation of the words used in section 23 of the Factory and Workshop Act, 1895, was to give each of these words its ordinary popular meaning. Any attempt to refine on the meanings of these words seemed to him to be likely to be fraught with difficulty. In a previous case they had given the word "dock" its popular meaning, "*Hennessey v. McCabe*" (16 *The Times Law Reports*, 77). And so here he thought they ought to give "wharf" its popular meaning. In his opinion the *locus in quo* here could not be described as a wharf at all. It was contiguous to a wharf, but it was a place in which an individual timber merchant was entitled to store timber. He did not doubt that if it had been roofed over it would have been a warehouse; but it was not a wharf.

[Solicitors—W. H. Quilliam, for the appellants; J. R. Watkins, for the respondents.]

Court of Appeal (Lindley, M.R.,
Vaughan Williams and Romer,
L.JJ.) 1900.
Jan. 22.

THE ATTORNEY-GENERAL V. THE BRIGHTON AND HOVE
CO-OPERATIVE SUPPLY ASSOCIATION (LIMITED).*

Highway—Nuisance—Unreasonable user of highway—Business premises—Obstructing road and footway with vans—Interference with public rights.

This was an appeal against a decision of Mr. Justice Kekewich's (reported in *The Times* of March 15 last). The action was brought by the Attorney-General on the relation of James Pack, a lodging-house-keeper, of 21, Lansdowne-street, Brighton, for an injunction to restrain the defendants, who carry on business in the same street, from causing a nuisance to the public and to the plaintiff by an alleged unreasonable user of the street, through blocking it with carts and vans, and causing an offensive smell by allowing accumulations of droppings from their horses. The plaintiff complained that the defendants used the street for loading and

unloading their vans, so that not only the roadway but also the foot pavement was obstructed from early in the morning to late at night. In the result the question became only one as to the right of the public generally to restrain the alleged nuisance, the plaintiff abandoning any claim for private damage. Mr. Justice Kekewich said that the question was whether there had been an unreasonable user by the defendants of the highway, every one being entitled to a reasonable use of it. An unreasonable user amounted to a public nuisance. In the present case, for all practical purposes, six vans of the defendants were more or less drawn up in the street throughout the day, the horses being turned round at right angles to the vans, the tail end of which was next to the defendants' premises. Other vans were in the street as well, taking up considerable room. When the defendants' vans took up half the street for practically the whole day, his Lordship could not say that this was a reasonable use of the highway. It was said that the defendants could not carry on their business without using the street as they had done, but if they could not carry on their business without making an unreasonable use of the highway they must go to some other premises where they could load and unload their vans without causing an obstruction. His Lordship granted an injunction restraining the obstruction, by the defendants, of the street and the pavement, but he held that the case as to nuisance by smell had failed. The operation of the injunction was suspended until after the second motion day in (last) Michaelmas sittings, in order to afford the defendants an opportunity of making arrangements to comply with the injunction. If he were satisfied that the defendants were doing their best to comply with it, he would attend to an application by them for a further extension of time. The defendants must pay the costs of the action, and, so far as the relator himself was concerned, as he had abandoned any claim to damages, the action must be dismissed. The defendants appealed.

Mr. Warmington, Q.C., and Mr. A. Beddall were for the defendants; Mr. Macmorran, Q.C., and Mr. E. A. Parkyn, for the relator, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that it seemed to him impossible to reverse the decision, though a verbal correction must be made in the formal judgment which had been drawn up. The evidence showed that the defendants carried on a large business in a street a little less than 20 feet wide. They blocked up half the street for some distance by having there as many as six vans loading and unloading in the day time. There was no obstruction at night, but during the day there were in every hour half a dozen vans loading and unloading, so that the passage of carriages along the street was seriously obstructed to such an extent that persons avoided the street. On the facts it was impossible not to say that there was an obstruction in fact, and *prima facie* this was a nuisance in law. The passage was, in fact, obstructed over the whole width of the street. Of course, if a single cart stopped at a house for the purpose of loading and unloading it must cause some obstruction, but this would not necessarily amount to a nuisance. The difficulty was in drawing the line. The defendants' case was that they were carrying on a lawful business and in a reasonable manner, and, looking only at their business, it appeared to be perfectly reasonable. The question was, What was the consequence of the reasonable exercise of their right conflicting with the right of the public? His Lordship would take the law to be as it was laid down in 1805 in "*The King v. Russell*" (6 East, at p. 430), where the Court said:—"It should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of

*Reported by W. L. OABELL, Esq., Barrister-at-Law.

the public; that the primary object of the street was for the free passage of the public, and anything which impeded that free passage without necessity was a nuisance; that if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot. But the Court could not be parties to any compromise for his using the street as his own for any part of his business." It came to this in substance—that in a doubtful case the private right to carry on a business must yield to the public right of user of a highway. It was difficult to draw the line, and it was a question of degree. But, when the obstruction was carried to such an extent that people avoided the street, it was utterly unjustifiable.

LORD JUSTICE VAUGHAN WILLIAMS agreed because he regarded the decision of the learned Judge as a decision of a question of fact as to which evidence was before him. He should not have agreed if the decision had been of a question of law resulting from the evidence. The decision was one of great importance to all populous towns, and his Lordship would not wish it to be said that there was a decision of the Court of Appeal that it was never lawful to do the particular acts which the defendants had done. Such a decision would be a serious blow to commercial interests. That there was a physical obstruction of the street by the defendants was obvious, but the action could not be maintained by merely showing that there was a physical reduction or displacement of the space temporarily available. It must be shown that this was not consistent with the lawful use of the highway. A highway was, no doubt, primarily meant for the passing and repassing of the public, but it was also intended that those who passed along it should be able to stop and load or discharge goods. It was no more unlawful to stop at a house in a narrow street than at a house in a wide street. His Lordship did not think there had ever been a conviction on an indictment for an excessive user of a lawful right as distinguished from an unlawful user of a highway, and the Courts had expressly asserted the right of access to premises abutting on a highway if it were properly exercised. On the other hand, it could not be said that no amount of user would constitute a nuisance if it consisted of an aggregate of lawful acts. In all such cases all the circumstances must be taken into consideration, and under the circumstances of the present case his Lordship agreed with Mr. Justice Kekewich that the defendants' user of the street was unreasonable.

LORD JUSTICE ROMER concurred. A tradesman was entitled to a reasonable use of the highway for the purpose of loading and unloading goods at his premises, but a user amounting to an appropriation of the highway for the purposes of his business would be unreasonable. The use made by the defendants of the street amounted to such an appropriation—making the street, in fact, part of their premises—and considerable inconvenience had been caused to the public, who were ceasing to make use of the street because of the inconvenience.

[Solicitors—Booth and Smee, for Fitz Hugh, Woolley, and Co., Brighton; Radford and Frankland, for Woods and Holmes, Brighton.]

Court of Appeal (A. L. Smith, Collins, } 1900.
and Vaughan Williams, L.J.J.) } Jan. 22.

LANCASHIRE ASYLUMS BOARD V. MANCHESTER CORPORATION.*

Rating—Agricultural Rates Act, 1896—Rate for

Asylum Board—Apportionment—Rateable value—54 Vict., c. xx.

The Lancashire Asylums Board, in estimating the amount required by them annually from the county of Lancashire and the county boroughs therein, should divide it between them in proportion to their respective rateable values as ascertained under sec. 33 of the Local Government Act, 1888, in accordance with their local Act (54 Vict., c. xx.), which is untouched by the Agricultural Rates Act, 1896.

Decision of the Divisional Court (15 *The Times* L.R., 220) reversed.

This was an appeal from the judgment of the Divisional Court (Mr. Justice Bruce and Mr. Justice Ridley) upon a special case; reported in 15 *The Times* Law Reports, 220; [1899] 1 Q.B., 759. The following facts are taken from the judgment of the Court below:—The question raised by this case was whether during the continuance of the Agricultural Rates Act, 1896, the Lancashire Asylums Board ought to divide the amount yearly required to be raised for their purposes in proportion to the rateable value of the county and the county boroughs as ascertained by the Local Government Act, 1888, section 33, or in proportion to the assessable value of the same as ascertained by the Agricultural Rates Act, 1896, and the regulations of the Local Government Board issued under that Act. By the Lancashire County (Lunatic Asylums and other Powers) Act, 1891 (54 Vict., Cap. XX.), a board was constituted called the Lancashire Asylums Board, to which were transferred the lunatic asylums of that county and of certain county boroughs, including Manchester, and it was provided by section 23 that all expenses incurred by them in the execution of their duties should be paid out of a fund to be called "The Asylums Fund." Section 24 deals with the raising of this fund, and is as follows:—"The Board shall before the first day of March in every year estimate the total amount required to be raised by contributions for the ensuing year, and shall divide that amount between the county and the county boroughs in proportion to the respective rateable values (as ascertained under section 33 of the Local Government Act, 1888) of the county and the county boroughs, and shall add to the amount apportioned to the county boroughs the sum of £4,000, or such other sum as may from time to time be fixed by agreement or by arbitration in manner provided by this Act, and referred to as 'the added sum.' The amount so apportioned, together with the added sum, shall be the aggregate amount required to be contributed by the county boroughs and shall be contributed by them respectively in proportion to their respective rateable values ascertained as aforesaid. The balance of the amount required to be raised by the Board shall be contributed by the county council." Section 33 (2) of the Local Government Act, 1888, provided for the appointment of a joint committee appointed by the counties and the county boroughs for the ascertainment of the respective rateable values and gave them certain powers. Under these powers, from 1891 to the passing of the Agricultural Rates Act, 1896, the amounts required to be contributed were calculated upon the respective values of the county and county boroughs as ascertained by section 33 (2), and the Lancashire Asylums Board, under section 26 of their Act, sent precepts to the county council and the borough councils for payment of the amount to be raised by each of them respectively. It was not their duty to find the rateable values, but to take them as found by the authorities, and to divide the

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

total amount required in accordance with those values. But by the passing of the Agricultural Rates Act, 1896, a different set of circumstances was constituted, out of which the present question arose. For the Asylums Board it was argued that it was now their duty to take as the basis of the division to be made by them the "assessable value" of the county and county boroughs as specified by the Rating Act of 1896 in place of the rateable values as calculated under the Local Government Act, 1888. For the city of Manchester, on the other hand, it was contended that these "assessable values" had no operation except for the levying of rates, and that, as the Asylums Board was not an authority levying rates, they ought to base their calculations on the "rateable values" found as they were before the passing of the Agricultural Rates Act, 1896, which, as they contended, operated upon the amount so apportioned to each council after it was so apportioned, and not before. The difference brought about was considerable in effect; for, if the contention of the Asylums Board was right, the amount found as due from the borough councils must be largely increased in comparison with that left to be raised by the county, while, on the other hand, the boroughs, which for the most part contain little agricultural land, would receive but a small annual grant from the Local Government Board. Since the Act of 1896 came into operation the county rate basis had been altered accordingly by the authorities, and the Asylums Board had in fact made their calculations upon the new basis instead of on the "rateable values," as they were ascertained before that Act. By section 1 of the Agricultural Rates Act, 1896, the occupier of agricultural land in England was liable to pay one-half only of the rate in the pound payable in respect of other hereditaments. By section 2, in respect of the deficiency which would arise in the produce of rates made by the "spending authorities," there was to be paid by the Commissioners of Inland Revenue to the "local taxation account" a sum which was to be paid out to each spending authority. The "spending authorities" were defined by section 9 of the Act, but did not include the Lunatic Asylums Board. By section 3 any spending authority requiring to raise from two or more parishes a sum by rate was to deduct from the amount to be raised the sum issuable to them in respect of their share in the annual grant, and to raise the net amount, after making such deduction, in proportion to the assessable value of those parishes, and such assessable value was to be the rateable value of each of the parishes reduced by an amount equal to one-half of the rateable value of the agricultural land in the parish. The effect of this was to give the relief to the agricultural land by assessing it at half its value instead of assessing it at the full value, and allowing the ratepayer to pay at half the rate in the pound. Section 4 dealt with the amount of the annual grant issuable as stated above, which amount was to be ascertained under section 4 and section 6 by returns made to the Local Government Board by the spending authorities of the sums received by them in the year next before the passing of the Act. Section 5 dealt with the preparation of valuation lists and the basis or standard for any county rate or borough rate, and provided that the value of agricultural land should in each case be stated separately from that of other hereditaments, and that the total rateable value of the agricultural land should be stated separately from the total rateable value of the other hereditaments in each parish. This was a necessary provision to carry out the purpose of section 3. By section 6 (3) the Local Government Board had power to make regulations for carrying out the Act. Section 9 defined "rate" as a rate "the proceeds of which are applicable to public purposes and which is leviable on the

basis of an assessment in respect of the yearly value of property, and includes any sums which, though obtained in the first instance by a precept, certificate, or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of a rate as before defined." Regulations were issued by the Local Government Board under the Act providing for the returns required and various other matters of detail not material to this case. It was then ordered, by way of carrying into effect the provisions contained in section 5 of the Act, that the valuation list was to be made in a particular form shown in the schedules, with a separate column showing the rateable value of the agricultural land (if any) contained in any hereditament, and that the lists were to be in this form instead of in the form provided by the Union Assessment Committee Act, 1862, for every rate to be made hereafter. Finally, as to the county rates, it was ordered by Article XVII. that county councils and other councils whose duty it was to make for the purposes of any rates a basis or standard of valuation which would not contain particulars of separately-rated hereditaments, but only the total rateable value of each parish, shall cause a basis or standard of valuation to be prepared in the form set out in schedule Z. It was further ordered that, notwithstanding anything contained in the County Rates Act, 1852, or in any other Act, from March 31, 1897, the values of the several parishes as shown in the column of such basis or standard or column headed "assessable value," &c. (that was to say, column 5 in the above schedule), "shall during the continuance of the Act be the basis, standard, or valuation for the levying of the county rates or any other rates leviable by the council according to the assessable value of the several parishes on which the same is levied, unless or until the council shall make a new basis, standard, or valuation in manner provided by law." Upon the Agricultural Rates Act, 1896, coming into operation a joint committee of the county of Lancaster, formed as required by section 33, subsection 2, of the Local Government Act, 1888, prepared a basis or standard for county rates in accordance with Article XVII. and schedule Z of the regulations under the Act. The amounts required by the precepts sent by the Asylums Board to the county council and to the councils of each of the county boroughs had since the Agricultural Rates Act, 1896, came into operation been calculated upon the values ascertained as regards agricultural land upon its assessable value, being one-half of its rateable value, and upon other land and buildings at their rateable value as calculated at the time when the Act of 1896 came into operation. The Asylums Board estimated the amount to be raised by contributions for the ensuing year, and divided that amount between the county council and the county boroughs in proportion to the respective values thereof as above stated with the addition of the sum required by section 24 of the local Act. The council of the city of Manchester paid to the treasurer of the Asylums Board the amount which the council would have had to pay if the total amount had been divided between the county council and the county boroughs in proportion to the respective rateable values thereof as calculated at the time when the Act of 1896 came into operation. The Asylums Board brought an action to recover the balance—£357 9s. 5d.—alleged to be due. The questions for the opinion of the Court were whether the Asylums Board, in dividing the total amount required by it to be raised by contributions during the continuance of the Agricultural Rates Act, 1896, was to divide that amount between the county and county boroughs in proportion (1) to their respective assessable values under the Act of 1896, or (2) according to their rateable values as calculated

before the Act. The Divisional Court answered question 1 in the affirmative and question 2 in the negative. The Corporation of Manchester appealed.

Mr. Macmorran, Q.C., and Mr. Ryde appeared for the appellants; Mr. Cripps, Q.C., and Mr. R. Cunningham Glen appeared for the respondents, the Asylums Board.

The COURT, having taken time to consider, delivered judgment, allowing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment of the Court:—The question which has arisen between the Lancashire Asylums Board and the Corporation of Manchester is whether the Asylums Board, under section 24 of a local Act called the Lancashire Lunatic Asylums Act, 1891, is to divide between the county of Lancashire and the county boroughs of that county the contribution which the Asylums Board annually requires in order to defray the expenses of the county lunatics in proportion to the "rateable values" of the county and county boroughs, as was the case prior to the passing of the Agricultural Rates Act of 1896, or in proportion to the "assessable values" of the county and county boroughs to be found in the later Act. The Corporation of Manchester asserts that the question of the division of the contributions to be made between the county and the county boroughs is not touched by the Agricultural Rates Act, 1896, though the method of rating the county and county boroughs is thereby altered. The Asylums Board on the other hand asserts that what was once "rateable value" is now no more, and that, as regards the division which the Board is to make, "assessable value" has taken the place of "rateable value," so long as the Agricultural Rates Act of 1896 is in existence. The point is one which makes a considerable difference to the Corporation of Manchester—and indeed to the other county boroughs in Lancashire—as regards the amount it can be annually called upon to contribute towards the expenses necessary for maintaining the county lunatics. Prior to the Agricultural Rates Act, 1896, matters stood thus: By the County Rate Act, 1852, sections 2-21, justices in counties were to prepare a basis or standard for fair and equal county rates, rateably and equally according to the full and fair annual value of the property within their respective limits, and were to order and direct a fair and equal county rate according to such basis or standard. By section 33, subsection 2, of the Local Government Act, 1888—which is the Act which created certain boroughs, county boroughs (of which Manchester is one), and which established county councils and joint committees of counties and county boroughs—it was enacted, "Where for the purpose of calculating any contributions . . . it is necessary to ascertain the rateable value of both a county and a county borough, such rateable value shall be ascertained and fixed by a joint committee composed of representatives of all the councils concerned, and such committee shall for that purpose have all the powers and jurisdiction of quarter sessions and of a committee of justices appointed under the County Rate Act, 1852, and the Acts amending the same." The object, I apprehend, of appointing this joint committee was that it might see that the rateable values of the county and county boroughs were fairly adjusted. In the year 1891 the county of Lancashire obtained special legislation by means of a local Act, entitled the Lancashire County (Lunatic Asylums and Other Powers) Act, 1891, whereby a Lunatic Asylums Board for the County Palatine of Lancaster was created, which Board was to provide asylum accommodation and to carry out other matters as a local authority under the Lunacy Act, 1890. By section 34 of the local Act it is enacted that, for the purposes of that Act, the rateable value of the county and of the county boroughs

shall be their rateable value as ascertained and fixed for the time being by the joint committee appointed under section 33 of the Act of 1888. By section 23 of the local Act all expenses incurred by the Asylums Board in the execution of its duties are to be paid out of a fund called the Asylums Fund, and any deficiency in that fund is to be raised by contributions to be made by the county and county boroughs in accordance with the provisions of the Act. By section 24 of the local Act it is enacted that the Board shall before the first day of March in every year estimate the total amount required to be raised by contributions for the ensuing year, and shall divide that amount between the county and county boroughs in proportion to the respective rateable values as ascertained under section 33 of the Local Government Act, 1888. By section 26 of the local Act it is enacted that, for the purpose of obtaining payment of the sums to be contributed by the county and the county boroughs respectively, the chairman of the Board shall before the 1st day of March in every year send to the county council and to the council of each county borough a precept for payment of the amount to be contributed by the county or county borough as the case may be. Although I have had to refer to many sections in different Acts, down to this it is perfectly plain that the division which the Asylums Board has to make of the contributions which it requires from the county and county boroughs was to be in proportion to their respective rateable values. This division and the sending of the precepts was the only thing the Asylums Board had to do as regards the money to be obtained from the county and county boroughs under the local Act of 1891. The Board was in no way concerned in rating or levying a rate either upon the county or county borough. Has, then, this division been altered by the Agricultural Rates Act, 1896, which was an Act to last for five years from March 31, 1897, from which date the Act was to come into operation? This Act is an Act by which the occupiers of agricultural land are for five years to be exempted from the payment of half the rates which they would otherwise have had to pay upon such lands, and it is the rating of agricultural land, in my opinion, which is dealt with by this Act. If the division of the contributions by the Asylums Board between the county and county boroughs is to be made in proportion to the "assessable values" mentioned in the Agricultural Rates Act, 1896, and not in proportion to the "rateable values" as prescribed by section 24 of the local Act of 1891, the way in which this Act of 1896 would operate to the detriment of the county boroughs is as I will now explain by means of hypothetical figures. Assume a county to consist, as to one half, of county boroughs having no agricultural land therein, and, as to the other half, of agricultural land. Assume the rateable value of the county boroughs to be £100,000, and of the agricultural land to be £50,000, and that the Asylums Board requires a contribution of £10,000 for the county lunatics to make up a deficiency in the asylums fund. Before the Agricultural Rates Act, 1896, upon these figures the county boroughs would have had to contribute to the Asylums Board twice as much as the occupiers of agricultural land in the county and no more, for the rateable value of the county boroughs would be just double that of the agricultural land; but, as since the Agricultural Rates Act, 1896, the occupiers of agricultural land have only to pay half the rates which they would otherwise have had to pay on these lands, this half of the rates not paid by the occupiers of agricultural land has to be borne by the county boroughs, when the Asylums Board divides the contributions it requires between the county and county boroughs. In other words, if the division for contributions is to be made upon "assessable values" under the Agricultural Rates Act, 1896, and not upon "rate-

able values" as enacted by section 24 of the local Act of 1891, the county boroughs of Lancashire will have to pay one half more to the Asylums Board than they otherwise would have done. The question, therefore, is, What is the division the Asylums Board has now to make between the county and the county boroughs? Is it the same as under the local Act of 1891, and before the passing of the Agricultural Rates Act, 1896—i.e., in proportion to the "rateable values" of county and county boroughs; or in proportion to the "assessable values" as found in the Agricultural Rates Act, 1896, so that the words "rateable values" in section 24 of the local Act of 1891 are now to be read differently from what they would have been undoubtedly read when the Act of 1891 was passed and for five years afterwards? It will be observed, when considering the scope of the Agricultural Rates Act, 1896, which is a general Act, that nowhere in it can be found any express repeal of any part of the local Act of 1891, and, what is more, nowhere in the Agricultural Rates Act, 1896, is the local Act of 1891 so much as mentioned. The local Act is left precisely where it was at the time it was passed, and for the best of all reasons, as it appears to me; for the local Act of 1891 in no way embraces either the rating or levying of rates either in a county or county boroughs by the Asylums Board, with which the Agricultural Rates Act, 1896, irrespective of the Asylums Board, now deals. The learned Judges in the Queen's Bench Division felt this difficulty in their way, for they say:—"It is true the precise position and duties of the Lancashire Asylums Board are not dealt with by the Agricultural Rates Act, 1896"—I say not so much as mentioned or dealt with at all—"but we cannot, therefore, exclude it from an Act of so general intention." The general intention of the Agricultural Rates Act, 1896, is to take off from occupiers of agricultural lands one half of their rates for a period of five years; but how does that alter the division the Asylums Board is to make, when the division by the Asylums Board is not dealt with by the Agricultural Rates Act, 1896, from first to last? The Agricultural Rates Act, 1896, is entitled as being an Act to amend the law with respect to the rating of the occupiers of agricultural land in England and for other purposes connected therewith. By section 1 it exempts the occupier of agricultural land from paying the whole rate, as he theretofore had done, and limits his liability to half of the rate, and it enacts that the deficiency thereby created is for five years to be made up by the Commissioners of Inland Revenue. It is clear, and indeed it is admitted by Mr. Cripps for the Asylums Board, that section 3 of the Agricultural Rates Act, 1896, has no reference to this case, and I might have passed it by; but I think I should point out that the section only deals with the levying of the rate by persons entitled to do so, that is, by the spending authority, which the Asylums Board is not, and it has nothing to do with the division of contributions required by the Asylums Board. Subsection 2 of section 3 is only for the purposes of section 3, and therefore admittedly does not apply. But this is how it is argued for the Asylums Board. It is said that section 5 of the Agricultural Rates Act, 1896, enacts that in every valuation list and the basis and standard of any county rate the value of agricultural land shall be stated separately from that of any building or other hereditaments, and that the total rateable value of agricultural land in each parish shall be stated separately from the total rateable value of the buildings and other hereditaments, and that, by section 6 (3) of this Act, the Local Government Board, for the purpose of ascertaining the deficiency and for the separation of value of agricultural land from buildings and other hereditaments, and generally for carrying into effect this Act, is to make regulations, and that these regula-

tions coupled with section 5 alter the division of contributions which the Asylums Board is to still make under section 24 of the local Act of 1891, and that the division by the Asylums Board is now to be made upon the "assessable value," and not upon the "rateable value" under that section. How section 5, which applies to the rating of agricultural lands separately from buildings and other hereditaments, can be held to touch the division the Asylums Board is to make, I do not see, and the regulations are for the levying of the rates, and not for the division of contributions. Article XVII. of the regulations and the form in schedule Z when read show this to be so. Column 2 in schedule Z deals with the net annual value of each parish according to the basis, standard, or valuation in force at the passing of the Act of 1896—i.e., rateable value beyond a doubt. And columns 3 and 4 deal with net rateable value divided between agricultural land and buildings and other hereditaments not being agricultural land. And by column 5 "assessable value" of a parish is one-half of the amount of agricultural land added to the amount of the other hereditaments other than land. These provisions were necessary to carry out the scheme of exonerating the occupier of agricultural land from paying the whole of the rate based upon the rateable value of this land, which before the Agricultural Rates Act of 1896 he had to pay, that being the object of the Act; and in my judgment neither section 5 nor the regulations under the Act of 1896 have anything to do with the division the Asylums Board has to make under section 24 of the local Act of 1891. There is a well-known rule which has application to this case, which is that a subsequent general Act does not affect a prior special Act by implication. That this is the law cannot be doubted, and the cases upon the subject will be found collected in the third edition of "Maxwell on the Interpretation of Statutes," at pp. 242-3, and I need not refer to them. Applying this rule to the present case how does the general Act of 1896 affect the special legislation of 1891? Surely, it does not do so at all. For the reasons above I am of opinion that the "rateable values" upon which the Asylums Board were to make the division for contributions under section 24 of the local Act of 1891 have not been touched by the general Act of 1896, and that the first question put to us must be answered in the negative, and the second in the affirmative, and that this appeal must be allowed with costs here and below.

Q.B. Div. (Channell and } 1900.
Bucknill, JJ.) } Jan. 22.

THE SAVOY HOTEL COMPANY (LIMITED) V. THE
LONDON COUNTY COUNCIL.*

Shop Hours Act, 1892—Employment of young persons—Duration of employment—Savoy Hotel and Restaurant.

This was a case stated by a metropolitan police magistrate upon a complaint made on behalf of the respondents that the appellants unlawfully employed in the Savoy Hotel and Restaurant a young person named Arthur Knight for longer than 74 hours in one week, contrary to section 4 of the Shop Hours Act, 1892, and failed to keep exhibited the notice required by the same section. The questions were (1) whether the Savoy Hotel and Restaurant was a shop within the meaning of the Shop Hours Act; and (2) whether Arthur Knight was wholly employed as a domestic servant within section 10 of the Act. Section 9 provides that "'shop' means retail and wholesale

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

shops, markets, stalls, and warehouses in which assistants are employed for hire, and includes licensed publichouses and refreshment houses of any kind." Section 10 provides that nothing in the Act shall apply to "any person wholly employed as a domestic servant." The case stated that the hotel was licensed to be kept as an inn for the sale of intoxicating liquors under the Act of 9 Geo. IV., c. 61, and the Acts amending the same. Intoxicating liquors were supplied to the public in the hotel and in the restaurant grill and dining-rooms, whether they were guests staying in the hotel or not. There was no bar or counter for the sale of intoxicating liquors. Arthur Knight was 15 years of age, and was employed at the Savoy Hotel as a page boy in the general service thereof for 89 hours a week. He slept in the hotel. He assisted in dusting the reception rooms in the early morning, but was principally employed as a messenger, taking up messages and sending off telegrams and messages for persons staying at, or using, the hotel and restaurant. The magistrate held that the hotel was such a licensed publichouse as fell within the definition of the word "shop," and that Arthur Knight was not wholly employed as a domestic servant within section 10, and convicted the appellants.

Mr. Avory appeared for the appellants; and Mr. Daldy for the respondents.

MR. JUSTICE CHANNELL said that the first of the questions involved in the case was not free from doubt, but, on the whole, he was of opinion that the appeal should be dismissed. The object of the Act was to restrict the employment of persons under a certain age from being employed for too long hours. This had already been done in regard to factories, and the Legislature intended by this Act to extend the same provisions to other businesses. In the body of the Act they used the word "shop" and in the definition clause they defined "shop" to mean certain things and to include others. The meaning of that was that the Legislature desired to include things which, though within the mischief aimed at by the Act, were not in the ordinary sense shops. The things added to the meaning of "shop" were "licensed publichouses and refreshment houses of any kind." It was true that this hotel was not an ordinary publichouse, but it was covered by the words "of any kind," and the employment of young persons in a grand hotel like this was just as much within the mischief aimed at by the Act as that in an inferior publichouse. With regard to the magistrate's finding that the boy was not wholly employed as a domestic servant, that was a finding of fact and the Court would not disturb it.

MR. JUSTICE BUCKNILL gave judgment to the same effect.

The appeal was accordingly dismissed.

(Solicitors—Fladgate and Co., for the appellants; W. A. Blaxland, for the respondents.)

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.JJ.) }

1900.
Jan. 23.

THE ORNEN.*

Ship—Collision—Regulations of 1897 for Preventing Collisions at Sea, Art. 21—Construction.

Art. 21 construed to mean that the vessel which has to keep her course and speed is to do so until the other vessel cannot avoid a collision without the assistance of the vessel which is bound to keep her course and speed.

This was an appeal by the defendants from the judgment of Sir Francis Jeune, and there was also a cross-

appeal by the plaintiffs, the learned President having held both vessels to blame for a collision. The case was reported in *The Times* of July 10. The action was brought by the owners of cargo lately laden on board the steamship Carola to recover damages sustained by them by reason of a collision which occurred between the Carola and the defendants' steamship Ornen in the Cattegat about 11 p.m. on July 23, 1898. The plaintiffs' case was that they were the owners of a cargo of timber lately laden on board the Swedish steamship Carola. The Carola at the time of the collision was on a voyage from Sandarne to Grimsby. She was on a north-west-by-north magnetic course, making about nine knots. In these circumstances the masthead light of the Ornen was seen about one to two miles distant and about a point on the starboard bow. Shortly afterwards the green light of the Ornen was also seen. The vessels continued to approach green to green, and the helm of the Carola was slightly starboarded. The Ornen suddenly opened her red light, and, coming on, with her stem struck the starboard side of the Carola, doing her such damage that she shortly afterwards sank, and the plaintiffs' cargo was wholly lost. The defendants' case was that the Ornen, a Swedish steamship of 745 tons net, manned by a crew of 21 hands, was on a voyage from Sunderland to Stockholm with a cargo of coal. The Ornen was on a south-south-east-half-east magnetic course, and was making about nine knots. In these circumstances the masthead light of the Carola was seen three or four miles off and slightly on the port bow. Soon afterwards the red light of the Carola came into sight on about the same bearing, and the helm of the Ornen was slightly ported and then steadied. The vessels approached red to red until they were about one-and-a-half to two miles apart, when the Carola shut in her red light and opened her green. The Ornen was kept on her course. When about half-a-mile off the Ornen blew one short blast on her whistle, showing that she was porting her helm. The Carola answered by one short blast, but, instead of porting, she was seen to be swinging apparently under a starboard helm. The engines of the Ornen were stopped and ordered full speed astern, but before they could be put astern the Carola came across the bows of the Ornen and the collision occurred. The President came to the conclusion that the Carola was to blame, but he also found that the Ornen was to blame for not having stopped and reversed her engines sooner instead of waiting until the last moment. The result was that both vessels were to blame. By Article 18 of the Regulations of 1897 for Preventing Collisions at Sea :—"When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other." Article 19 :—"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." Article 21 :—"Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision." Article 22 :—"Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." Article 23 :—"Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

Mr. ASPINALL, Q.C., and Mr. C. STUBBS, for the

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

defendants, said that the learned President found that the defendants' case was in substance correct, and they contended that, as the vessels were crossing vessels, by Article 19, inasmuch as the *Carola* had the *Ornen* on her starboard side it was her duty to keep out of the way of the *Ornen*; and by Article 21 it was the duty of the *Ornen* to keep her course and speed, which she did, until the risk of collision became imminent, when her engines were stopped and reversed. She therefore did everything that was required of her by the rules and by good seamanship. The *Ornen* was therefore not to blame.

Mr. CARVER, Q.C., and Mr. MAURICE HILL, for the plaintiffs, contended that the vessels were not crossing vessels within the meaning of Article 19, and that therefore that article did not apply. According to the finding of the President the vessels were meeting nearly end on, and that being so, no subsequent manœuvre would make them crossing vessels within the meaning of the article. Further, if the crossing article did apply, then the *Ornen* had violated Article 21 by not keeping her course and speed. They also contended upon the cross-appeal that the President was wrong in finding the *Carola* to blame.

The COURT dismissed the appeals.

LORD JUSTICE A. L. SMITH said that as regards the cross-appeal, in his opinion it was impossible to say that there was not ample evidence upon which the President could find that the *Carola* was to blame. The President held the *Carola* to blame for starboarding her helm instead of porting it, and persisting in that course until the collision occurred. The President also found that the *Ornen* was to blame for not having stopped and reversed her engines when she saw the *Carola's* green light. Mr. Justice Barnes had put a construction upon the rules in "*The Ranza*" (*Shipping Gazette*, Dec. 13, 1898), that the vessel which had to keep her course and speed was to do so until the other vessel could not avoid a collision without the assistance of the vessel which had to keep her course and speed. He (the Lord Justice) adopted that construction. Therefore, assuming that these ships were crossing ships, though the *Ornen* had by the rules to keep her course and speed, the question was whether she did not do so too long. The Court came to the conclusion that the period between the whistle of the *Ornen* and the collision was at the most one minute, and they were advised by their assessors that the point of time before the collision at which the *Carola* could have of herself avoided the collision was more than a minute. Therefore the President was right in holding that the *Ornen* was also to blame.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS concurred.

[Solicitors—Stokes and Stokes, for the defendants; Thomas Cooper and Co., for Hill, Dickinson, and Co., Liverpool, for the plaintiffs.]

Chan. Div. . . } 1900.
(Byrne, J.) } Jan. 23.

IN RE THE DUKE OF NORFOLK'S PARLIAMENTARY ESTATES—DUKE OF NORFOLK V. LORD HERBES.

Settled Land Acts—Scheme for improvements—

Approval of trustees—Settled Land Act, 1882.

Trustees of settled land may approve a scheme for improvements submitted to them by the tenant for life before they have capital moneys actually in hand, and may reimburse the tenant for life the money advanced by him for the purposes of the scheme out of capital moneys subsequently received.

This was an application by the Duke of Norfolk

*Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

which raised a new and important question under the Settled Land Act, 1882—viz., whether trustees for the purposes of the Act can approve a scheme for improvements submitted to them by the tenant for life before they have capital moneys actually in hand, and further in the event of a scheme having been approved under such circumstances whether they may reimburse the tenant for life the money advanced by him for the purposes of the scheme out of capital money subsequently received. It appeared that schemes for the improvement of the Parliamentary estates had from time to time been submitted by the Duke to his trustees and approved of by them when they had either no capital money in hand available, or not enough to pay for the works proposed by these schemes. The Duke had accordingly found the money necessary for carrying out the various schemes, and as the trustees now had capital money in hand the object of the present application by the Duke was to get repaid by his trustees the various sums of money advanced by him for the purpose of completing and paying for the proposed works when completed.

Mr. Ingle Joyce and Mr. John Dixon appeared for the Duke; Mr. Levett, Q.C., and Mr. J. M. Stone appeared for the trustees.

MR. JUSTICE BYRNE said,—This case raises an important question under the Settled Land Act, 1882, and one which does not appear to have been the subject of reported decision; it is, whether or not trustees for the purposes of the Act may approve a scheme for improvements submitted to them by the tenant for life before they have moneys in their hands available for the proposed expenditure. There is a second question, which falls for decision in case the first should be answered in the affirmative—viz., whether or not, when a scheme has been approved under such circumstances, and the improvements have been executed and paid for by the tenant for life in anticipation of moneys becoming afterwards available for the purposes of the approved scheme, the trustees are entitled, either with or without the approval of the Court, to reimburse the tenant for life the moneys so expended. The trustees may not apply capital moneys in their hands in or towards payment for improvements unless prior to the execution of the work a scheme has been submitted to and approved by them. There are no words in the Act in terms negating the right of trustees to approve of a scheme in anticipation of moneys coming to their hands, but I have to consider the scope and provisions of the Act to see whether or not such a right is conferred upon them. It has already been determined in the case of "*In re Millard's Settled Estates*" ([1893] 3 Ch., 116) that a prospective order cannot be made by the Court authorizing payment by the trustees for work to be done under an approved scheme out of moneys not in their hands at the time when the order is asked for. This was a decision of the Court of Appeal turning upon section 26 (2) (iii.) and it was recognized by the Master of the Rolls in his judgment that there are no negative words to say the Court cannot make such an order, but he points out that under the other clauses of the same subsection the trustees cannot pay except upon certificates, which cannot be given prospectively, and takes that as an indication that it was never intended that the Court should make a prospective order, and he states that he cannot find in the Act anything which authorizes the Court to make prospective orders of the kind. This case does not decide the point now before me, although it has an important bearing upon it from the reasoning adopted, and I will mention particularly one passage in the Master of the Rolls's judgment where he says at page 120:—"What is wanted is protection—that is, protection for those interested in the land; and as practical men we

know that to authorize a thing to be done is a very different thing from approving it when it has been done." It was urged on behalf of the tenant for life, and it is the fact, that in "*Re Millard*" the schemes had been approved by the trustees, and it was never suggested in argument, or in the judgments, that such approval was not within the power of the trustees, although the point, if a sound one, would have afforded a complete answer to the application; and the observation is of great weight, though it must not be pressed too far, as the point does not appear to have been suggested or argued and it may have been passed by as immaterial, having regard to the construction placed by the Court upon the clause of the subsection under which the order was sought for. The case of "*In re Marquis of Bristol's Settled Estates*" [(1893], 3 Ch., 161) was on an application made under section 15 of the Act of 1890, and determined that a prospective order could not be made under that section to take effect upon moneys which might thereafter arise, but in the course of his judgment Mr. Justice Kekewich, in considering the meaning of section 26 of the Act of 1882, makes some observations at the foot of page 166 showing that in his view the use of the words "to be expended" points to moneys in hand, and he says:—"It seems to me there would be very great difficulty in holding that if expenditure were sanctioned now, there being no money out of which that could be made, there would not be a charge which would have to be raised in the same way as any other charge on the land." To some extent this line of reasoning is applicable to an objection to a construction of the section which would give a power to approve a scheme in anticipation of subsequent receipt of moneys, as there would undoubtedly be grave difficulty, to say the least of it, in the way of refusing a subsequent order for payment on proper evidence that the moneys had been expended in accordance with the scheme previously approved, especially having regard to the fact that the scheme to be submitted under section 26 (1) must show the proposed expenditure for the execution of the improvement. "*In re Tucker's Estate*" [(1895], 2 Ch., 468), also an application under the Act of 1890, deals with the principle upon which the Court ought to exercise its discretion in respect of allowing the tenant for life to be reimbursed moneys he has expended without first submitting any scheme, and the observations which have been referred to of the Master of the Rolls and Lord Justice Lopes, in that case about the duty of a tenant for life to submit a scheme must be read in view of the fact that it does not appear by the report that there were no capital moneys available at the time the tenant for life made the expenditure. I do not think that section 2, subsection (9), or section 33 of the Act really afford any assistance in the matter, and I only mention them to show that they have not been overlooked. Capital money arising under the Act shall, "when received," be invested in any of the modes pointed out by section 21 of the Act including (iii.) in payment for any improvement authorized by the Act. The words "when received" point to the expression "capital money arising under the Act" being used as including money to arise at a future date, and I do not see any good ground for limiting it so as to exclude moneys which may arise at a future time, though not receivable immediately or within any given period. Section 22, subsection (1), provides that capital money shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court at the option of the tenant for life and shall be invested or applied by the trustees or under the direction of the Court accordingly, and subsection (2) provides that the investment or application by the trustees shall be made

according to the direction of the tenant for life; section 25 describes improvements authorized by the Act, and then section 26 deals with the procedure to be adopted where the tenant for life is desirous that capital money shall be applied in or towards payment for an authorized improvement. The tenant for life may submit for approval to the trustees or to the Court, as the case may require, a scheme for the execution of the improvement. I do not think that I ought to put so narrow a construction upon section 26, subsection (2), as to hold that it means that the capital money must be actually in the hands of trustees before a scheme is approved by them or upon section 26, subsection (3), that it means that the money must be actually in Court before a scheme is approved, and indeed I think it is clear that a literal construction to that effect is impossible, and I may refer to section 22, subsection (7), which shows that securities for capital money are not capital moneys although they may be converted into money which shall be capital money arising under the Act. I think it would be a *reductio ad absurdum* to say that, there being thousands of pounds of what had been capital moneys invested in Consols and in Court or in the hands of trustees, it is necessary as a preliminary to the approval of a scheme that the Consols should be converted into actual cash. Then it is suggested that if there is money receivable under an existing contract either presently or in the near future, or if there be securities in Court or in the hands of trustees capable of being immediately converted into cash, the amounts so receivable or capable of being turned into cash may in effect be regarded as money in Court, or in the hands of the trustees, as the case may be, so as to be in substance and effect moneys in Court or in hand; but I feel the difficulty that the moment a departure is made from the supposed literal construction the matter is very much at large, and I do not see where to draw the line. Is it to be drawn at money immediately payable under a contract, money payable by instalments under a contract, money to be paid in a year or in two years or in 20 years? I was much impressed by the argument that if trustees or the Court may approve a scheme before capital moneys are available the tenant for life and the trustees or the Court may be really committing the estate to an expenditure before the period arrives at which a judgment ought to be exercised, and section 53 of the Act and the observations of the Master of the Rolls and of Mr. Justice Kekewich, that I before quoted, are appealed to in support of this argument. But I think the true answer is to be found in this. The scheme of the Act is to give wide powers to the tenant for life and to give power of consent to trustees upon the footing that they will act fairly in the exercise of their respective powers, and that neither trustees nor the Court will sanction schemes which are improvident nor which will unduly fetter any discretion which ought to be exercised at a later date, and there is always this safeguard that tenants for life and trustees joining in improvident schemes or not acting with a due regard to the interest of the remainder-men are running the risk of the possible establishment of a personal liability against themselves. The Act is framed for honest folk, and what are considered sufficient safeguards and protection are provided for the parties interested. I think the observation of the Master of the Rolls is to be read with regard to the subject-matter of the case before him, and that he is dealing with the case of safeguards provided by the Act before payment can be actually made, and not with the case of approval of a scheme. I can see many considerations weighing against the contrary view. Suppose, for example, a tenant for life is desirous of selling a portion of his estate with the special object of effecting what he considers a great improvement

upon the remainder of it. I think it would be most unfortunate if he should be obliged first to sell and then to find that the trustees did not approve of his scheme. Upon the whole case and a consideration of the terms of the Act I have come to the conclusion that a scheme may be approved, although there are not at the time capital moneys in the hands of the trustees for carrying it out. Upon the second question I am of opinion that, if after a proper scheme has been duly approved the tenant for life, with the knowledge of the trustees, *bona fide* expends money for the purpose of and in accordance with such scheme, early expenditure being for the advantage of all parties interested, there is no prohibition to be found in the Act against the trustees, when they have capital money in their hands, adopting his expenditure and recouping him what he has actually spent, subject to the proper certificate being obtained. The question of what might happen should the tenant for life die after his expenditure and before recoupment and another tenant for life succeed and direct the moneys to be applied in some other way does not arise for decision and I, therefore, express no opinion about it. I ought to add that in the present case there is not the faintest suggestion that the several schemes, the payments in anticipation by the tenant for life, and the repayments by the trustees have been otherwise than prudent and for the advantage of all persons interested.

[Solicitors—Few and Co.]

Chan. Div. } 1900.
(Byrne, J.) } Jan. 23.

IN RE GOSLING—GOSLING V. SMITH.*

Charity—Charitable Bequest—Validity—Bequest for pensioning off clerks.

The late Mr. Bennett Gosling, who died in May, 1855, bequeathed by a codicil a sum of £1,890 6s. 4d. Consols standing in his own and his brother Robert's names, "the produce of different sums of money invested by me at different times in our joint names," to be invested in the names of trustees to be fixed upon by the partners in the firm of Goslings and Sharpe at the time of his death, to form a fund to be called the "Superannuation Fund" for the purpose of pensioning off the old and worn-out clerks of the firm of Goslings and Sharpe; and the testator then said he trusted that the partners in the said firm would in consideration of such bequest add and set apart a sum of money in addition to such bequest, in order that a beginning might be made for forming such a fund. In 1896 the superannuation fund by additional gifts and accumulations of dividends amounted to, or was represented by, £5,567 India Three per Cent. stock and a considerable sum of cash. In June, 1896, the firm of Goslings and Sharpe was amalgamated with the firm of Barclay and Co. (Limited); and in consequence of this amalgamation, some difficulties had arisen as to the proper objects and distribution of the fund. The present trustees now applied to the Court by originating summons for the determination of the following questions:—(1) Whether the gift made by the codicil of the late Mr. Gosling, as set out above, was a good charitable gift; and (2) if such gift were a good charitable gift, whether a scheme ought not to be settled for the administration of the fund, or whether the fund ought not to be applied *cy-près* for charitable purposes.

Mr. Walters appeared for the trustees.

Mr. HOWARD WRIGHT represented the residuary

legatee, and contended that the gift was not a good charitable gift and therefore void.

Mr. ROWDEN, Q.C., and Mr. MACSWINNEY, for a clerk in the firm at the date of the amalgamation, argued that, there being no public element in the gift, it was not charitable.

Mr. MULLIGAN, Q.C., and Mr. FRANK RUSSELL, for a clerk who was in the firm at the time of the testator's death, contended that the sole object of the gift was to benefit the clerks in the firm at the time of the testator's death.

Mr. Methold and Mr. Hall Hall for other parties.

Mr. INGLE JOYCE, for the Attorney-General, argued that the gift was a charitable gift, and therefore good.

MR. JUSTICE BYRNE said that amongst the other charitable objects enumerated in the statute of Elizabeth the "aged" and "impotent" are especially mentioned; in his opinion, "old and worn-out" clerks came within this description, and he thought, moreover, having regard to the phrase "pensioning off," and to the frame of the gift, that poor clerks of the firm and those unable properly to provide for themselves and their families were intended to be benefited. His Lordship also said he thought it clear that the benefits of the gift were intended to extend to persons who might not become clerks until after the testator's death, and who might be absolutely unknown to him. So long as the gift was in favour of a section of the public, if within the scope of charitable gifts, it was a charitable gift; and the fact that the section of the public was limited to persons born or residing in a particular parish, district, or county, or belonging to or connected with any special sect, denomination, guild, institution, firm, name, or family did not of itself render that which would be otherwise charitable void for lack of sufficient or satisfactory description, or take it out of the category of charitable gifts. For these reasons, his Lordship held the gift to be a good charitable gift, and, after some further discussion, directed a scheme to be settled for the administration of the fund.

[Solicitors—Walters, Deverell, and Co.; Freshfields; Hare and Co.]

Chan. Div. } 1900.
(Buckley, J.) } Jan. 23.

PANNELL V. CITY OF LONDON BREWERY COMPANY
(LIMITED) AND OTHERS.*

Landlord and Tenant—Covenants—Breach—Re-entry—Notice.

When, after a notice specifying several alleged breaches of covenant, the lessor fails to prove one of such breaches, the notice is not thereby rendered bad in respect of the other two.

This was an action by the freeholder of The Denmark, a publichouse at Camberwell, against the assignees of the lease and their tenants, to recover possession of the property on the ground of breaches of covenants in the lease. The lease was dated October 10, 1868, and contained a proviso for re-entry on breach of covenant. The defendants denied that there had been any breach, and, among other defences, contended that the notice given by the plaintiff specifying the alleged breaches and requiring the defendant company to remedy the same was insufficient.

Mr. H. Terrell, Q.C., and Mr. Gilks were for the plaintiff; Mr. Astbury, Q.C., and Mr. G. F. Mortimer for the defendant company; and Mr. George Cave and Mr. R. Edmondson for the other defendants.

*Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

*Reported by F. EVANS, Esq., Barrister-at-Law.

MR. JUSTICE BUCKLEY, in delivering judgment, said that the notice was given on January 31, 1899, and the writ was issued on June 5, 1899, and, therefore, a reasonable time for making the repairs had been given. After describing the property and its boundaries, and stating the effect of the lease, his Lordship said the notice referred to a number of alleged breaches (some of which were not now relied on by the plaintiff), including the non-repair of fences and the omission to do certain painting. The plaintiff had, however, failed to prove any breach of covenant as to the painting, but, as that alleged breach was mentioned in the notice, Mr. Astbury contended that the notice, being bad as to that, was bad altogether. The argument came to this—that if three different breaches of covenant were mentioned in a notice under section 14 of the Conveyancing and Law of Property Act, 1881, and the lessee was required to remedy them, and then it turned out that only two of the breaches had taken place, the notice was bad in respect of all three matters. If that was the law, it was very inconvenient, for it would necessitate sending a separate notice for each breach of covenant. Section 14 of the Act of 1881 said, “A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of.” If the notice specified the breach which had occurred and the breaches which had not occurred the lessor had, in his Lordship’s opinion, done what the statute required and something more. Then was the matter covered by the authority of reported cases? Some of these were decided before 1892 when the section was amended by section 2 of the Conveyancing Act, 1892. “*Skinner’s Company v. Knight*” ([1891], 2 Q.B., 542) decided that the compensation payable under section 14 of the Act of 1881 did not include the costs of a solicitor and surveyor consulted as to preparing the notice, but the law on this head had been altered by the Act of 1892. In “*Lock v. Pearce*” ([1893], 2 Ch., 271) the notices were given in 1891, and not only stated the breaches of covenant and required payment of compensation, but also required payment of the solicitor’s and surveyor’s charges, and at p. 280 the present Master of the Rolls said:—“It is true that he asked for £2 2s. for the surveyor’s fees, and there is a case which decides that he could not recover them; but in fact he told them what compensation he wanted. The notices are as good as any notice could be.” That was a decision of the Court of Appeal that a notice which required the lessee to do something which he was not compellable to do was not for that reason a bad notice. It was said that the contrary had been decided in “*Horsey Estate (Limited) v. Steiger*” ([1899], 2 Q.B., 79), but the observations of the Lord Chief Justice at p. 92 of the report meant not that the notice was bad, but that the proceedings on the notice were bad. The action in that case was commenced two days after service of the notice, and the time allowed was held to be unreasonable. In the present case, in his Lordship’s judgment, the notice was not bad. The case was distinguishable from “*In re Serle*” ([1898], 1 Ch., 652), which did not appear to decide the point now before the Court, but to be a decision as to the insufficiency of the particulars of the breaches. His Lordship then discussed the evidence with reference to the alleged breaches still relied on, and held that there were no breaches on which the plaintiff could rely.

The action was dismissed with costs.

[Solicitors—Moon, Gilks, and Moon; Western and Sons; Hulberts, Hussey, and Metcalfe; R. Horner Hargreaves.]

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Q.B. Div. }
(Day, J.) }

1900.
Jan. 23.

STEWARDS AND CO. (LIMITED) V. THE QUEEN.*

Contract—Agreement—Construction—Acceptance of tender.

This was a petition of right, in which Sir R. Reid, Q.C., Mr. Joseph Walton, Q.C., and Mr. T. J. Bullen appeared for the suppliants; the Solicitor-General and Mr. R. B. D. Acland for the Crown.

By the petition £27,386 17s. 4d. was claimed as damages for breach of contract under the following circumstances. In 1895 the Lords Commissioners for the Admiralty were engaged in erecting a new breakwater termed Portland New Breakwater, and invited tenders “for the supply of cap and roach stone, now lying in rough stacks in quarries, in such quantities and at such times as may be required by the Admiralty. . . . contractors to state the approximate quantity of stone they are able to supply.” The suppliants sent the following tender:—“We . . . do hereby agree to deliver cap and roach stone (rough), approximate amount two million tons (it is believed that a considerably larger amount is obtainable, but as the amount required is not stated we have not verified this), in accordance with specification for the sum of 4d. per ton.” The tender was accepted in these terms:—“Gentlemen,—I have to acquaint you that your tender, dated September 7, 1895, is accepted for the supply for the new breakwater at Portland of about 2,000,000 tons or such quantity as may be required of cap and roach stone (rough) in accordance with a specification. . . .” On December 23, 1897, the superintending civil engineer wrote:—“As the Admiralty have entered into a contract with Messrs. W. Hill and Co. for the completion of the new breakwater works, will you please note that the Admiralty will cease to draw stone from your stone heaps after January 15 next. From that date all work will be carried on by the contractors subject to any arrangement they may make with you.” By January 15 the suppliants had only supplied 254,985 tons, 8cwt., 2 quarters of the stone, and they claimed that they were entitled to damages for loss of profit on the remainder of the two million tons and expenses. For the suppliants it was contended that it would be absurd to construe the contract as meaning that, while they were bound to supply up to a *maximum* of two million tons, the Admiralty might take as little as they chose. “Required” must mean “required for the construction of the breakwater.” For the Crown it was contended that the form of invitation for the tender showed that it was not intended to take all the stone from one contractor. As to the interpretation of the contract “*Burton v. the Great Northern Railway Company*” (9 Ex., 507) and the *Great Northern Railway Company v. Witham*” (L.R.9, C.P., 16) were cited. These cases showed that a contract might be unilateral, one party being bound to supply what was required, though the other was not bound to require anything. “*Hamlyn v. Wood and Co.*” ([1891], 2 Q.B., 488) was also cited. It cannot be said that, in this contract, the Admiralty impliedly agreed to go on buying their breakwater in order to take the suppliants’ stone. Yet that contention was necessary for the suppliants’ case.

Mr. WALTON having replied,

HIS LORDSHIP said that it was perfectly clear the Admiralty had expressed their willingness to take whatever amount the suppliants were able to supply and the suppliants had bound themselves to supply up to 2,000,000 tons. “Required” no doubt meant “required for the construction of the breakwater,”

*Reported by H. G. SNOWDEN, Esq., Barrister-at-Law.

and whether it was required or not did not depend on whether the Admiralty wanted it or chose to have the work done by another contractor. He gave judgment for the plaintiffs, the question of the amount of damages standing over.

Q B. Div. }
(Mathew, J.) }

1900.
Jan. 23.

BESTELL V. NYE.*

Building contract—Architect—Certificate as to work done—Liability.

Where a building contract provided that the price was to be paid on the architect's certificates from time to time, and that his final certificate was to be conclusive evidence that the builders were entitled to receive payment; *held* that an action would not lie against the architect for negligence in issuing such certificate.

This was an action against an architect, in which the plaintiff sought to recover money alleged to have been received by the defendant to the plaintiff's use, also damages for the defendant's negligence. The defendant was employed by the plaintiff as architect in connexion with the building of a bungalow for the plaintiff in Sussex. The terms of the employment of the defendant were contained in certain letters which passed between the parties, from which it appeared that the defendant was to be paid by the plaintiff for "plans, specifications, and supervision of works" 5 per cent. upon the amount of the expenditure, travelling and out-of-pocket expenses to be charged extra. In accepting the defendant's offer in these terms, the plaintiff wrote that the charge was to be an inclusive charge covering everything. The defendant entered upon the work. He prepared a specification on which tenders were obtained, and included therein a provision that surveyor's charges for bill of quantities should be 2½ per cent. on the amount of the estimate, and for drawings, &c., £10 10s. The defendant himself prepared a bill of quantities, and obtained a tender from some builders at Brighton, for the erection of the bungalow for £1,790. The tender was accepted and a contract was signed by the plaintiff, which provided that the price should be paid by instalments upon the defendant's certificates, and that his final certificate should be conclusive evidence that the builders were entitled to receive payment of the final balance. The work was completed and the plaintiff paid the contract price, together with the cost of certain extras on the defendant's certificates. The defendant was paid by the builders 2½ per cent. on the contract price for taking out the quantities and the ten guineas for the drawings. The plaintiff alleged that the receipt of these payments by the defendant was a breach of the defendant's term of employment, and was, alternatively, a secret profit made by the defendant in the course of his employment. The defendant contended that the ordinary course of business had been followed, and that the plaintiff was fully aware that the cost of taking out the quantities was not included in the defendant's charges for acting as architect to the work. The second head of the plaintiff's claim was for damages for negligence on the part of the defendant. The plaintiff's case was that the defendant had omitted to check the builder's accounts with due skill and diligence, and had passed as extras works included in the contract and had certified for sums improperly passed. These allegations were denied by the defendant. Since the action was begun the plaintiff had died, and his executors had been substituted as plaintiffs.

Mr. Bray, Q.C., and Mr. E. Morten appeared for the

plaintiff; Mr. Boxall and Sir Lennox Napier for the defendant.

MR. JUSTICE MATHEW, in giving judgment, said that the defendant alleged that the terms of his employment by the plaintiff were that his charges were only to cover the ordinary work of an architect, apart from the work of taking out the quantities. The course of business with regard to taking out quantities was that the builder employed some one to take out the quantities. The builder affixed his own prices to the quantities, and he added to the amount of his tender the fee of the quantity surveyor, and in the event of the tender being accepted that fee was included in the first certificate given by the architect. It was not usual in London for the builder to employ the architect to take out the quantities, but it was said that in the country it was permissible and that it was not considered that there was anything objectionable in that course being followed. In the present case the defendant, who was the architect to the work, acted as quantity surveyor, and the amount of his fee was included in the sum for which the defendant, as architect, gave his first certificate. Some time afterwards the plaintiff discovered that this had been done, and he claimed the benefit of the payment on the ground that by the terms of the employment the defendant's charge was to be an inclusive one. On the other hand, the defendant said that the agreement contained in the correspondence was confined to his ordinary duties as an architect, and that the builder might, if he had chosen, have employed any one else to take out the quantities, which, it was admitted, was a necessary thing to be done. His Lordship came to the conclusion that the agreement between the plaintiff and the defendant did not cover the cost of taking out the quantities; but his Lordship felt compelled to add that he did not think that the defendant had acted as an honourable man, because he had concealed from the plaintiff the fact that he was making this arrangement. The plaintiff was unfortunately now dead, but the learned Judge was satisfied from the correspondence that the defendant did not disclose to the plaintiff the arrangement with the builder as to taking out the quantities. It was conceivable that if the plaintiff had known of it he might have disapproved. With regard to the other part of the case, the damages were claimed on the ground that the defendant had been negligent in issuing his final certificate. The defendant was sued for negligence only; there was no imputation of fraud. The defendant's answer to the charge of negligence was that he had relied on the word of the builder, but his Lordship was satisfied that the defendant had not held the scales impartially, and had been guilty of negligence which had benefited the builder at the expense of the plaintiff. The question was, Could damages be recovered from the defendant in these circumstances? His Lordship was clearly of opinion that damages were not recoverable. It was not necessary to refer at length to the authorities on the subject. There was the case of "Tharsis Sulphur Company v. Loftus" (L.R., 8 C.P., 1), the case of an average adjuster: "Pappa v. Rose" (L.R., 7 C.P., 525), the case of a broker; and the case of "Stevenson v. Watson" (4 C.P.D., 148). The principle of law applicable to the case was that when two men employed a third to settle a dispute they were bound by what he decided. The parties were supposed to have satisfied themselves as to the third person's skill and care, and they were not allowed to say, after his decision had been given, that he had acted negligently or with want of skill. The result was that there must be judgment for the defendant, but without costs.

[Solicitors—White and Leonard; Ingoldby and Adken for Harry Nye, Brighton.]

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Court of Appeal (Lindley, M.R.,
Vaughan Williams and Romer,
L.JJ.) } 1900.
Jan. 24.

IN RE JOSEPH HARGREAVES (LIMITED).*

Company—Winding up—Jurisdiction of the Court
—Power to order production of documents—
Discretion—Companies Act, 1862, sec. 115.
Decision of Wright, J. (*ante*, p. 93), affirmed.

This was an appeal from a decision of Mr. Justice Wright's (reported *ante*, p. 93). The liquidator of the above-named company, which was in voluntary liquidation, applied under section 115 of the Companies Act, 1862, for production by the surveyor of taxes of the Bradford First District of three balance-sheets of the company which, while it was a going concern, had been left with him for income-tax assessment purposes. He declined to produce the balance-sheets, and was supported in his objection by the Board of Inland Revenue, which passed a resolution as follows:—"In the opinion of the Board of Inland Revenue, who have duly considered the question, the production of the documents referred to in the summons . . . would be prejudicial and injurious to the public interests and service." A minute of this resolution was proved by the secretary to the Board. It was intended to use these balance-sheets upon a misfeasance summons against the officers of the company. In support of the application it was contended that the liquidator represented the company which had issued the balance-sheets, and that no objection could be raised to the company itself seeing them. It was further contended that the objection ought to be made personally by the head of the objecting department. Mr. Justice Wright said that, though there might be cases in which the Court could require the principal officer of the department to come into Court and prove that the production of the documents sought to be produced would be against public policy, the usual practice was to accept the certificate of the Board. No ground had been shown for overruling the objection, and in the exercise of the discretion conferred upon him by section 115 of the Companies Act, 1862, he declined to order the production of the documents. The liquidator appealed.

Mr. P. Wheeler appeared for the liquidator; and Mr. Danekwerts, Q.C., and Mr. Rowlatt for the Board of Inland Revenue.

The Court dismissed the appeal.

The MASTER of the ROLLS said that the language of section 115 of the Companies Act, 1862, showed that a person who applied for production of documents under that section had no absolute right to an order. It had been decided over and over again that under that section the Judge had a discretion, and that if the Judge had considered the matter and had exercised his discretion the Court of Appeal would not interfere. He did not say that the Court of Appeal had no jurisdiction to interfere with the exercise by a Judge of first instance of his discretion, but *prima facie* the Court ought not to interfere. The appeal should be dismissed.

LORDS JUSTICES VAUGHAN WILLIAMS and ROMER concurred.

[Solicitors—Jaques and Co., for Neill and Holland, Bradford; Solicitor for Inland Revenue.]

Court of Appeal (A. L. Smith, Rigby, } 1900.
and Collins, L.JJ.) } Jan. 24.

THE KILMAHO.†

Ship—Salvage—Towage—Agreement—Reasonableness of agreement—Salvage award reduced—Costs.

This was an appeal by the defendants from the judgment of Mr. Justice Bucknill, reported in *The Times* of December 13 last. The action was brought by the owners, master, and crew of the steamship Tintore to recover salvage for services rendered to the defendants' steamship Kilmaho, her cargo and freight, off the north-west coast of Spain on September 26 and 27 of last year. The Tintore was a Spanish steamship of 1,326 tons gross register with a crew of 29 hands, and about 5 45 p.m. on September 26, when in latitude 45° 8' N., and longitude 8° 36' W., in the course of a voyage from Barcelona to Liverpool with a cargo of fruit and wine, she fell in with the Kilmaho exhibiting signals of distress. The Kilmaho was a steamship of 2,155 tons gross register with a crew of 20 hands. About 9 a.m. on September 26, when in latitude 45° 22' N., and longitude 8° 28' W., in the course of a voyage from Seville to Glasgow with a general cargo, she struck some submerged wreckage with her propeller and broke off the blades. The Kilmaho set what sails she could and endeavoured to make for Ferrol, which was about 90 miles distant. When the Tintore came up it was agreed that she should endeavour to tow the Kilmaho to Ferrol for £2,000, and a written agreement to that effect was entered into. The Kilmaho was made fast, and the towage commenced about 9 30 p.m. During the towage the weather was heavy and the Tintore sustained severe damage. The hawsers parted about 5 a.m. on September 27. The vessels were again made fast about 7 15 a.m., and the towage continued for another 15 minutes, when the hawsers again parted. Neither vessel had then any ropes left which were fit for towage. At this time the Kilmaho had been towed 50 miles, and was 40 miles from Ferrol and about 20 miles off the Spanish coast. The captain of the Tintore offered to take off the crew of the Kilmaho, but this was refused. It was then agreed that the Tintore should proceed to Ferrol and send assistance, and the master of the Kilmaho entered into a written agreement undertaking to pay £2,000 for all the services of the Tintore. The captain of the Kilmaho stated in his evidence that he protested against the agreement, but felt bound to sign it on account of the position of his vessel; the captain of the Tintore denied this. The Tintore then proceeded to Ferrol, which was reached about 2 30 p.m., and information of the position of the Kilmaho was given to the British Consul and a telegram sent to her owners. At 4 35 p.m. the Tintore left Ferrol in search of the Kilmaho, but failed to find her, and proceeded on her voyage for Liverpool. The Kilmaho was ultimately picked up by the steamship Tudor and brought safely by her into Ferrol on the night of the 23rd. The value of the Tintore was £10,800, of her cargo £7,200, and of her freight £600, in all £18,600. The value of the Kilmaho was £24,150, of her cargo £4,125, and of her freight at risk £323, in all £28,602. Mr. Justice Bucknill gave judgment for the plaintiffs for the £2,000 claimed.

Mr. F. LAING, Q.C., and Mr. LAURISTON BATTEN, for the defendants, contended that under the first agreement, which was a salvage agreement, nothing became due, success being essential to a claim under a salvage agreement. If services rendered under a salvage agreement were, though not successful, of some benefit to the ship in distress, then the Court would award something on a *quantum meruit*. But in the present case, when the second agreement was made the Kilmaho was in a worse position than when the first agreement was made, as she was out of the course of other vessels and much nearer to a rocky and dangerous coast, and this the learned Judge had found. Therefore the services rendered under the first agreement could not be taken into account as part of the consideration for the second

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

†Reported by W. F. BARRY, Esq., Barrister-at-Law.

agreement. Nothing being due under the first agreement, the master of the *Kilmaho*, being an agent of necessity, had no authority to bind his owners by the second agreement to pay anything for the services already rendered under the first agreement. Therefore, if those services formed part of the consideration for the second agreement, the master had no authority to bind his owners. That being so, the sum of £2,000 was an outrageous sum for merely going into Ferrol and sending assistance to the *Kilmaho*. The evidence of the master of the *Kilmaho* was to the effect that he signed the second agreement under protest, alleging that the sum was exorbitant and that the agreement would not be binding, but the position of the *Kilmaho* was such that he had no option but to sign it. This, no doubt, was denied by the master of the *Tintore*. The agreement was therefore made under duress. The Court would award some reasonable sum for the services rendered under the second agreement, taking into account the fact that the services only lasted a few hours, whereas the salvage services rendered by the *Tudor* occupied a much longer time, and only £1,500 was paid to her. They referred to "*Kennedy on Salvage*," p. 32; "*The Cheerful*" (11 P.D., 3); "*The Benlarig*" (14 P.D., 3); "*The Mark Lane*" (15 P.D., 135); "*The Rialto*" ([1891] P., 175); "*Akerblom v. Price*" (7 Q.B.D., 129); "*The Medina*" (2 P.D., 5).

MR. ASPINALL, Q.C., and MR. SUTTON TIMMIS, for the plaintiffs, contended that, apart from any agreement, the services rendered by the *Tintore* were very considerable, and, in looking at the proper amount to award, the Court would take into consideration the value of the *Kilmaho*, her freight, and cargo—namely, over £23,000. Secondly, the learned Judge had found, as a fact, that there was no duress in signing the second agreement. The first agreement—to tow to Ferrol—not having been performed the plaintiffs could not recover the agreed sum of £2,000 under it. Still, the evidence showed that the services rendered under that agreement conferred a benefit on the *Kilmaho*, as she was 50 miles nearer to Ferrol when the towing ceased, where she would be more likely to meet with other vessels and be in a better position than if she had not been towed. The learned Judge really found that a benefit had been conferred upon the *Kilmaho* by the towage, and he took that fact into account in awarding £2,000. The law was clear that where services rendered under a salvage agreement were not entirely successful, if benefit was conferred by them the Court would award a *quantum meruit*. "*The Aztec*" (3 Asp. Mar. Cas. (O.S.), 326); "*The Hestia*" ([1895] P., 193).

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that when the *Tintore* had towed the *Kilmaho* about 50 miles she was able to tow her no longer. It was not denied that, if the *Kilmaho* had been benefited by the towage services already rendered, she would have been entitled to some reward, though not to the agreed sum of £2,000. It was a question of fact whether the *Kilmaho* was left in a better position than when the towage began. It seemed to him that the learned Judge in the Court below came to the conclusion that the position of the *Kilmaho* was worse at that time than at the beginning of the towage. She was left on a lee shore out of the track of vessels with a nor-west wind blowing. In these circumstances nothing could have been recovered in respect of the services rendered up to that time. The second agreement was then made to the effect that the *Tintore* should go into Ferrol, about 40 miles away, give notice of the situation of the *Kilmaho*, and seek assistance for her. For those services the sum of £2,000 was to be paid. Was that an exorbitant sum to pay for those services? In his Lordship's opinion

it was an exorbitant sum for those services. It was suggested that part of the £2,000 was for the towage services already rendered. The answer to that suggestion was that the master had no authority to pledge his owners' credit for past services for which the owners were not liable. Therefore the owners of the *Tintore* were not entitled to recover the £2,000, but they were entitled to something, and in the circumstances the Court thought that £500 would be a proper sum.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS concurred.

MR. LAING asked for the costs of the appeal. This Court had decided in "*The Gipay Queen*" ([1895] P., 176) that the general rule was not to allow costs to an appellant in a salvage case who succeeded in reducing the amount of the salvage award, but that it was not a hard and fast rule. Where the award was considerably reduced, as in the present case, the general rule did not apply, and the successful appellants should be allowed their costs.

MR. ASPINALL contended that the general rule to allow no costs should apply.

The COURT said that as the award had been reduced from £2,000 to £500 the appellants ought to have the costs of the appeal, the costs in the Court below not being interfered with.

[Solicitors—Pritchard and Sons, for Batesons, Warr, and Wimshurst, Liverpool, for the plaintiffs; Botterell and Roche, for Vaughan and Roche, Cardiff.]

Q.B. Div. (Channell and)
Bucknill, JJ.)

1900.
Jan. 24.

CAVILL V. AMOS.*

Local Government—Hackney carriage—Unlicensed carriage—"Plying for hire"—Town Police Clauses Act, 1847 (10 and 11 Vict., c. 89), sec. 45.

Held, on the facts, that there had been no plying for hire.

This was a special case stated by two justices for the borough of Harwich, before whom an information was heard, laid by the respondent and charging the appellant, under section 45 of the Town Police Clauses Act, 1847, with permitting an unlicensed carriage belonging to him to be used as a hackney carriage plying for hire within the borough. The material facts were these:—The appellant was a cab proprietor at Harwich and owned licensed and unlicensed carriages, acting himself as driver, and employing others as drivers. On June 17, 1899, the appellant drove a landau licensed as a hackney carriage to the cabstand opposite the pier. On the arrival of a passenger steamer, the drivers on the stand solicited the passengers in the usual manner as they came off the pier. A party consisting of nine gentlemen walked along the cabstand and tried to obtain a hackney carriage to accommodate them all. In this they were unsuccessful, as there were no hackney carriages on the stand licensed to carry more than five persons. The appellant said to one of the party, named Jackson, "Will you go for a drive to-day?" Jackson answered, "We all want to go together; if you have a carriage to take the lot of us, we will have it." The appellant said, "I have one at my stables; if you like you can come and see it." Five of the party then got into the appellant's licensed carriage and he drove them to his stables without making any charge therefor, the remaining four of the party following on foot. The whole of this time the appellant was wearing his badge as a licensed driver. On arriving at the stables the appellant transferred the horse from the hackney

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

carriage to an unlicensed wagonette. The whole party got into the wagonette and the appellant (having previously removed his driver's badge) drove them out, returning again to the stables in about two hours and a half. On these facts the justices held that although, if the appellant had remained in his stables and been hired from there without any touting or soliciting, such a hire would no doubt have been lawful, he had, by wearing his badge and touting for customers on the pier, plied for hire and engaged himself to the party in question; and that he would not avoid the law and convert the engagement into a private hiring by merely transferring his customers (obtained by solicitation on a public cabstand) to an unlicensed carriage, which it would have been illegal for him to take on to such cabstand. The justices consequently held that there was a plying for hire within the meaning of the Act, and convicted the appellant.

Mr. C. E. Jones appeared for the appellant; and Mr. H. Tindal Atkinson for the respondent.

The COURT allowed the appeal.

MR. JUSTICE CHANNELL said there was no evidence upon which the justices could find a plying for hire. In ordinary cases, in order that there should be a plying for hire, the carriage itself should be exhibited. He thought, however, that a man might possibly ply for hire with a carriage without exhibiting it, by going about touting for customers. In this case, however, the appellant touted for customers for his licensed carriage. He did not solicit persons to go in the wagonette in the first instance. Consequently there was no plying for hire with the wagonette.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—F. P. Suthery, for the appellant; Morris and Bristowe, for Ward and Hugh Jones, Harwich.]

Q.B. Div. (Channell and Bucknill, JJ.) 1900.
Jan. 24.

STANTON V. BROWN.*

Landlord and Tenant—Ground Game Act, 1880—
Agreement—Validity.

An agreement reserving all sporting rights to the landlord, though void as to ground game, is good as to other sporting rights.

This was a special case stated by two justices of Gloucestershire before whom an information was heard charging the respondent with trespass on a certain farm in pursuit of game. It was proved that the respondent was shooting partridges over the farm on the occasion referred to in the information. He, however, had obtained permission to shoot over the farm from the tenant, and contended that the tenant was entitled to shoot and permit others to shoot over it. The tenant was holding the farm as a tenant from year to year on the terms, so far as they were applicable to a tenancy from year to year, of an expired lease dated March 12, 1888, whereby the farm was demised to the tenant subject to a reservation to the lessor "of the exclusive right of the lessor and his friends to enter upon the said farm for the purpose of sporting or otherwise." The justices were of opinion that the reservation in the lease was an agreement, condition, or arrangement which purported to divest or alienate the right of the tenant to kill or take ground game, and was therefore void under section 3 of the Ground Game Act, 1880. They were of opinion that the reservation of sporting rights was inseparable in its terms, and that there was no authority to support the contention that it would be held to be good in part as to winged game and void in part as

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

to ground game. They therefore were of opinion that the parties to the lease were thrown back upon their common law rights and that by the common law the tenant had the right to kill both the winged and ground game and could lawfully authorize the defendant to do so. They accordingly dismissed the information subject to the present case.

Mr. W. L. Richards appeared for the appellant.

The respondent did not appear.

The COURT allowed the appeal.

MR. JUSTICE CHANNELL said the case was quite clear. It was impossible to read section 3 of the Ground Game Act, 1880, which provided that "every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given and reserved to him by this Act . . . shall be void," as meaning that the agreement should be void in its entirety, and "*Beardmore v. Meakin*" (20 L.J., Notes of Cases, 8) showed that it did not mean that the reservation could not be void in its entirety either. One reason was that the section applied to agreements made before the Act as well as to agreements made after it; and it was impossible to suppose that the Legislature intended, in an Act conferring on occupiers the right of killing ground game, to destroy a reservation as to winged game. If the section did not effect that in the case of agreements made before the Act, it could not do it in the case of subsequent agreements. The respondent might have raised a much better defence on the ground of a claim of right ousting the justices' jurisdiction. But that point was not taken. The case must, therefore, be remitted to the justices with directions to convict.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—Heelas, Stroud (Glos.), for the appellant.]

Chan. Div. } 1900.
(Cozens-Hardy, J.) } Jan. 25.

IN RE THE ILLUSTRATED NEWSPAPER CORPORATION.*

Master and Servant—Journalist—Dismissal—
Notice—Reasonableness.

Held, on the facts, that a month's notice was reasonable.

This was a summons in a voluntary liquidation to determine whether a claim by Mrs. Aitken, the Scotch representative of the *Gentlewoman*, for 26 weeks' salary was well founded. The business of the above corporation was to carry on the *Gentlewoman*, an illustrated ladies' weekly sixpenny newspaper. Mrs. Aitken, apart from artists, was the sole representative of the *Gentlewoman* in Scotland. Mrs. Aitken's employment commenced in 1891, when the newspaper had recently been started. The terms of her employment were contained in a letter to her from the editor, dated June, 1891, and her answer to the editor's letter. The arrangement was to last in the first instance for three months. Mrs. Aitken was to provide a column at the rate of £1 1s. a column. The arrangement was modified, and the amount she received and the work she did were increased. The terms were finally arranged in April, 1896. The editor then wrote to Mrs. Aitken, proposing to put the financial relationship between her and the company on a new footing; he complained of certain charges, and added, "What I propose to do is to pay you 21s. per column for all matter we insert, and 31s. 6d. for all services and all petty-cash, stationery and postage-stamps being supplied. When from home by the editor's instructions, actual railway fares of

*Reported by D. FITCHAM, Esq., Barrister-at-Law.

course to be paid, and a daily allowance of 10s. to cover all expenses." This arrangement was accepted, with the alteration of 31s. 6d. to two guineas, with a minimum payment of three guineas a week. A settlement was come to monthly. In August, 1898, the editor wrote a letter, dismissing Mrs. Aitken. After making certain complaints, he wrote, "I therefore give you one month's notice to terminate your connexion with the paper, and as I prefer that you shall write no further word for it, I will send you a cheque equivalent to the amount of one month's dues, on receiving from you all papers, stationery, stamps, tickets of invitation, &c., which you now hold as our representative, and I shall be glad if you will do so at once." A tender of £12 12s. was afterwards made, but Mrs. Aitken claimed six months' salary. A resolution to wind up has since been passed.

Mr. GILMORE, for Mrs. Aitken, argued that a reasonable notice was six months.

Mr. MUIR MACKENZIE and Mr. ARCHIBALD READ, for the liquidator, contended not only that a month's notice was sufficient, but that there were sufficient grounds to dismiss Mrs. Aitken without notice.

Mr. MUIR MACKENZIE, however, in answer to the JUDGE, said the liquidator was willing to abide by the tender of a month's salary.

MR. JUSTICE COZENS-HARDY said he was not concerned to consider whether the company could have dismissed Mrs. Aitken without notice. He preferred not to approach that question. The company gave a month's notice, and tendered a month's salary. They were prepared to abide by that. That being so, all that he need consider was whether, under the circumstances, that was a reasonable notice. He thought it was. The payment was reckoned by the week, and made monthly. He saw no ground for saying that there was a contract for a yearly service. At the very outside a month's notice was sufficient. Mrs. Aitken would be allowed to prove for 12 guineas. He would allow no costs. The liquidator would get his costs out of the estate.

[Solicitors—Ingle, Holmes, and Sons; Burgess and Cosens.]

Q.B. Div. (Channell and Bucknill, JJ.) } 1900.
Jan. 25.

THE NATIONAL SPORTING CLUB (LIMITED) V. COPE.*
Licensing Acts—Offences—Sale without licence—Club.

The shareholders in a limited company carrying on the business of a club were composed chiefly of members of the club, but some were non-members.

Held, that the company could not sell intoxicating liquor to the club without a licence.

This was a special case stated by one of the metropolitan police magistrates on the hearing of certain informations laid against the appellant company under the Excise Acts for selling liquors and tobacco without the necessary licences. The material facts were as follows:—The appellants are a limited company duly registered and incorporated under the Companies Acts and carry on the business of a club at No. 43, King-street, Covent-garden, under the style of the National Sporting Club (Limited). The memorandum and articles of association of the company do not require that only members of the club shall be shareholders in the company; but the rules of the club require that every member of the club shall be a shareholder in the company. It was admitted that the company had no Excise licence

for the sale of any intoxicating liquor or tobacco. The capital of the company is £16,000, divided into 6,500 preference shares of £2 each and 1,500 ordinary shares of £2 each. The preference shares (of which 3,442 have been issued) were originally allotted to members of the club but are now held partly by members and partly by non-members; the holding by non-members is only of such shares as were not repurchaseable by the club by reason either of their being the property of members who had resigned, or because, having been held by members of the club who had died, they had become the property of their representatives. The preference shareholders are entitled to receive out of the profits of each year a preferential dividend at the rate of 8 per cent. per annum. The whole of the ordinary shares were taken by the two vendors of the business in part payment of the purchase money, and dividends are only payable upon such ordinary shares out of the surplus profits, if any, on the year's working after the payment of the preferential dividend of 8 per cent. The business of the company was acquired from the two vendors, who became two directors of the company, for £8,500 cash and 1,500 ordinary shares at £2 each. The rules of the club enable members to introduce guests to the club. On ordinary nights, being nights other than the "entertainment nights" mentioned below, the practice is for a member introducing a guest to write his (the member's) and the guest's name in a book kept for the purpose. On "entertainment nights" (that is to say, on evenings when an athletic or some other display is being held in the theatre of the club) the practice is as follows:—Tickets are issued to members desirous of introducing guests, such tickets being taken from a book containing the counterfoils of the same, and no person is allowed to be admitted to the club on such occasions unless he produces to the officials of the club a ticket on the counterfoil of which is written the name of the guest and the name of the member introducing such guest. There are provisions in the rules of the club for preventing persons not being members of the club from paying for any refreshment or tobacco supplied to them in the club, and the same must be paid for by a member. These provisions are made in good faith and notices calling attention to these regulations are and were, on the occasions to which the informations referred, posted in the different rooms on the club premises. Strict instructions were given both on those occasions and at other times to the *employees* of the club to comply with this rule, and several persons, including an ex-inspector of the Metropolitan Police, were specifically employed to see that such rule was carried out. All intoxicating liquor and tobacco served upon the club premises is supplied to the company and paid for by the company's cheque, and the profit, if any, upon the sale of the same as well as all profits derived from carrying on the club go into the funds of the company and are distributed in dividend among the shareholders. On the evenings of April 24 and May 1, 1899, which were "entertainment nights," the respondent, who was an officer of Inland Revenue, acting on the instructions of his superiors, in company with H. M. Thorpe, also an officer of Inland Revenue, obtained admission to the club by means of tickets which had been obtained from, and the counterfoils of which were signed by, a member. On April 24 the officers Cope and Thorpe arrived about 9 p.m. At the door they handed in an envelope containing the tickets, and passed in downstairs, through a room used as a refreshment room, into a theatre. A boxing competition was going on. About 10 p.m. there was an interval, and they went into the refreshment room they had passed through. There is a bar on the left coming from the theatre with tables there. Thorpe ordered supper for two, half a bottle of claret, and a glass of gin and

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

soda from a waiter. No question was asked as the officers entered as to their being members. They had signed no book. What Thorpe ordered was supplied and he paid the waiter. After that Cope ordered of the waiter two cigars and was supplied, paying 2s. After that the officers went to the bar. Cope ordered of the barmaid one gin and soda and one bottle of beer. She served the gin and was pouring the soda out, and as she was doing so she asked if Cope was a member, and without waiting for an answer finished pouring it out. Cope made no answer, but put down 2s. The beer was supplied, too. On May 1 the same officers went to the club again. Thorpe handed in the tickets. They were not asked any questions and signed no book. There was a boxing competition going on. At the interval about 10 the officers went into the refreshment room. Thorpe ordered supper, one gin and soda, and one lemonade and claret, and cigars of a waiter. They were supplied and Thorpe paid. The officers went to the bar and Cope ordered from the same barmaid as on April 24 one gin and soda and one bottle of Bass. She said, "Are you a member, Sir?" Cope said, "No." She said, "You know you are not allowed to pay," and did not supply the liquor. Having regard to the circumstances under which these officers were served and to all the evidence before him, and to the precaution against the service of non-members, the learned magistrate was of opinion that, for the purposes of this case, the respondent and his brother officer were in the position of members of the club, that they were, in fact, taken and assumed by the waiters and barmaid who supplied to them the refreshments, tobacco, and liquors as above stated to be members of the club, and under that assumption the officers were, in fact, supplied by the waiters and barmaid as members of the club. He thought that if the waiters or a barmaid had knowingly supplied non-members they would have acted beyond the scope of their authority in so doing. He found as a fact that they sold the liquors and tobacco to the officers thinking they were members; and he declined to deal with the case as one of a sale to non-members of the club. It was also proved, and the learned magistrate found as a fact, that the appellants on April 24 and May 1 made a practice of selling and did sell both intoxicating liquors of the kinds mentioned in the informations and tobacco to members of the club. The learned magistrate was of opinion, upon the evidence before him, that the appellant company was carrying on the business of a proprietary club, the goodwill and fixtures whereof the company had bought; that the company was a separate legal entity distinct from the club and also distinct from its shareholders; that the refreshments, liquors, and tobacco were the property of the company and not in any way the property of the members of the club; that the refreshments, liquors, and tobacco were sold by and for the company to the individual members of the club who were supplied therewith by the waiters and barmaid; that all the profits from the sale of the refreshments, liquors, and tobacco to members of the club, and from carrying on the club, were the property of, and received by, the company, and were divisible amongst the shareholders of the company as such according to their respective rights as such shareholders; that the managers, waiters, barmaid, and other servants employed in the club were the servants of the company; that there was no transfer of the property in any liquor or tobacco until the particular liquor or tobacco was supplied and handed to the member of the club ordering it, and who was in fact thereby bound to pay for it; and that such transaction of supplying and handing over the liquor and tobacco was a sale thereof. The learned magistrate accordingly convicted the company of two offences against 6 Geo. IV., c. 81, section 26,

for retailing spirits without a licence on April 24 and May 1 respectively; of two offences against the same enactment for dealing in tobacco without a licence on the same dates; of two offences against 23 and 24 Vict., c. 27, section 19, for selling wine by retail without a licence on the same dates; and of one offence against 4 and 5 Will. IV., c. 85, section 17, for retailing beer without a licence. He, however, stated the present case.

Mr. Lawson Walton, Q.C., and Mr. Charles Mathews appeared for the appellants; and the Attorney-General, Mr. Danckwerts, Q.C., and Mr. Rowlatt for the respondent.

The COURT, without hearing counsel for the respondent, dismissed the appeal.

MR. JUSTICE CHANNELL said a good many cases had been cited and the principle of those cases had been discussed; but this case must be decided on its own special facts. The law as to purely members' clubs must be taken to be settled—namely, that for such clubs no licence is required. The form gone through, when a member obtained and paid for liquor, was held not to be a sale of liquor such as to make the licensing laws applicable, but to be merely a form of distributing common property. The case was treated as being analogous to the case of persons living together in the same house and ordering a cask of beer on a joint account, making an arrangement among themselves that each should pay for the beer drunk by him. That being the principle applicable to members' clubs, it was further held that the principle was not defeated by the fact that the property is vested for the purposes of convenience in trustees. In such cases the property was in the trustees, and the members of the club had certainly no legal property in the excisable articles. They had, however, an interest in them, and the case was treated as if the property had been in them, and the obtaining and paying for liquor by the members was treated as a mere distribution of property, in which they had a common interest. Mr. Lawson Walton might be right in saying that a corporation might be constituted of the members of a club which would stand exactly in the position occupied by the trustees in the ordinary case of a members' club. That was, it might be, established by "*Newell v. Hemingway*" (58 L.J., M.C., 46), though the case was possibly to be explained on the ground that the proceedings were against the manager, and not against the company. He would express no opinion on these points. Then as to the case of proprietary clubs, he would imitate the caution of Mr. Justice Wright. He would not say that a proprietary club might not be so constituted as to come within the principle applicable to a members' club. But in the ordinary case the proprietor managed the whole thing, the property was his both legally and in fact, and he made a profit out of the concern. It was impossible to bring that case within the principle applicable to members' clubs. In the case of a members' club it did not signify whether there was a profit or not, because the profits were applied in the general purposes of the club and the transaction was still only a distribution. But in the case of a proprietary club the question whether the proprietor is carrying on the concern for profit was important, as was brought out by the Irish case of "*Lynam v. O'Reilly*" ([1898] 2 I.R., 48). It was clear that, in the case of an ordinary proprietary club, there was a sale and a sale by retail of refreshments to the members; and he thought that was decided by "*Bowyer v. Percy Supper Club*" (L.R. [1893], 2 Q.B., 154), because, although Mr. Justice Mathew said he did not agree with the magistrate on a question of fact, it was not to be assumed that the case was decided on that ground, and he thought the judgments

showed that it was not decided on that ground. It remained to deal with the present case. It was not a case in which the members of the club were incorporated into a corporation consisting wholly of the members of the club. If that had been so there would be much force in the argument that the corporation stood merely in the position of trustees, and that, though in law a corporation is a distinct legal entity from its members, the arrangement was merely a means of distributing among the members of the club and of the corporation, who would be identical, property in which they had a common interest. But here the company was not a mere incorporation of members of the club. There were outside shareholders. The company was therefore a legal entity which was not either in law or in fact identical with the club. To that outside body the property of the club belonged. Consequently the case was brought within the principle applicable to an ordinary proprietary club. True the proprietor was incorporated, but the corporate proprietor made profits and paid dividends. For the reasons he had given the case did not, in his opinion, come within the case of members' clubs, but was within that class of proprietary clubs where there is a sale from the proprietor to the members, both within the meaning of the Excise Acts and of section 3 of the Licensing Act, 1872.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—Lea and Lea, for the appellants; Solicitor to the Inland Revenue Commissioners, for the respondent.]

Court of Appeal (Lindley, M.R.,
Vaughan Williams and Romer, }
L.J.J.)

1900.
Jan. 26.

HOPE V. WALTER.*

Specific Performance—Agreement for purchase of freehold property—Decree refused.

At the date of the contract for the purchase of freehold premises they were, unknown both to vendor and purchaser, being kept as a disorderly house. On this fact coming to the knowledge of the purchaser he would not complete.

Decree of specific performance refused.

This was an appeal from a decision of Mr. Justice Cozens-Hardy dated March 17. The action was brought for specific performance of an agreement to purchase property which was described in the particulars of sale as "the eligible freehold property for investment comprising the brick-built corner house and shop." Then followed a description of the accommodation, and the property was described "as let on a quarterly tenancy under an agreement dated July 20, 1895, at a rent of £55 per annum." The action was brought by the vendors, who were trustees for sale. For the purpose of the action it was assumed that, at the date of the contract and for some time before, the property in question had been used for immoral purposes, and that in 1897 the tenant had been convicted for keeping it as a disorderly house. It was admitted that neither the vendors nor the purchaser were aware at the date of the contract of the improper use to which the premises were being put. The defendant resisted the claim for specific performance and counter-claimed for rescission of the contract upon the ground that the property was being used as a disorderly house. Mr. Justice Cozens-Hardy held, upon the authority of some observations of Vice-Chancellor Wigram in "Lucas v. James" (7 Ha., 410, 419), that inasmuch as both parties were ignorant of the existence

of the nuisance there was no sufficient ground for refusing specific performance, and he gave judgment for the plaintiffs. The defendant appealed.

Mr. Eve, Q.C., and Mr. Tomlin were for the defendant; and Mr. Astbury, Q.C., and Mr. R. B. Yardley for the plaintiffs.

The COURT allowed the appeal.

The MASTER of the ROLLS felt rather strongly that this was a case in which it would be wrong to grant specific performance. It would be almost a scandal if the Court having the power to refuse the extraordinary remedy of specific performance were to thrust down the throat of an innocent person the obligation of becoming the buyer of a house kept as a brothel. It was true that the plaintiffs did not know of the character of the house they were putting up for sale or of the conviction of their tenant; and the same observation applied to the purchaser, who was no more to blame than the plaintiffs. But before the time for completion he found it out. It was said that upon the authorities the defendant's objection ought not to prevail. His Lordship was not prepared to say that the counterclaim by which the defendant sought to set aside the contract could be supported. He thought it could not. Nor was he prepared to say that the plaintiffs could not maintain an action for damages. But when the Court was asked to exercise its extraordinary jurisdiction, he thought that this was a case in which the Court ought to hold its hand. Apart from the legal aspect of the case the position of a man who became the owner of a disorderly house was not an enviable one; it was a position to which a stigma attached, and under the provisions of the Criminal Law Amendment Act, 1885, if he did not turn out the tenant he would be liable to criminal proceedings. To force such a position as that upon a man was contrary to those principles of justice and fairness by which this Court was always guided in the exercise of its jurisdiction. The only authority which had any bearing on the case was that of "Lucas v. James," but that case was entirely distinguishable. There the purchaser resisted specific performance on the ground that there was a disreputable house some doors off the premises he had contracted to buy. That was a totally different case from this. His Lordship based his judgment in this case upon the grounds that this Court would not compel a man to buy property which, if he took no steps to prevent it, would expose him as owner to criminal proceedings by reason of its state at the time of the sale, unless he knew or ought to have known of the state of the property. The appeal would be allowed.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

LORD JUSTICE ROMER said that he felt more doubt on the subject than the Master of the Rolls, but was not prepared to differ from the other members of the Court.

[Solicitors—Attree, Johnson, and Ward; Shoubridge and May.]

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.J.J.)

1900.
Jan. 26.

THE SNARK.*

Negligence—Employment of contractor—Liability of principal—Salvage operations—Wreck not properly lighted.

Decision of Gorell Barnes, J. (15 *The Times* L.R., 170) affirmed.

This was an appeal by the defendants from the judgment of Mr. Justice Barnes, reported in 15 *The*

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Times L.R., 170; [1899] P., 74. The plaintiffs were the owners of the steamship *Vesta*, and the defendants were the owners of the barge *Snark*. The action was *in personam* to recover damages for injuries to the *Vesta*, owing to her having run upon the *Snark*, which had been sunk in the fairway of the Thames, off Cuckolds Point. The *Snark*, without any negligence on her part, had been sunk by a collision with a steamer on August 1, 1897, at about 12 15 a.m. The owners of the *Snark* employed a contractor named Forrest, who was called an "underwaterman" and was familiar with that class of work, being frequently employed by the Thames Conservancy, to raise the *Snark* for a fixed sum. Forrest went to the Thames Conservancy and gave them notice of the wreck, and on August 2 the Thames Conservancy sent a mark boat to the spot, for which the defendants paid them. Forrest then got his plant ready and relieved the Thames Conservancy of the task of marking the sunken barge, and on the next day the Thames Conservancy's mark boat was removed. Forrest was guilty of negligence in marking the barge, and in consequence the *Vesta* ran upon the sunken barge and was seriously damaged. The defendants contended that they were not liable for the default of Forrest, who was an independent contractor, and to whom the possession and control of the barge had been handed over. Mr. Justice Barnes held that, though the defendants had placed Forrest in physical custody of the barge for the sole purpose of raising it, they retained the possession and control, and that, therefore, they were liable.

Mr. F. LAING, Q.C., and Mr. LAURISTON BATTEN, for the defendants, contended that there was no duty on the defendants to raise the barge. They had a right to abandon it altogether. They had also a right to abandon possession of the barge to a contractor for the purpose of raising her, and the defendants would not be liable for the negligence of the contractor. The question of property was not material; the question was one of possession. The same principle must apply as in the case of the handing over of the possession of a barge afloat. In the case of a highway on land a person could not leave an obstruction upon it. But a person was not responsible for leaving a ship accidentally sunk at sea. In such cases as "*Hardaker v. Idle District Council*" ([1896], 1 Q.B., 335) the work which the contractor was employed to perform was itself dangerous work, and therefore it was held that the person could not escape liability by employing an independent contractor. In the present case the defendants employed Forrest to do a perfectly harmless thing—namely, to raise the sunken barge. The sunken barge was the danger, and not the raising of it. The case would be different if the defendants had employed Forrest to sink the barge. They also referred to "*Rex v. Watts*" (2 Esp., 675); "*Brown v. Mallett*" (5 C.B., 599); "*White v. Crisp*" (10 Ex., 321); "*The Douglas*" (7 P.D., 151); "*The Utopia*" ([1893], A.C., 492); "*The Crystal*" ([1894], A.C., 508); "*Holliday v. National Telephone Company*" ([1899], 2 Q.B., 392); "*Beven on Negligence*," second edition, vol. i., p. 493.

Mr. Carver, Q.C., and Mr. C. Stubbs, for the plaintiffs, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the defendants entered into a contract with Forrest under which Forrest was to raise the sunken barge. The defendants did not in any way abandon their property in the barge. Forrest was guilty of negligence in connexion with the marking of the sunken barge, in consequence of which the *Vesta*, while navigating the river, ran upon the barge and was damaged. The question was whether the defendants were liable for the damage so caused. It was said that they were not liable because they had

delegated the job and the proper lighting of the sunken barge to an independent contractor. The Thames was a highway, and, in his Lordship's opinion, Forrest was put to do work which was likely to cause injury to passing ships unless proper precautions were taken. This Court had in several cases, and notably in "*Hardaker v. Idle District Council*," laid down the law with regard to the liability of a person who employed an independent contractor to do certain work. In "*Penny v. Wimbledon Urban District Council*" ([1898], 2 Q.B., 212) Mr. Justice Bruce laid down the law thus:—"When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that if the necessary precautions are not taken he cannot escape liability by seeking to throw the blame on the contractor." That case came to this Court on appeal ([1899], 2 Q.B., 72) and he (the Lord Justice) had adopted every word of that, and he desired to adopt it again. The present case fell directly within that rule of law. It was said that that rule did not apply in its unqualified terms to matters arising at sea or in a navigable highway like the Thames. No doubt there was this distinction, that if a barge was sunk in the Thames, it was in the power of the owner to abandon it and to refuse to have anything more to do with it. In such a case it seemed that the Thames Conservancy must, under their statute, come in and remove the obstruction. It seemed to his Lordship from the judgment of the Privy Council in "*The Utopia*" that, though it was in the power of the owner to abandon the sunken vessel, until he abandoned it he was liable in the ordinary way, and if the work to be done was such that he could not escape liability by delegating its execution to an independent contractor, he was liable for the negligence of the independent contractor. In "*The Utopia*" the Privy Council said that "the result of these authorities may be thus expressed. The owner of a ship sunk, whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned, or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving an injury from her." Where was there any evidence that the owners of this barge had abandoned—or properly transferred—the possession, management, and control of the barge within the meaning of that decision? There was no such evidence. They employed Forrest to raise the barge for themselves. For these reasons, in his opinion, the judgment of the learned Judge was right.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS concurred.

[Solicitors—Stokes and Stokes, for the plaintiffs; J. A. and H. E. Farnfield, for the defendants.]

Chan. Div. }
(Cozens-Hardy, J.) }

1900.
Jan. 26.

IN RE THE COOLGARDIE GOLDFIELDS—EX PARTE
HAMILTON AND FLEMING.*

Solicitor—Liabilities—Personal undertaking.

Certain unstamped documents were allowed in evidence on the undertaking of the solicitor for the defendants (a company which shortly afterwards

*Reported by D. FITCAIRN, Esq., Barrister-at-Law.

ent into liquidation) to pay the stamps and duties: *held*, that the solicitors were personally liable to carry out this undertaking.

This was an important application arising out of the fact that a solicitor had, in order to put in evidence unstamped documents on behalf of his clients, in accordance with the usual practice of the Chancery Division, given his personal undertaking to pay for stamps and duties to a large amount, and his client turned out solvent. The application was heard on Wednesday, 17th inst.

His LORDSHIP gave judgment as follows:—In a case two applications were made by shareholders seeking to have their names removed from the register of shareholders in the company on the ground substantially that the prospectus on the faith of which they had applied for shares contained statements which were false. The motions came on before me in July last. Witnesses were examined and cross-examined. Counsel for the company, in the course of the cross-examination of one of the applicant's witnesses, proposed to put in certain documents which were unstamped and which plainly required to be stamped. I pointed out the difficulty, having regard to section 14 of the Stamp Act, 1891. That section, so far as is material, is as follows:—"Upon the production of an instrument chargeable with any duty as evidence in any Court of civil jurisdiction in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the Judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof it may, on payment to the officer of the Court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same and of a further sum of one pound, be received in evidence, and all just exceptions on other grounds." Counsel thereupon communicated with his professional client, and, upon an undertaking being given by the company's solicitors to stamp a certain deed, the matter proceeded. His course was adopted with reference to several similar documents which the company's counsel desired to use in opposition to the case of the applicants. The deeds and documents thus tendered did not, in my opinion, assist the company. On the contrary, they helped the applicants. In the result I allowed the applications with costs. The solicitor, who was present in Court, seems to have been under the impression that he was not giving a personal undertaking, and he immediately endeavoured to be relieved from his undertaking. It is stated that to stamp the documents will cost several hundred pounds. When an application by the solicitors was made to me on July 25, *ex parte*, I declined to entertain it without notice being given to the company and to the Inland Revenue authorities. His application is reported in the "Weekly Notes for 99," p. 128. Certain communications have since taken place between the solicitors and the Inland Revenue authorities, but nothing more has been done. The orders are not and cannot be drawn up, although some months have elapsed. The applicants still remain on the register. Meanwhile, the company has been wound up by the Court on the ground of insolvency. Under these circumstances the applicants now apply by motion for directions that the orders made on the granting of the motions on July 21 may be drawn up forthwith, omitting from such orders the unstamped documents, the company's liquidator undertaking not to appeal from the orders, or in the alternative that the solicitors may be committed for contempt in making default in carrying out their undertaking to stamp the

documents, or, as a further alternative, that the solicitors may be ordered to stamp such documents with the proper stamp duty within four days after service upon them of the order. The notice is served upon the company and its liquidator. They are willing to undertake to withdraw the pending appeals from my order, as they do not desire to prosecute those appeals. The other respondents are the solicitors who gave the undertaking and the Board of Commissioners for Inland Revenue. Notwithstanding the express language of section 14 of the Stamp Act, 1891, it is the settled practice to allow an unstamped document to be used upon the personal undertaking, not of the parties to the action, but of solicitors who are officers of the Court, to stamp it and to produce it so stamped before the order is drawn up. I have endeavoured to ascertain the origin of this practice. The earlier Stamp Acts, so far as my investigations have extended, do not contain any provision similar to section 14 of the Act of 1891. The Consolidation Act of 1854 (17 and 18 Vict., c. 83) only enacts in section 27 that every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not be properly stamped. But by section 28 of the Common Law Procedure Act, 1854, which received the Royal Assent two days later, it was enacted as follows:—"Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the Court whose duty it is to read such document to call the attention of the Judge to any omission or insufficiency of the stamp, and the document if unstamped or not sufficiently stamped shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty and the penalty required by statute, together with the additional penalty of £1 shall have been paid." Section 29 gives certain consequential directions. These sections were repealed in 1870, and subsequently re-enacted in section 16 of the Stamp Act, 1870. This again was repealed and in substance re-enacted in 1891, the chief distinction being that the obligation now rests directly upon the Judge, and not upon any officer of the Court. I am indebted to Mr. Lavie, the Registrar, for a note of the case which I believe to be the origin of the settled practice to which I have referred. On the 20th of July, 1855, a cause of "Jennings v. Christopher" came on before Sir John Romilly on motion for judgment, and the following is an extract from the Registrar's minute, fol. 218:—"Collins proceeds to show his title. The agreement referred to. Mr. Roupell says it is not stamped. The solicitor tenders the money to the Registrar, who protests. Court reads the Act as to this clause, and is of opinion that, though under the clause in the Act making these selections applicable to all Courts of civil jurisdiction, this Act is applicable to this Court, yet that there is no officer of this Court now, unless it be the Clerk of Records and Writs, who answers the description of the officer of Court whose duty it is to read the documents, &c. Certainly not the Registrar. Mr. Blaxland, the solicitor for the plaintiff, undertaking that the proper stamp shall be paid and affixed, let this cause proceed. And at the end of the entry relating to the cause are the following:—See that memorandum is duly stamped before drawing up decree. The memorandum was duly stamped before it was entered in the order." It will be observed that the Court accepted the undertaking of the solicitor, without requiring any signature of the Registrar's book or other document. The advantages of the practice are obvious. It is not always easy to settle at once what is the amount of the stamp duty, and, moreover, it may well be that when the amount required is known the cash is not at the moment in Court. It would be in the last degree inconvenient and undesirable to direct an action

to stand over in the middle of the trial in order that a document might be stamped. The Court, therefore, accepts the undertaking of its own officer that the document shall be stamped before the order is drawn up as satisfying the obligations of the statute. The Court looks to its own officer, and leaves that officer to claim indemnity from his own client. I am not aware of any difficulty having arisen until the present case. Sir John Romilly in 1862 refers to it as the ordinary course. See "*Re Ward*" (31 Beavan, p. 1), where he says, "The Court accepts the undertaking of solicitors to pay the penalty of not stamping an agreement and various other acts," and he proceeds to say:—"I am never informed whether they are performed or not, I have not the slightest doubt that they are performed in every case, but if it afterwards came to my knowledge that the act, without the performance of which the case could not have properly been heard, had not been performed, or that the money had not been paid, I should compel the solicitor, at the instance of anybody interested in the matter, to make good his undertaking or assertion on the faith of which the Court had acted; it is no answer to say that it was the duty of many other persons to look into the matter and see that the act was duly performed." See also "*Seton on Decrees*," 4th Ed., p. 26. In this state of circumstances it seems to me to be clear that an undertaking was given to the Court by the company's solicitor, acting through the member of their firm who was present in Court. This is not seriously disputed, for the application to be relieved from the undertaking pre-supposes that the undertaking was given. I think it is of the utmost importance that such an undertaking given by officers of the Court should not be released without the consent of the person or persons for whose benefit the undertaking was given. Those persons in the present case are the Commissioners for Inland Revenue. They, through their counsel, state that they have no power to waive the stamping of the documents, although they can and will in the present case waive penalties, and they insist for the protection of the Revenue that the undertaking given should be enforced. On the other hand, I think it is not just that the applicants, who have, by their own evidence, established a title to relief, should be prevented from obtaining relief by reason of the failure of their opponents or of their opponents' solicitors to stamp documents which were put in, not by the applicants, but by the opponents. If I make no order on the present motion, it may be that the applicants will have to pay several hundred pounds before they can get the order made by me in July last perfected. I think I shall be doing what is fair between the parties and right towards the Inland Revenue authorities by directing the order to be forthwith drawn up without entering the unstamped documents, the company undertaking to withdraw their appeals. I must order the solicitors upon their undertaking to cause these documents to be produced to Mr. King, the Registrar, at his room, properly stamped, within four days after service upon them of this order. It will be stated on the face of the order that the Inland Revenue Commissioners agree to waive penalties, and I shall expressly reserve liberty to the Commissioners to apply in case this order is not obeyed by the solicitors. The solicitors must pay the costs of the applicants of this motion. In point of form I think the motion should be headed "*In the Matter of the Solicitors*," and I direct it to be amended accordingly.

Mr. Martelli was for the applicants; Mr. M. Muir Mackenzie for the solicitor; Mr. Vaughan Hawkins for the Inland Revenue; and Mr. A. Russell for the liquidator.

[Solicitors—Morton, Cutler, and Co.; Solicitor to the Inland Revenue; Solicitor to the Board of Trade.]

Chan. Div. }
(Covens-Hardy, J.) }

1900.
Jan. 26.

IN RE THE BERNICIA STEAMSHIP (LIMITED).*

Company—Memorandum of Association—Enlargement of.

Semble, the Court will sanction resolutions for the enlargement of the objects of a company under the Companies (Memorandum of Association) Act, 1890, only where there is no opposition to the petition.

This was a petition to obtain the sanction of the Court to resolutions that had been passed for the enlargement of the objects of the above company under the Companies (Memorandum of Association) Act, 1890. The company was formed to purchase and work a particular steamship, and on the sale or loss of that ship to acquire any other steamship. The statement of the objects in the original memorandum limited them in this way, "but there shall only be held one steamship at the same time." The company proposed to take power to hold and employ any number of ships. No shareholder opposed and the only creditor consented. The matter was argued Jan. 19 by Mr. Vernon Smith, Q.C., and Mr. A. Chitty on behalf of the company.

After stating the facts, MR. JUSTICE COVENS-HARDY said he thought this case was brought within the terms of the Companies (Memorandum of Association) Act, 1890, so that he had jurisdiction to make the order asked. But it remained to consider whether in his discretion he ought to make the order. He felt some difficulty because of the wide nature of the change proposed. It would turn a single-ship company into a company which might become owners of the whole fleet of the Cunard Company or of the P. and O. Company. Such a change was more usually and more properly effected by what was known as a reconstruction. When that course was adopted the Legislature had jealously guarded the interests of dissentient shareholders. No such protection was afforded under the Act of 1890. It seemed to him that the Court ought not to allow the Companies Act, 1862, to be evaded by means of an alteration in the memorandum of association. If, therefore, any shareholder had appeared to oppose the petition, he did not think he should have felt at liberty to confirm the special resolution. But there was no opposing shareholder. The only creditor consented. Nobody would be prejudiced. The heavy expense of reconstruction would be avoided. Under those circumstances he did not see any sufficient reason for refusing to make the order.

[Solicitors—George Reader and Co.]

Q.B. Div. (Channell }
and Bucknill, JJ.) }

1900.
Jan. 26.

OVER V. HARWOOD.†

Vaccination—Proof of offence—Evidence, sufficiency of—Onus of proof.

This was a special case stated by six justices for the county of Surrey on the hearing of an information under section 31 of the Vaccination Act, 1867, charging the appellant with disobedience to an order made under that section and requiring him to cause a child of his to be vaccinated. On the hearing of the information the appellant was not present, but was represented by counsel. In order to prove the disobedience to the order the respondent, who was a vaccination officer appointed by the guardians of the Farnham Union, deposed that he

*Reported by D. FITZGERALD, Esq., Barrister-at-Law.

†Reported by A. F. JENKIN, Esq., Barrister-at-Law.

had not received any certificate of successful vaccination of the child in question, nor any certificate that the child was unfit to be vaccinated, nor to be insusceptible to vaccination, and he produced the register of vaccinations kept by him. No evidence was submitted on behalf of the appellant, nor any other evidence on behalf of the prosecution. On behalf of the appellant it was submitted that the evidence given by the respondent was not sufficient proof that the appellant was guilty of the offence charged. On behalf of the respondent it was contended that the evidence adduced was sufficient proof that the appellant had not complied with the order requiring the vaccination of the child. The justices accepted the respondent's view, and convicted the appellant subject to the present case.

Mr. Schultess-Young appeared for the appellant; and Mr. Ryde for the respondent.

The COURT dismissed the appeal.

MR. JUSTICE CHANNELL, after adverting to the manner in which the case was stated, said the substantial point, and the point intended to be raised, was whether there was, not sufficient evidence, for that was a question for the magistrates, but any evidence of disobedience to the order on the part of the defendant. The burden of proof was on the prosecution. It was not uncommon in modern Acts to insert provisions imposing the burden of proof on the defendant with reference to a negative. That, however, was not done in the case of the offence under consideration. Indeed, the words in the section, "or shall not be shown to be then unfit to be vaccinated, or to be insusceptible of vaccination," which seemed to throw the burden of proving unfitness for, or insusceptibility to, vaccination on the defendant, tended to show that it was not intended to throw the burden of proof on the defendant with reference to the matter now in question. How, then, was the fact that the child had not been vaccinated to be proved? It was a negative proposition. If the proceedings were of a civil character, that alone would throw the burden on the defendant. But that rule did not apply to criminal proceedings. Some evidence must, therefore, be given by the prosecutor, since the case did not come within the provisions of section 30 (2) of the Summary Jurisdiction Act, 1879, as to exceptions, provisos, excuses, and qualifications. It being then necessary that there should be some evidence that the child was not vaccinated, the question was what evidence was required. Very generally there was no way of proving a negative except by a presumption. In the present case there was machinery whereby if a child is vaccinated the fact has to be notified. If there was no notification, some one had omitted to do his duty. The fact, therefore, that there was no notification was, in his opinion, *prima facie* evidence of the negative proposition that the child was not vaccinated. It was said that it was not the best evidence that could have been adduced. But the Court had nothing to do with that. If the public vaccinator had been called, it would still have been necessary to rely on presumption. The justices might have refused to be satisfied with the presumption arising on the vaccination officer's evidence, and have required further evidence. But the Court could not interfere with their decision on that matter.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—H. T. Nicholson, for the appellant; Johnson, Weatherall, and Bent, for Potter and Crundwell, for the respondent.]

Court of Appeal (A. L. Smith, } 1900.
Rigby, and Collins, L.J.J.) } Jan. 27.

MAUDE V. BROOK.*

Master and Servant—Master's liability to servant

—Workmen's Compensation Act, 1897—"Scaffolding," what is.

Loose trestles, with boards laid across them to enable plasterers to get to the top of the walls and ceilings of a room, held to be "scaffolding" (Collins, L.J., dissenting).

This was an appeal from the award of Judge Greenhow, the Leeds County Court Judge, in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, Ann Maude, was the widow of a workman, Jeremiah Maude, who at the time of the accident was in the employment of the appellant, J. Herbert Brook. The case raised two questions—first, whether the deceased man was employed in the "construction" of a building; and, secondly, whether the building was being constructed by means of a "scaffolding" within the meaning of section 7, subsection 1, of the Workmen's Compensation Act, 1897. The appellant, who was a master plasterer, was building two villas in November, 1898, and the deceased man was employed with other workmen on the inside plastering work of the villas. As will be seen below, it was disputed that the appellant was himself building the villas, but the Court said that it must be taken that the appellant was the builder. The villas were more than 30ft. high. To enable the plasterers to get up to the top of the walls and ceilings of the rooms loose trestles with boards laid across them were used. The trestles were about 4ft. high, and some of the workmen were at the time of the accident working on the trestles. The deceased man was on November 24, 1898, standing on the top landing of one of the houses, but not on a trestle, plastering the walls and smoothing the plaster down with a hand "float." By some means, of which no evidence was given, he fell over the staircase where the banisters had not then been put up and was killed. At the time of the accident the house had been roofed in, and the outside scaffolding had been taken down, but the inside plastering work had not been completed. The respondent having claimed compensation under the Act, the appellant in his answer stated that he denied liability to pay compensation upon the ground that "the employment of the said Jeremiah Maude was not an employment to which the Act applies." At the conclusion of the evidence before the County Court Judge it was submitted on behalf of the present appellant that there was nothing being constructed or repaired by means of a scaffolding; that the trestles and boards did not constitute a scaffolding; that the building was complete, the roof being on; and that plastering was not part of the construction of a house. "*Wood v. Walsh*" ([1899], 1 Q.B., 1,009) was referred to. The County Court Judge was of opinion that the plastering of the walls and ceilings of the unfinished house was part of its construction, and that the arrangement of trestles and boards, although inside the house, was a "scaffolding" within the Act. It formed a platform used by the workmen engaged in the higher plastering to reach their work. Although the deceased man was not using the scaffolding himself and did not fall from it, he (the County Court Judge) was of opinion that the deceased man died from injury by accident arising out of and in the course of his employment in a building exceeding 30ft. in height (which was not contested) which was being constructed by means of a scaffolding, and that his widow was entitled to compensation. He accordingly made an award in her favour for £296. The appellant gave notice of appeal upon the grounds:—(1) That the employment of the deceased was not an employment to which the Workmen's Compensation Act, 1897, applied; (2) that the appellant was not the undertaker

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

within the meaning of the Act; and (3) that there was no evidence in support of the findings of the County Court Judge.

Mr. RUEGG, Q.C. (Mr. A. Powell with him), for the appellant, said that there was one ground of appeal—namely, that the appellant was not the “undertaker” within the meaning of section 7 of the Workmen’s Compensation Act, 1897. The point was that the appellant was not the builder of these houses, but merely a master plasterer who did the plastering work, and, therefore, did not come within the definition of “undertakers” in section 7, subsection 2, which meant, in the case of a building, “the persons undertaking the construction, repair, or demolition.” It was said that that point was not taken before the County Court Judge.

Mr. J. A. COMPTON, who appeared for the respondent, said that in his opening statement to the County Court Judge, as appeared from the Judge’s notes, he said that the appellant was building the two houses, and as that did not seem to be disputed no evidence was called upon it. The point was not specifically raised in the answer to the claim for compensation, nor was it taken before the County Court Judge. If it had been taken before the Judge, he was instructed that the respondent could have called evidence to the effect that the appellant was building these houses himself upon his own land.

Mr. RUEGG said that the answer of the appellant to the claim for compensation raised the point, because it raised every condition necessary to bring the employment within the Act, one of the conditions being that the employment must be by the person undertaking the construction of the building. It was not necessary to take it before the County Court Judge, because it lay upon the respondent to bring his case within the Act, and it was open now to the appellant to show that the respondent had not done so.

LORD JUSTICE A. L. SMITH.—We do not think that the appellant can raise that point now. It was open to him to raise it before the County Court Judge, but he did not do so. If he had raised it there the respondent could have called evidence with the view of showing that the appellant was himself building these houses. That being so, the point is not open now.

Mr. RUEGG said that the two other questions were whether, at the time of the accident, the building was being “constructed,” and, if so, whether it was being constructed by means of a “scaffolding.” It was not now contended that plastering could not be construction, it being a question of fact for the Judge in each case. But the building was not being constructed by means of a “scaffolding.” The Legislature never intended two trestles and a board across the top placed inside a room to be a “scaffolding.” The word “scaffolding” was used in its ordinary and popular sense as a structure of poles, uprights, boards, &c., fastened together. It must, as Lord Justice Collins said in “Hoddinott v. Newton, Chambers, and Co.” ([1899], 1 Q.B., 1,018), be interpreted by reference to the nature of the work for which the Legislature contemplated that it was to be used; that was, the construction, repair, or demolition of a building, exceeding 30ft. in height, as a whole. No one would in ordinary language say that these trestles and boards were a scaffolding. The danger contemplated was that incidental to dealing with a building more than 30ft. high by means of a scaffolding adequate to such a building. The learned Judge was therefore wrong.

Mr. A. POWELL followed on the same side. The scaffolding must be one necessary for the particular building under construction. The building 30ft. high was the dominating element. The scaffolding must be of such a height and of such a nature as to enable the building 30ft. high to be constructed. Why otherwise

should a minimum height of 30ft. be fixed for the building?

LORD JUSTICE A. L. SMITH.—I can put many conundrums upon this Act as good as that. (Laughter.)

Mr. POWELL said that it seemed that the provision as to the scaffolding and the building 30ft. in height came from the schedule to the Notice of Accidents Act, 1894, and section 23, subsection 2, of the Factory and Workshop Act, 1895.

LORD JUSTICE COLLINS.—Would a board placed across two chairs in a drawing-room be a scaffolding? The Legislature could not have intended such an arrangement to be a scaffolding.

Mr. J. A. COMPTON, for the respondent, contended that there was evidence upon which the County Court Judge could find that the arrangement of trestles and boards was a scaffolding. It was a question of fact in each case for the Judge. It was necessary to have some sort of scaffolding in the room to do the plastering work, and as it was impossible to have an ordinary scaffolding with poles, an arrangement of trestles and boards was used. It was a mere question of convenience which was used. A plasterers’ scaffolding was well known in the trade. He referred to the definition of “trestle” in Webster’s Dictionary and in the Century and Imperial Dictionaries.

Mr. RUEGG, Q.C., replied.

The COURT dismissed the appeal, LORD JUSTICE COLLINS dissenting.

LORD JUSTICE A. L. SMITH said that they must take it that the appellant was the builder of these houses. They were not completed, and the deceased man was engaged in doing plastering work. In his opinion the County Court Judge was justified in holding that at the time of the accident the building was being “constructed.” The next question was whether the building was being constructed by means of a “scaffolding.” The Act required that the building should be 30ft. high, but there was nothing in the Act requiring the scaffolding to be 30ft. high, nor anything limiting the accident to a fall off the scaffolding. It had been held that it was immaterial whether the scaffolding was inside or outside the building. Suppose a house was being built by means of trestles and boards outside, with a ladder to give access thereto, would not a County Court Judge be entitled to find that the house was being constructed by means of a scaffolding? This Court had always refused to give a definition of the word “scaffolding.” The Court could only say in each case whether there was any evidence to entitle the County Court Judge to find that the arrangement was a scaffolding. It seemed to him that if trestles and boards were used outside a house for the purpose of constructing it, there would be evidence that the trestles and boards formed a scaffolding. He could not say as a matter of law that if they were used inside the house for the purpose of completing it they were not a scaffolding. There was nothing in the Act requiring the scaffolding to be one composed of poles and supports. Therefore he could not say that there was no evidence to justify the County Court Judge in finding that this arrangement was a scaffolding. A good many examples of possibly ridiculous results from so holding were put in the argument. All he could say was that in his experience of construing the Act during the last year and a quarter there had been some apparently ridiculous results following from the language used in the Act. But there was the Act. In his opinion the appeal should be dismissed.

LORD JUSTICE RIGBY concurred. In his opinion, in construing the Act, they were not at liberty to confine the word “scaffolding” to the most usual form of scaffolding. A thing might be a scaffolding whether it was a usual or an unusual arrangement. A thing might

scaffolding though no poles were used in

JUSTICE COLLINS said that he regretted that he was not able to agree with his brethren. He could not do so entirely with his judgment in "*Hoddinott v. Chambers, and Co.*" Having carefully reconsidered the matter, he adhered to what he had said in that case, and he did not think it necessary to repeat it. His safe rule was to give to the words in question their ordinary popular meaning. The words must be taken in their context. He could not think that a scaffold upon two trestles in a room came within the meaning of the word "scaffolding" as used in this section. He did not think that any ordinary uninstructed person would understand the word "scaffolding" to mean a scaffolding of poles and supports used in the construction, repair, or demolition of a building. In "*Hoddinott v. Newton, Chambers, and Co.*" he accepted the responsibility of giving some meaning to the word "scaffolding" without attempting to define its exact meaning. In "*Hoddinott v. Newton, Chambers, and Co.*" he attempted to state the considerations which he had taken into account in ascertaining whether a scaffolding was or was not a scaffolding. It was his opinion that his view was supported by the decision in "*Wood v. Walsh*" ([1899], 1 Q.B., 1,009). In that case, workmen, who were painting the outside of a building, used ladders for the purpose, and a board was placed across the end of one of the ladders, the board resting on a window-sill. If the trestles and ladders were a scaffolding in the present case, he did not think the arrangement in "*Wood v. Walsh*" was a scaffolding. Lord Justice A. L. Smith said that the ladder was not a scaffolding, as to the arrangement of a plank attached to a ladder whether it was a scaffolding was a question of fact, and the arbitrator found that it was not a scaffolding. In "*Hoddinott v. Chambers, and Co.*" there was an arrangement of boards resting on ledgers secured to iron inside a building. Lord Justice A. L. Smith said that there was evidence that the arrangement was a scaffolding, though it was not necessary to decide whether it was or was not. He (Lord Justice Collins) was of opinion that it was not a scaffolding, and he thought that Lord Justice Bouverie took the same view as he did, because

Justice said that the words construction, scaffolding, should not be considered separately together, for they had a mutual bearing upon each other. That case afforded some guidance as to the meaning of a scaffolding. The result of holding that the arrangement of trestles and boards to be a scaffolding was a strange indeed. It was admitted that the arrangement would cover the case of a workman employed in building away from the scaffolding. It must be as if a house was completed except the inside plaster, and if only one plasterer was on a board upon two trestles finishing the plastering of a room, a workman, who stumbled when going up, was injured, could claim compensation under the Workmen's Compensation Act. That would be a strange result. The word "scaffolding" meant, in his opinion, one system of scaffolding, capable of being used for the whole of the building or the whole of the repair of the building. JUSTICE A. L. SMITH said that he wished to make the observation. In "*Hoddinott v. Newton, Chambers, and Co.*" he had merely said that, in his opinion, there was evidence upon which the County Judge was entitled to find that the structure was

a scaffolding. So also in "*Wood v. Walsh*," he merely declined to interfere with the finding of the County Court Judge.

[Solicitors—W. Hurd and Son, for H. A. Child, Leeds, for the appellant; G. Trenam, for Milling and Dodgson, Leeds, for the respondent.]

Q.B. Div. (Channell and Bucknill, JJ.) 1900.
Jan. 27.

THE QUEEN V. THE JUSTICES OF SOMERSET.*

Justices—Appeals to quarter sessions—Notice of appeal.

Personal service of a notice of appeal to quarter sessions from a conviction under the Licensing Acts is not necessary.

In this case cause was shown against a *mandamus* calling upon the justices, sitting in quarter sessions, to hear and determine an appeal from a conviction under the Licensing Acts. Mr. John Talbot was convicted at the petty sessions held at Kilmersdon of unlawfully permitting drunkenness upon licensed premises. The information was preferred by Walter Rawlings, the superintendent of police for the division of Frome. On the day when the information was heard, Rawlings was away on his holiday, and he was represented at the hearing by the superintendent of a neighbouring division, a man named Rutherford. At the conclusion of the case, Mr. Talbot's solicitor informed Rutherford that he intended to appeal. Rutherford thereupon undertook to see that the notice of appeal duly came to the hands of Rawlings. On the day following, Rutherford left the notice of appeal at the police-station at Frome, with instructions that it should be brought to the notice of Rawlings. The notice was left in Rawlings's office awaiting his return, which did not take place until eight days after the conviction. On the hearing of the appeal, an objection was taken on the ground that the notice of appeal had not been duly served upon "the other party" in accordance with section 31 (2) of the Summary Jurisdiction Act, 1879, which requires that the appellant shall, "within seven days after the day on which the said decision of the Court was given, give notice of appeal by serving on the other party . . . notice in writing of his intention to appeal . . ." The justices, the chairman of whom was Sir Edward Fry, being of opinion that the service required by section 31 (2) was a personal service, refused to hear the appeal.

Mr. F. E. WEATHERS, in showing cause, referred to subsection 7 of section 31, which provides that "every notice in writing required by the section to be given by an appellant . . . may be transmitted as a registered letter by post in the ordinary way, and shall be deemed to have been served at the time when it would be delivered in the ordinary course of post," and argued that if this form of service were not adopted, the service must be personal. The service on Rutherford was not effective, because, though he acted as an advocate for Rawlings at the hearing at petty sessions, his representation of Rawlings ended with the hearing and he therefore had no authority to accept service on his behalf, see "*The Queen v. the Justices of Oxfordshire*" ([1893], 2 Q.B., 149).

Mr. GARLAND, in support of the rule, contended that personal service was not necessary. He cited "*The Queen v. the Justices of Essex*" ([1892], 1 Q.B., 490); "*The Queen v. the Justices of Yorkshire, North Riding*" (7 Q.B., 154); and "*The Queen v. the*

*Reported by O. G. WILBRAHAM, Esq., Barrister-at-Law

Freemen of Leicester" (15 Q.B., 671). He stated that those cases were not cited to the justices.

The COURT made the rule absolute.

MR. JUSTICE CHANNELL said that the history of the case was that the cases cited in support of the rule were not brought to the attention of the Court below, and they had consequently held that personal service was necessary. In so holding they were wrong, and, as they had based their decision upon an erroneous point of law, the *mandamus* must go. If they had merely held that there was no service, this Court could not have interfered with their decision.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—R. W. Wheatley, Son, and Daniel, for Crutwell, Daniel, and Co., Frome, for the justices; Bell, Brodrick, and Gray, for Sandford, Bristol, for Talbot.]

Q.B. Div. (Channell and) 1900.
Bucknill, JJ.) Jan. 27.

THE LONDON, BRINGTON, AND SOUTH COAST RAILWAY COMPANY V. FAIRBROTHER.*

Justices—Jurisdiction—*Bona fide* question of right.

The Railways Regulation Act, 1840, enables justices to try a question of right arising in connexion with a prosecution for wilful trespass thereunder.

This was a case stated by justices of Surrey upon an information laid by the railway company (the appellants) against the respondent for trespassing upon premises, known as the station approach, at the appellants' station at Dorking, and for refusing to quit the same on being requested so to do by a properly-qualified official of the company, contrary to the Railways Regulation Act, 1840, section 16. The justices dismissed the information on the ground that they had no jurisdiction to hear it, the respondent having, as they found, raised a *bona fide* question of right. The respondent is a cab-driver, and on July 1 last he drove his cab up the approach road to a place in front of the booking-office and refused to go, saying that he had as much right to be there as any one else. At the hearing of the information it was alleged on behalf of the railway company that the road in question was a private road, and a conveyance was produced in support of their title. The solicitor who appeared for the respondent called no evidence, but contended that the road in question was one over which there was a public right of way. Section 16 of the Railways Regulation Act, 1840, provides, so far as is material to this case, as follows:—"If any person . . . shall wilfully trespass upon any railway, or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the company, every person so offending . . . shall . . . when convicted before" a justice of the peace " (who is hereby authorized and required, upon complaint to him upon oath, to take cognisance thereof, and to act summarily in the premises), shall, in the discretion of such justice, forfeit to her Majesty any sum not exceeding £5. . . ."

MR. GEORGE ELLIOTT, on behalf of the railway company, contended that, as the Act which gave the justices jurisdiction was in such terms that it was impossible for them to hear and determine the information without trying the question of title, it necessarily conferred upon them the jurisdiction to try such question. He cited "*Foulger v. Steadman*" (L.R., 8 Q.B., 65).

The respondent was not represented.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The COURT allowed the appeal upon the ground stated by the learned counsel.

[Solicitors—Rose and Co., for William J. Down, Dorking.]

Q.B. Div. (Channell and) 1900.
Bucknill, JJ.) Jan. 27.

THE MAYOR, &C., OF SOUTHEND-ON-SEA V. DAVIS.*

Local Government—By-law—Validity.

This was an appeal by case stated from justices of Southend-on-Sea. An information was preferred by the appellants against the respondent charging him with unlawfully using within the borough of Southend-on-Sea an organ worked by steam, contrary to one of the by-laws in force within the borough. The question raised by the case was whether the by-law under which the information was preferred was reasonable and valid. The by-law was as follows:—"No organ or other musical instrument worked by steam or other mechanical means, nor any steam whistle or steam horn, shall be used within the borough, provided always that this by-law shall not apply to any locomotive or steam engine in use on any railway within the borough nor to any steam whistle or steam trumpet within the meaning of the Factories (Steam Whistles) Act, 1878." The by-law was made under the provisions of the Southend-on-Sea Corporation Act, 1895, section 44 of which provides:—"The powers conferred upon the corporation by the Municipal Corporations Acts to make and enforce by-laws for the good rule and government of the borough shall be deemed to include the power to make and enforce by-laws to regulate, or if the council think fit to prohibit, the use of any organ or other musical instrument worked by steam or other mechanical means, or any steam whistle or horn within the borough, provided always that this section shall not apply to any locomotive or steam engine in use on any railway within the borough." The respondent is a travelling showman, and in September last he erected in a field within the borough a round-about worked by steam, to which was attached an organ, also worked by steam. The organ was in the centre of a field 116 yards from a public road, and played from 7 a.m. until 9 30 p.m. The justices held that the by-law was unreasonable and invalid, and on that ground refused to convict the respondent.

MR. MACMORRAN, Q.C. (with whom was Mr. Herbert Smith), for the appellants, argued that the by-law, being in the terms of the Act of Parliament, could not be impeached for unreasonableness.

MR. W. H. STEVENSON contended that the effect of the local Act was to empower the local authority to make such by-laws with respect to musical instruments worked by mechanical means as could be made under the Municipal Corporations Acts, and that such by-laws must accordingly be limited to the purpose of providing for the good rule and government of the borough. The terms of the by-law in question were large enough to include the case of a man amusing himself with a musical box in his private house. That was manifestly not required for the good rule and government of the borough, and the by-law was, therefore, invalid. He cited "*Kruse v. Johnson*" ([1898], 2 Q.B., 91).

The COURT allowed the appeal, remitting the case to the justices, with the opinion that the by-law was valid.

MR. JUSTICE CHANNELL said that section 44 of the local Act gave the local authority large powers with reference to mechanical musical instruments, and it was referred to the local authority to decide whether such musical instruments were a nuisance, and whether it was

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

necessary to prohibit them. If the by-law had confined itself to steam organs, no one could have doubted its validity or reasonableness. He thought it was unfortunate that the proviso in favour of whistles on locomotives had not been extended to small mechanical instruments in private houses. But the omission to make such a proviso did not render the by-law unreasonable.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—J. E. and H. Scott, for W. H. Snow, Town Clerk, Southend-on-Sea, for the appellant; Godfrey and Webb, for T. Watson and Wright, Leicester, for the respondent.]

Court of Appeal (A. L. Smith } 1900.
and Collins, L.J.J.) } Jan. 29.

HURBALL V. EVERITT AND SONS (LIMITED).*

Practice—Appeal—Security for costs—Arbitration under Workmen's Compensation Act, 1897.

Where an award was made in favour of the employers, but execution stayed pending an appeal, the Court refused to order security for costs.

This was an application by employers for an order for security for the costs of a workman's appeal from an award of a County Court Judge in an arbitration under the Workmen's Compensation Act.

MR. ROWLATT appeared for the employers in support of the application. The workman was without sufficient means to pay the employers' costs of the appeal if it was unsuccessful, and he was being assisted in these proceedings by a number of workmen.

MR. SYLVAIN MAYER appeared for the workman, who had made an affidavit stating that he was fighting the case on his own account. A point of law had been raised and argued at the hearing of the arbitration, and the County Court Judge, in making an award in favour of the employers with costs, had ordered a stay of execution pending an appeal, so that the point of law might be decided by the Court of Appeal.

The COURT dismissed the application.

LORD JUSTICE A. L. SMITH said he thought this case ought to be treated as an exception to the general rule. The workman appeared to be without means to pay the costs if he failed in his appeal, but the County Court Judge had ordered a stay of execution pending an appeal, and had thereby, in effect, invited the parties to come to this Court to have a point of law determined. Under these circumstances he thought the workman ought to be allowed to appeal without giving security.

LORD JUSTICE COLLINS concurred.

Q.B. Div. (Channell and } 1900.
Bucknill, J.J.) } Jan. 29.

PALMER V. SNOW.†

Sunday Observance—29 Car. II., c. 7—Hairdresser.

A barber is not within the provisions of 29 Car. II., c. 7, against carrying on business on Sunday.

This was an appeal by case stated from the stipendiary magistrate for South Staffordshire. An information was preferred by the respondent against the appellant charging him that, being a tradesman of Wolverhampton, to wit, a hairdresser, he did exercise worldly labour, business, or work of his ordinary calling upon the Lord's Day, contrary to the provisions of the

statute 29 Car. II., c. 7. The statute named (section 1) provides as follows:—"No tradesman, artificer, workman, or labourer or other person whatsoever, shall do or exercise any worldly labour, business, or work of his ordinary callings upon the Lord's Day or any part thereof (works of necessity and charity only excepted)." The appellant is a hairdresser and it was proved that on Sunday, September 24 last, he kept open his shop and shaved several customers and cut the hair of others. No articles were sold or purchased in the shop. The magistrate, being of opinion that the appellant had exercised his "calling" or "business" for gain or profit, and that he was a "tradesman," convicted him, fining him 2s. 6d. and costs.

MR. M. SHEARMAN, for the appellant, contended that the Act did not apply to barbers or hairdressers, inasmuch as they were not *ejus dem generis* with "tradesman, artificer, workman, or labourer." The business or profession of a barber, he said, was one that was well known and, at the date of the Act, was one of more importance than it was now, associated as it was with that of surgery. If the Legislature had desired to prohibit this business on Sunday, it would have expressly included it among the prohibited trades and occupations. Barbers were incorporated as a craft in the reign of Henry IV., and surgeons were enjoined for their protection against "blood letting" and the "feet or craft of barbery or shaving." A tradesman, he argued, was a person who dealt in goods in retail, and an artificer was one who worked upon raw materials. A farmer was not within the Act, "*Reg. v. Silvester*" (33 L.J., M.C., 79), nor was the owner of a stage coach, "*Sandiman v. Breach*" (7 B. and C., 96).

MR. DICKENS, Q.C. (Mr. William Shakespeare with him), for the respondent, contended that the appellant came within the words "artificer, workman, or labourer," being a person who earned his living with the work of his hands. He also contended that he was a tradesman in the sense that a blacksmith was a tradesman, because he plied a trade. He cited "*Phillips v. Innes*" (4 C. and F., 234).

MR. SHEARMAN, in reply, quoted a passage from *Julius Caesar* where the cobbler says:—"All that I live by is, with the awl. I meddle with no tradesman's matters."

The COURT allowed the appeal.

MR. JUSTICE CHANNELL said that all that was necessary for them to say in this case was that a barber was not a tradesman within the Act, because of the way in which the summons was framed. But the Court were not satisfied to base their judgment upon that point only, because it might in that case be assumed that they thought that the appellant's business came within some one of the remaining words. They did not, however, think so. The Act in question differed from the Scotch Act under which "*Phillips v. Innes*" was decided, because the Scotch Act began by saying that no ordinary labour or handicraft should be carried on on Sunday. If that provision had been in force in England the barber might have come within it. The English Act only related to certain specified persons. The words "or other persons whatsoever," as had already been decided, were to be read *ejus dem generis* with the preceding words. With regard to the word "tradesman" he was strongly of opinion that though the word tradesman might often be used as distinguished from gentleman or a professional man so as to include barber, yet that the word was not so used in the statute, but that it was intended to mean a person who carried on the business of buying and selling. "Artificer" meant somebody who made something. The remaining words "workman or labourer," though they might possibly apply to an assistant, involved the idea of a person employed by some one else and did not, therefore, apply to the

*Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

†Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

appellant. The consideration urged by counsel that the business of a barber was when the Act was passed a well-known business and one of much more importance than it was at the present time lent additional force to the argument that a barber was not one of the persons to whom the Act was intended to apply.

MR. JUSTICE BUCKNILL gave judgment to the same effect.

[Solicitors—Maudes and Tunnelcliffe, for Dallow and Dallow, Wolverhampton, for the appellant; Murr and Rusty, for Sharpe and Derby, West Bromwich, for the respondent.]

Q.B. Div. }
(Darling, J.) }

1900.
Jan. 29.

SAFFERY V. MAYER.*

Gaming—Betting—Gaming Act, 1892—Partnership agreement to back horses.

In this case Mr. J. J. Saffery, as trustee of the estate of Claude Vautin, a bankrupt, claimed to recover the sum of £433 14s. 9d., the principal and interest due under three promissory notes for £150 each given to Vautin by the defendant Albert Mayer, of 13, Buckingham Palace-road. The defence was that the notes in question were given in respect of a gambling transaction, and therefore the plaintiff could not recover.

Mr. Atherley-Jones, Q.C., and Mr. H. Kisch appeared for the plaintiff; and Mr. Abinger was for the defendant.

The action, which was set down for trial under Order XIV., was before his Lordship on the 27th, and was reported in *The Times* of January 29. His Lordship reserved judgment.

Mr. ATHERLEY-JONES said that the parties in this case were on the point of coming to terms, and he suggested, therefore, that his Lordship should postpone giving judgment.

MR. JUSTICE DARLING said that as the matter was one of some public interest, he would give his judgment now, and the parties could come to what terms they liked afterwards. The action was brought by the plaintiff as trustee in the bankruptcy of Vautin against the defendant on three promissory notes. These notes amounted to £400, and the defence was that the notes were given in respect of a contract which was void under the statutes against wagering. The first statute to be considered was 8 and 9 Vict., c. 109, section 18, which ran as follows:—"And be it enacted that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering shall be null and void: and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money . . . which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." That being the law the cases of "*Rosewarne v. Billing*" (15 C.B., N.S., 316) and "*Read v. Anderson*" (10 Q.B.D., 100) were decided. In consequence of the decision in the latter case the Gaming Amendment Act, 1892, was passed, and that statute provided that "any promise, express or implied, to pay any person any sum of money paid by him under, or in respect of, any contract or agreement rendered null and void by the Act 8 and 9 Vict., c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services relating thereto or in connexion therewith, shall be null and void, and no action shall be brought to recover such sum of money." The difference was that not only contracts to pay

but promises to pay money under or in respect of any such contracts were rendered null and void. In this case the defendant Mayer thought he had discovered an infallible system for winning money by backing horses, and he imparted his discovery to Vautin and go Vautin to supply £500 for working the system, and both of them were to share in the profits. At first money was made and then it was lost. Vautin, after a time, wanted his money back, and he wrote on June 1, 1897, to Mayer asking if he was not right in saying that they entered this concern on joint account, and he wanted his share, £250, back again. His Lordship found as a fact that £500 was advanced by Vautin to a fund for the joint benefit of the defendant and himself, and was in the nature of partnership capital. The £100 subsequently advanced was a loan, and that of course the plaintiff could recover. His Lordship referred to the cases of "*De Mattos v. Benjamin*" (63 L.J., Q.B., 248) and "*Tatam v. Reeve*" ([1893] 1 Q.B., 44), and said that the question was whether the transaction came within the Act of 1892 as being "in respect of" a contract null and void under the earlier Act. He came to the conclusion that it did not come within the Act, and that the money was not paid "in respect of" any null or void contract. The money was paid in respect of an agreement between the parties that they should enter into a partnership to back horses. He therefore thought that Vautin would have been able to have recovered this money from the defendant if the action had been between them.

No application for judgment was made.

Court of Appeal (Lindley, M.R., Vaughan) } 1900.
Williams and Romer, L.J.J.) Jan. 30.

IN RE THE WREXHAM MOLD AND CONNAH'S QUAY
RAILWAY COMPANY.*

Railway—Receiver—"Working expenses and proper outgoings," what are—Costs of defending an action—Railway Companies Act, 1867, sec. 4.

Order of Byrne, J. (15 *The Times* L.R., 358), varied.

This was an appeal from a decision of Mr. Justice Byrne's, reported in 15 *The Times* L.R., 358. The question raised by this appeal was whether certain costs of the railway company incurred in defending an action in relation to the cost of constructing the line were working expenses of the railway or other proper outgoings in respect of its undertaking within section 4 of the Railway Companies Act, 1867. That section enabled judgment creditors of a railway company to obtain the appointment of a receiver, and, if necessary, of a manager of the undertaking of the company, and it continued as follows:—"And all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein." On September 8, 1897, an order was made under this section upon the petition of the Great Central Railway Company, a judgment creditor, appointing a receiver and manager of the undertaking of the Wrexham Company, and directing the receiver out of the moneys to be received by him to pay the costs of all parties to the petition, and the order also directed inquiries as to the debts of the company, and as to rights and priorities, in accordance with the terms of the section.

*Reported by E. HARRINGTON, Esq., Barrister-at-Law.
No. 12.—VOL. XVI.

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

Prior to this order an action had been commenced by the executors and trustees of Mr. Piercy, the contractor for the line, against the company for the balance of the cost of constructing the line, and on July 25, 1897, this action was referred to arbitration, and the arbitration was pending at the date of the receivership order. On November 22, 1897, upon the application of the Piercy trustees, an order was made giving them liberty, notwithstanding the order of September 8, 1897, to carry on the action and proceed with the arbitration, including liberty to the company to continue to attend the arbitration proceedings, but no order was made as to the company's costs. In March, 1898, the award was made and judgment was entered up in the terms of the award, which was to the effect that the company should pay to the Piercy trustees £23,643 cash, and also certain sums of stock and debenture stock, each party to pay his own costs. The effect of the award was that the claims of the Piercy trustees were cut down to a considerable extent. An application was then made by the company and its directors, and the solicitor for the company, that the costs up to September 8, 1897, and also subsequently thereto, incurred in the defence of the action and arbitration should be treated by the receiver as proper outgoings of the undertaking, and should be payable in priority to the claims of the debenture stockholders of the company. Mr. Justice Byrne said that the test to be applied in such cases was whether the costs incurred were "working expenses or other proper outgoings," without which the railway could not be carried on. In the present case his Lordship thought it was obvious that the undertaking could have been carried on just as well and effectually if the company had not resisted the claim made in the action. He did not say that it was not right for the company to resist the claim, or that the costs of so doing might not hereafter be properly provided for. But he held that these costs were not proper outgoings within the meaning of section 4. This application for the payment of these costs must therefore fail. The applicants appealed.

Mr. C. A. Russell, Q.C., and Mr. R. J. Parker were for the appellants; Mr. Neville, Q.C., and Mr. F. Thompson were for the Piercy trustees; Mr. Whinney was for the debenture holders; Mr. Mark Romer was for the Great Central Railway Company.

The appeal was argued on January 23 last.

The MASTER of the ROLLS said that the Railway Companies Act, 1867, contained no mention of costs, yet there must be power in the Court to give costs in proceedings under the Act, otherwise the costs of a petition for a receiver under section 4 could not be provided for. But ever since the passing of the Act orders had been made for the payment of those costs, and an order had been made in this case for payment of the costs of the petition. That section was passed upon the footing that the Court had jurisdiction to order payment of the costs of the proceedings thereby directed. If there ever was any doubt as to the jurisdiction of the Court to order payment of the costs of proceedings under an Act of Parliament where not expressly authorized to do so that doubt was removed by the Judicature Act, 1890, section 5, as explained in "*In re Fisher*" ([1894] 1 Ch., 450). The question in this case turned upon what was the real meaning of the order of November 22, 1897, giving the company liberty to continue to attend the arbitration proceedings notwithstanding the receivership order. In his Lordship's opinion the real meaning of that order was not merely that the company should attend the proceedings, but that it should fight the claim of the Piercy trustees on behalf of everybody instead of the claim being contested in Chambers. The award was made with the result that the claim of the Piercy trustees was considerably reduced, but the arbitrator

made no order as to costs, leaving the parties to pay their own costs. The question was how were the costs of the company to be obtained. The company and its solicitor applied that these costs might be regarded as proper outgoings of the undertaking. Mr. Justice Byrne was unable to take that view, and this Court felt the same difficulty. These costs were certainly not working expenses of the railway, and, without going so far as to say, as Lord Justice Kay said, in effect, in "*In re the Eastern and Midlands Railways Company*" (45 Ch.D., 367, 378) that "other proper outgoings" meant the same thing as working expenses, it would be unhelpfully stretching the words of section 4 to say that proper outgoings included the costs of defending an action by the contractor for his charges in connexion with the construction of the railway. But having regard to the view already expressed as to the effect of the order giving the company leave to attend the arbitration proceedings, he was of opinion that the order of Mr. Justice Byrne should be varied by adding a declaration that the costs incurred by the company since the date of the receivership order in defending the action and the proceedings consequent thereon ought to be treated as incurred in the prosecution of the inquiries directed by that order and were incurred for the benefit of the debenture-holders and other creditors of the company, and ought to be paid, with the costs of the application, in priority to any future payments to such debenture-holders or other creditors.

LORDS JUSTICES VAUGHAN WILLIAMS and ROMER concurred.

[Solicitors—Norris, Allens, and Chapman; Field, Roscoe, and Co., for Evan Morris, Wrexham; Sharpe, Parker, and Co., Liverpool; Cunliffe and Davenport.]

Q.B. Div. (Channell }
and Bucknill, JJ.) }

1900.
Jan. 30.

STRAID V. TILLOTSON AND ANOTHER.*

Fishery—Salmon Fishery Act, 1873, sec. 22.

Taking fish which are in a dying condition, otherwise than with a properly licensed instrument, is an offence within the Salmon Fishery Act, 1873, sec. 22.

This was an appeal by case stated from justices of the West Riding of Yorkshire. An information was preferred by the appellant against the respondents charging them with taking trout by means other than a properly licensed instrument, to wit, by taking the same with their hands, contrary to section 22 of the Salmon Fishery Act, 1873, as extended to trout or char by section 7 of the Freshwater Fisheries Act, 1878. Section 22 of the Salmon Fishery Act, 1873, enacts, so far as is material to this case, that, in all fishery districts in which licenses are payable, "any person fishing for or taking, killing, or attempting to take or kill, salmon by any means whatsoever other than a properly licensed fishing weir, fishing mill dam, fixed engine, instrument, net, or device for catching or facilitating the catching of salmon, or assisting any such person in so doing, shall be liable to a penalty not exceeding £5." The respondent took from Eller Beck, a tributary of the river Aire, 20 trout (which were apparently poisoned, but still alive). They subsequently sold a portion of the fish, which were found to be unfit for food. There was not sufficient proof to show how the fish had become in a dying condition, or that, apart from taking the fish with their hands, the respondents had in any way been concerned in killing them. The justices were of opinion that, in the absence of evidence to connect

*Reported by O. G. WILBRAHAM, Esq., Barrister-at-Law.

the respondents with having poisoned the water, or with having in some way been concerned in killing the fish, the fact that the respondents were proved to have taken the fish out of the water with their hands did not, under the circumstances, constitute an offence, the fish being in a dying state at the time, and they accordingly dismissed the summons.

Mr. H. T. WADDY, for the appellant, said that, if it were held that the Act did not apply because the fish were in a dying condition, persons who took fish out of a river, which had previously been poisoned by other persons with whom they were in collusion, could not be proceeded against, in spite of the fact that they were clearly doing a thing which was within the mischief of the Act. He cited "*Gazard v. Cooke*" (55 J.P., 102).

Mr. WALTER STEWART, for the respondents, contended that the justices were right in holding that the Act did not apply, because the removal of dying fish from a stream, so far from being detrimental to the fishery, would be beneficial to the surviving fish.

The COURT allowed the appeal, remitting the case to the justices with the opinion that the taking of dying fish was within the Act.

MR. JUSTICE CHANNELL said that if the justices found that the respondents took the fish innocently, without having been concerned in poisoning them, they would be justified in treating the offence as one not requiring punishment; but he was of opinion, having regard to the argument of the learned counsel for the appellant, that the taking of dying fish was within the Act.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—Richard Smith and Sons, for Charlesworth and Wilson, for the appellant; Turner and Co., for W. Thompson, Skipton, for the respondent.]

Q.B. Div. (Channell } 1900.
and Bucknill, JJ.) } Jan. 30.

LLANDUDNO URBAN DISTRICT COUNCIL V. HUGHES.*

Hawker—Licence—Exemptions—Hawkers Act, 1888, sec. 3 (3)—Markets and Fairs Clauses Act, 1847, sec. 13.

This was an appeal by case stated from justices of Carnarvon. An information was preferred by the appellants against the respondent charging him that, after a market-place had been opened for public use within the limits of the district of the Llandudno Urban District Council, he did unlawfully expose for sale in a street within the limits aforesaid, and not in his own dwelling-place or shop, certain articles, to wit, potatoes, in respect of which tolls were authorized to be taken in the market, contrary to section 13 of the Markets and Fairs Clauses Act, 1847. The section referred to is as follows:—"After the market-place is open for public use every person other than a licensed hawkker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s." It appeared from the case that the respondent was a person who followed the trade of selling and hawking potatoes, vegetables, and fruits, and had for many years followed that trade without holding a hawkker's licence, as he was authorized to do by section 3 (3) of the Hawkkes Act, 1888. In consequence of a notice published by the appellants on July 14, 1899, and before the alleged offence, he took out a hawkker's licence. The justices held that the

respondent was within the exemption in section 13, and dismissed the information.

Mr. E. H. LLOYD, for the appellants, contended that, inasmuch as by virtue of section 3 (3) of the Hawkkes Act the respondent was not a hawkker, he could not make himself one by taking out a licence, and that he was, therefore, not a person exempted from the operation of section 13. He cited "*Woolwich Local Board v. Gardiner*" ([1895], 2 Q.B., 497) and "*Openshaw v. Oakeley*" (60 L.T., 929).

Mr. A. E. GRIFFITH, for the respondent, contended that his client had brought himself within the exemption.

The COURT dismissed the appeal.

MR. JUSTICE CHANNELL said that he must hold that the respondent was a licensed hawkker within the meaning of the exemption, unless some clear reason were shown for the contrary. The reason shown was that in "*Woolwich Local Board v. Gardiner*" a person holding a pedlar's licence, who, by virtue of the Pedlars Act, 1871, was deemed to be a licensed hawkker, but who was in fact found to be acting not as a pedlar but as a hawkker, was held not to be within the exemption. But in that case the man was actually doing something in breach of his licence, whereas in the present case the respondent did what it was lawful for him to do under the Act. He was therefore entitled to the benefit of being a licensed hawkker.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—Belfrage and Co., for James Porter, Conway, for the appellant; Pensonby, Hughes, and Co., for W. J. Corbett, Llandudno, for the respondent.]

Chan. Div. } 1900.
(Byrne, J.) } Jan. 30.

BURCHELL V. WILDE.*

Solicitor—Partnership—Dissolution—Right to use firm's name.

This was a motion for an interim injunction to restrain the defendants from carrying on business as solicitors under the name or style of "*Burchell and Co.*" or under any other name or style of which "*Burchell*" or "*Burchells*" forms part. In 1874 the plaintiff, J. W. Burchell, was admitted a partner in the firm of "*Burchells*," and in the year 1882 a new partnership was constituted. The partners were W. Burchell, the elder, and W. Burchell, the younger, who subsequently ceased to be members of the firm, the defendant W. G. Wilde, and the plaintiffs J. W. Burchell and C. T. D. Burchell. They took the style of "*Burchell and Co.*" By an agreement of June, 1893, the plaintiffs and the defendant W. G. Wilde agreed to continue in partnership as solicitors in continuation of their then partnership under the style of "*Burchell and Co.*" at No. 5, the Sanctuary. The defendant W. Wilde was a son of the defendant W. G. Wilde, and there were provisions for his being admitted into the partnership under certain conditions. In the year 1899, differences having arisen, the partnership was dissolved as from December 9, 1899. Under the terms of dissolution the plaintiffs acquired the offices at the Sanctuary. Judgment was delivered.

Mr. Swinfen Eady, Q.C., and Mr. Vernon were for the plaintiffs; Mr. Levett, Q.C., and Mr. Norton, Q.C., for the defendant William George Wilde; and Mr. Alexander, Q.C., and Mr. Napier for the defendant William Wilde.

MR. JUSTICE BYRNE said,—It is common ground that there was no express agreement as to goodwill or firm

*Reported by O. G. WILBRAHAM, Esq., Barrister-at-Law.

*Reported by E. B. SCHOMBURG, Esq., Barrister-at-Law.

name, and that the rights of the parties upon the question I have to decide stand exactly as though there had been a simple dissolution by consent, no sale of goodwill or assets being contemplated and all parties intending to continue to practise, but nothing was said as to the style under which any of them should so practise. The plaintiffs, with a new partner, also named Burchell, are carrying on business at the old office as "Burchells and Co.," and the defendants (the defendant William Wilde having been taken into partnership by his father) as "Burchell and Co." Each side is willing to make some modification in the name so as to make the resemblance less close, but the plaintiffs claim themselves to use the name "Burchell" or "Burchells" and to restrain the defendants from using the word "Burchell" or "Burchells" in any way as part of their firm name. Notice of dissolution has been duly signed and gazetted, and independent circulars have been sent to every client of the old firm stating the fact and also giving notice of the constitution and places of address and assumed styles of the new firms. At the date of the dissolution the defendant W. G. Wilde was entitled to a larger share of the profits than any of his partners, and he had been a partner in the successive partnerships since 1882, when the style was changed from "Burchells" to "Burchell and Co." His Lordship, after referring to various authorities, including "Banks v. Gibson" (34 Beav., 566), and "Thynne v. Shove" (L.R. 45, C.D., 577) citing "Levy v. Walker" (L.R. 10, Ch.D., 436) and saying that "Levy v. Walker" was not to be read as determining that the purchaser of a business and goodwill is entitled to use the style of the old firm if that style includes the name of a living person, and if the use of it would expose the owner of such name to liability, continued:—Upon principle it is difficult to see why the rights of any partner upon a dissolution under circumstances like those in the present case in reference to the use of the firm name should be greater than the right of a purchaser who has bought the goodwill, and, having regard to the effect of more recent decisions, I think "Banks v. Gibson" must be read subject to the qualification that the use of the old name must not expose the other partners to liability. The plaintiffs' right to the injunction depends upon their establishing that any use of the word "Burchell" as part of the name of the defendant firm would expose them to risk. I cannot say that I am satisfied that any of the plaintiffs would be under any tangible risk of liability if the defendants were to practise as "Burchell, Wilde, and Son," especially if the plaintiffs were to use a style carrying their initials or were to take the name of "Burchells and Burchell" as I understand they are not unwilling to do. Upon the whole case, I think I ought to make no order on the motion.

The defendants having stated that they were willing to adopt the style of "Burchell, Wilde, and Co.," no order was made on the motion except that costs be costs in the action.

Chan. Div. }
(Cozens-Hardy, J.) }

1900.
Jan. 31.

IN RE THE NORTH OF ENGLAND IRON STEAMSHIP
INSURANCE ASSOCIATION.*

Company—Winding up—Jurisdiction—Company
with no capital paid up or credited as paid up
—Jurisdiction of High Court to wind up.

HIS LORDSHIP, in giving judgment, said,—This is a petition for the confirmation of a special resolution

*Reported by D. FITCATRN, Esq., Barrister-at-Law.

altering the memorandum of association of the North of England Steamship Insurance Association; jurisdiction is given by the Companies (Memorandum of Association) Act, 1890, to "the Court which has jurisdiction to make an order for winding up the company." The first question I have to consider is whether I have any jurisdiction to deal with the petition. The association was registered as an unlimited company in February, 1876. The memorandum of association contained three clauses. (1) The name of the company is the North of England Steamship Insurance Association. (2) The registered office of the company will be situate in England. (3) The object for which the company is established is the mutual insurance of iron steamships insured with the company by members of the company. This complied strictly with section 10 of the Companies Act, 1862. The company has no shares and no capital. It is, however, a company the winding up of which is plainly contemplated by section 79 of the Act of 1862, and under section 81 of that Act the Chancery Division of the High Court had jurisdiction to wind it up. But by section 33 of the Companies (Winding-up) Act, 1890, section 81 of the Act of 1862 is repealed and section 1 of that Act is substituted. That section is as follows:—(1) "The Courts having jurisdiction to wind up companies in England and Wales shall be the High Court, the Chancery Courts of the counties palatine of Lancaster and Durham, the County Courts, and the Stannaries Court." And the question arises whether there is now any Court competent to wind up a company which has no capital paid up or credited as paid up. Upon the whole I have come to the conclusion I cannot attribute to the Legislature the intention to render all companies formed under section 9 or section 10 of the Act of 1862 exempt from the jurisdiction of any Court and to leave companies formed under section 8 liable to be wound up. Section 32 (subsection 2) of the Act of 1890, which is as follows:—"In part IV. of the Companies Act, 1862, and in this Act the expression 'the Court,' when used in relation to a company, shall, unless the contrary intention appears, mean the Court having jurisdiction under this Act to wind up the company," assumes that part IV. of the Act of 1862 which is headed "Winding up of companies and associations under this Act" continues in full force. I think I am justified in holding that subsection 1 of section 1 defines the Courts which have jurisdiction to wind up all companies in England and Wales, except so far as cut down by the following subsections, and that subsections 2 and 3 apply only to companies formed under section 8 and which, therefore, possess a capital. The result is that the High Court has jurisdiction to wind up the association and, therefore, has jurisdiction to sanction an alteration of the memorandum of association. The question of jurisdiction being settled, I feel no difficulty in confirming the special resolution, the object of which is to enlarge the scope of the operations of mutual insurance. The order, therefore, will be as prayed.

Mr. O. Leigh Clare was for the petitioners.
[Solicitors—Williamson, Hill, and Co.]

Court of Appeal (Lindley, M.R.,
Vaughan Williams and Romer,
L.JJ.) }

1900.
Feb. 2.

THE SOUTH AFRICAN BREWERIES (LIMITED) v. KING.*
Conflict of Laws—Contract—Covenant in restraint of trade—Brewery in South Africa.

Held, that the contract was governed by the law of the South African Republic.

*Reported by H. B. HENNING, Esq., Barrister-at-Law.

Decision of Kekewich, J. (15 *The Times* L.R., 442), affirmed.

This was an appeal from a decision of Mr. Justice Kekewich's, reported in 15 *The Times* L.R., 442. It raised an interesting and important question of private international law—namely, whether an English contract entered into in a foreign country between a British subject resident there and an English company having its registered office in England, but carrying on its business solely in that foreign country—the contract being in respect of the business carried on there—should be governed by the English law or by the law of that foreign country. The facts were shortly these:—In 1890 the Natal Brewery Syndicate (South-East Africa) (Limited) was incorporated in England for the purpose of carrying on the business of brewers in the Transvaal, the colony of Natal, and elsewhere in South Africa. By an agreement, dated October 14, 1892, made between the syndicate (which was then carrying on its business at Johannesburg, in the Transvaal, and at Pietermaritzburg, in Natal) on the one part, and the defendant (a brewer and a British subject then resident in Nottingham) of the other part, it was agreed that the defendant should proceed to Johannesburg and serve the syndicate as brewer or otherwise in the business of a brewer carried on at Johannesburg and in Natal or elsewhere, at a salary of £300 a year, the agreement to be determinable by either party by notice in writing; and the defendant thereby undertook not to engage in any brewing business in South Africa within five years after the termination of the agreement without the sanction of the syndicate, and that in the event of the syndicate being taken over by any other company he would carry out that agreement with such other company on the terms and conditions contained therein. Thereupon the defendant went out to Johannesburg and carried on the management of the syndicate's brewery there until November, 1892, when the syndicate's undertaking was taken over by another English company, the South African United Breweries (Limited), which was formed and registered in England for that purpose. The defendant then continued in the employ of that company on the terms of the original agreement with the syndicate until April 11, 1895, when by an agreement of that date executed in South Africa and expressed to be made between the new company "or its successors" of the one part and the defendant, described as of "the Castle Brewery," Johannesburg, being the company's brewery, of the other part, the defendant agreed to serve the company for five years from October 1, 1894, determinable by the company alone, "as brewer or otherwise in their business carried on at Johannesburg and in the colony of Natal or elsewhere in South Africa," at a monthly salary of £54 8s. 4d. And the defendant agreed "not to engage in any brewing business in South Africa within a period of ten years after the termination of his engagement by the company, except with the consent in writing of the board of directors in London of the company." In May, 1895, the South African United Breweries (Limited) was reconstructed, and the whole of its undertaking was taken over by the plaintiffs, another English company, and the defendant continued in their employ as brewer upon the terms of the agreement of April 11, 1895. By notice in writing of March 3, 1897, duly served on the defendant, the plaintiffs determined that agreement, whereupon the defendant became concerned, it was said, in the promotion of a company registered in Scotland under the name of the "Durban Brewery Syndicate (Limited)" for the purpose of establishing a brewery at Durban, in the colony of Natal, under the management of the defendant, without the plaintiffs'

consent, and he had, it was alleged, entered into an agreement with the Scotch company to manage its brewery at Durban for seven years. The plaintiffs then brought this action for an injunction to restrain the defendant from committing this alleged breach of his agreement of April 11, 1895. In his defence the defendant alleged that both the agreements of 1892 and 1896 were wholly void according to the law of the South African Republic as not having been executed before the Landdrost, and also that the restrictions in the agreement of 1895 were invalid both according to the law of the South African Republic and also according to the law of this country, as being greater than were reasonably necessary for the plaintiffs' protection, and as also being most oppressive towards the defendant. Mr. Justice Kekewich held that the contract was governed by the law of the South African Republic, and adjourned the further trial of the action to enable the parties to adduce evidence as to that law. The plaintiffs appealed.

Mr. Warrington, Q.C., and Mr. Younger, Q.C., were for the plaintiffs; Mr. Buckmaster was for the defendant.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the conclusion at which the learned Judge had arrived was unquestionably right. It was impossible to decide the rights of the parties under this contract without knowing what the law of the Transvaal was. Upon the construction of the whole of the contract his Lordship thought it clear that Johannesburg was the primary place to which the contract related, and, having regard to the fact that this contract was entered into at Johannesburg, in his opinion the clause now in question ought to be governed by the law of the Transvaal, and this appeal should be dismissed with costs.

LORDS JUSTICES VAUGHAN WILLIAMS and ROMER concurred.

[Solicitors—Loughborough, Gedge, and Co.; H. G. Campion and Co.]

Chan. Div. } 1900.
(Farwell, J.) } Feb. 2.

BIRD V. PHILPOTT.*

Bankruptcy—Assets—Undischarged bankrupt trading—Surplus in first bankruptcy—Second bankruptcy.

This case raised important questions as to the rights of persons having transactions with undischarged bankrupts. The facts, which were not substantially in dispute, were as follows:—In 1885 the defendant Thomas Lovibond Templeman was in business as a plumber at Taunton, and in August of that year was adjudicated bankrupt. The defendant George Philpott was appointed his trustee in bankruptcy. A small dividend was paid to his creditors, but he did not receive his discharge. In 1891 he came to Slough and obtained employment as an engineer in the Great Western Railway Company. He also engaged in building operations, and purchased plots of land for that purpose without disclosing the fact that he was an undischarged bankrupt. In April, 1897, he became acquainted with the plaintiff, Mr. Walter Avery Bird, a solicitor at Uxbridge, who acted for him in some legal matters on the strength of a reference to his bankers. Subsequently Templeman requested the plaintiff to procure advances for him on the security of certain houses known as 1 to 4, Chard-villas, Montague-road, Slough. The plaintiff procured the advances from a Mrs. Payne, and himself advanced money to enable Templeman to purchase further plots of land and to

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

continue his building operations. These advances were repaid out of mortgage money. In September, 1897, the plaintiff procured for Templeman a further advance of £600, out of which he subsequently purchased the land, on which he then proceeded to build, with the aid of further moneys advanced by the plaintiff for that purpose, the houses known as 5 and 6, Chard-villas. In May, 1898, Templeman also purchased three plots of land adjoining 5 and 6, Chard-villas, which plots were purchased with moneys provided by the plaintiff, who paid the deposit and subsequently provided the whole of the balance to prevent the forfeiture of the deposit. By a mortgage of June 17, 1898, Templeman gave the plaintiff a first charge over 5 and 6, Chard-villas, and the three plots of land to secure the sum therein named and any future sums that might become due and costs, and also a second charge over 1 to 4, Chard-villas. On September 30, 1898, Templeman was again adjudicated bankrupt, and the defendant Cecil Mercer was appointed his trustee and communicated to the plaintiff the fact that Templeman was already an undischarged bankrupt. The plaintiff then offered to pay the debts due under the first bankruptcy, but the defendant Philpott declined to accede, saying that the defendant Mercer, as trustee under the second bankruptcy, would be entitled to any surplus of assets in the first bankruptcy. The plaintiff, alleging that all the liabilities of Templeman to himself were incurred in order to enable him to acquire lands for building purposes and to build houses thereon and for obligations and costs connected therewith, claimed (1) a declaration that he was entitled to a first mortgage on 5 and 6, Chard-villas, and the three plots of land adjoining and to a second mortgage on 1 to 4, Chard-villas, to secure his various advances by virtue of the indenture of June 17, 1898; (2) further, or in the alternative, a declaration that he was entitled, on payment of the balance of debts, costs, and expenses incurred under Templeman's first bankruptcy, to have conveyed to him the property mentioned in the said indenture as security for the amount of principal, interest, and costs purporting to be secured by the said indenture.

Mr. Herbert Reed, Q.C., and Mr. E. W. Hansell appeared for the plaintiff; the Solicitor-General (Sir R. B. Finlay, Q.C.) and Mr. Muir Mackenzie for the defendants.

The plaintiff, examined by Mr. REED, said he had made inquiries about Templeman and the answers were satisfactory. Nos. 1 to 4, Chard-villas, were mortgaged to Mrs. Payne, and he deducted the advances he had made from the mortgage money. Templeman gave him a charge over these houses to secure his costs. He did not provide the purchase money for the site of 5 and 6, Chard-villas, but he made advances for the purpose of building. The conveyance of the three plots of land was handed to him on his paying the balance of the purchase money. That was subsequent to the date of the mortgage of June 17.

Witness was cross-examined by the SOLICITOR-GENERAL as to certain items in his account against Templeman.

Mr. REED said the case consisted of two parts—(1) as against Philpott, the first trustee; and (2) as against Mercer, the second trustee. As against Mercer, it was purely a question of law. Mercer claimed to be entitled to the property of Templeman subject only to the rights therein of Philpott. He contended that that claim was ill-founded. Bankruptcy was not a total conversion, it only took a man's property for certain purposes, and the surplus went back, after satisfaction of creditors, to the bankrupt. When the debts were paid there was a trust for the bankrupt. If there was a second bankruptcy the second trustee took by a new title and subject to mesne encumbrances. "*Cook v. Sturgis* "

(28 L.J., Ch., 345) and "*Troup v. Ricardo* " (34 L.J., Ch., 91) were authorities as to surplus of assets. Those were cases under the old Insolvency Acts, but there was no difference of principle on this point between those Acts and the Bankruptcy Act, 1883. Real estate in surplus went to the bankrupt's heir—"*Charman v. Charman* " (12 Vesey, 580) and "*Banks v. Scott* " (5 Maddock, 493), and a similar rule applied to personalty—"*Ex parte King* " (17 Vesey, 116). When the creditors were satisfied, voluntary settlements were no longer void as against the assignee—"*Curtis v. Price* " (12 Vesey, 103) and "*Re Sims* " (3 Manson, 340). The question of surplus was also discussed in three more modern cases—"*Re Leadbitter* " (10 Ch. Div., 388); "*Re Sheffield* " (*Ibid.*, 435); and "*Re Evelyn* " ([1894] 2 Q.B., 302). As to the case as against the first trustee, Philpott, it was partly a question of law and partly of fact. The principle of "*Meux v. Smith* " (11 Sim., 410) applied to the case of the three plots of land. Plaintiff had supplied all the money for the purchase. In conclusion, counsel referred his Lordship to the following cases:—"*Cohen v. Mitchell* " (25 Q.B.D., 262); "*New Land Development Association* " ([1892] 2 Ch., 138); "*Re Clark* " ([1894] 2 Q.B., 393); "*Re Clayton* " ([1895] 2 Ch., 212); and "*Hunt v. Fripp* " ([1898] 1 Ch., 675).

The SOLICITOR-GENERAL said that as regards Mercer there was no conveyance of the surplus or possible surplus by the bankrupt in this case, but a mortgage of specific property. That property did not belong to the bankrupt, but had vested by operation of law in the first trustee. Therefore, the plaintiff could not take advantage of the principle involved in the cases cited by Mr. Reed, in which an expected surplus had been assigned by the bankrupt. All property, including after-acquired property, vested in the trustee. As regards the case against Philpott, the advances made in respect of 1 to 4, Chard-villas, had been repaid, and Templeman could not charge those houses for the plaintiff's costs, as the houses were not his property. Nos. 5 and 6, Chard-villas, were conveyed before the date of the mortgage under which the plaintiff claimed. The mortgage could have no effect, because it was completed after the property vested in the trustee of the first bankruptcy. In "*Meux v. Smith*," which had been said to apply to the three plots of land, the circumstances were quite different. There the money necessary to obtain the lease was provided by the plaintiff.

Mr. MUIR MACKENZIE followed on the same side.

After Mr. REED had replied,

Mr. JUSTICE FARWELL, after reciting the facts, said that the first question to be decided related to the title of Mercer. Speaking generally, the trustee took the bankrupt's property and nothing more. Here it was contended that, as there would be a surplus of assets in the first bankruptcy, provided that he held that after-acquired property belonged to the first trustee, the surplus ought to go to the second trustee. He could not take such a view. To do so would be to hold that a bankrupt could not deal with his property at all, and that was not supported by the authorities. The trustee took the estate of a bankrupt for a limited purpose only, subject to this—that he was trustee for the bankrupt of the residue, though the bankrupt could not intervene till it was known that there was a surplus and all his debts were paid. But he had a right to the surplus, which, if he so liked, he could dispose of by will or by deed *inter vivos*. The two cases cited from the *Law Journal* established what seemed to him to be the principles of bankruptcy law on this point. The Solicitor-General, however, had said that the Bankruptcy Act, 1883, was differently framed from the old Insolvency Acts. He did not think there was any real difference except in the machinery of vesting. Then

the Solicitor-General had said that this was not a mortgage of surplus, but of specific property. That was to look only at the shell and not at the substance. The bankrupt could not be heard to say, "I have only mortgaged the surplus," and he did not see how any one who claimed through him could say so either. Therefore he could see no distinction on this point either, and must decide that the second trustee had no claim to the surplus, but only to the property of the bankrupt at the time of the second bankruptcy. The second question related to the title of Philpott. With regard to 1 to 4, Chard-villas, the charge for costs set up by the plaintiff was invalid as against the trustee, who became entitled to the houses as after-acquired property of the bankrupt. The plaintiff had no claim either as regards 5 and 6, Chard-villas, for they were not purchased with his money. The three plots of land raised a different question, as they were acquired by the bankrupt entirely with the plaintiff's money. He thought the facts in this instance were substantially within "Meux v. Smith," and he must hold that the plaintiff was entitled to a charge on those three plots. As the second trustee had taken over the property he must pay the costs.

Q.B. Div. (Channell and
Bucknill, JJ.)

1900.
Feb. 2.

LOGSDON V. TROTTER.*

Metropolis—Common lodging-house—Registration—Common lodging-house, what is.

This was an appeal by case stated from the decision of a Metropolitan Police magistrate. An information was laid by the appellant, on behalf of the London County Council, against the respondent charging him with keeping a house as a common lodging-house and receiving lodgers therein, which house had not been inspected and approved by the local authority and registered under the Common Lodging Houses Act, 1851. The house in question was known as the Victoria-home, and was situated at 177, Whitechapel-road. The question was whether the nature of the house was distinguishable from the Salvation Army shelters, which, in the case of "Logsdon v. Booth" (reported *ante*, p. 12), were recently decided to be common lodging-houses within the Act. The house was one of three homes the property of a body of trustees, one of whom was the respondent. The trustees established and carried on the homes under the terms of a deed whereby they agreed to hold certain property for the purpose of establishing and carrying on an institution called the "Emigrants' and Working Men's Home Association." The house in question was built in 1897. It contains accommodation for 128 lodgers—that is to say, it contains 128 single-bedded cubicles or bed-rooms, and certain rooms used in common. The building is not registered as a common lodging-house. Each cubicle contains one bed only, which is occupied exclusively by one man. Each cubicle is 6ft. 6in. long and 4ft. 6in. wide, and the walls are 6ft. 6in. high. Each lodger pays 6d. or 8s. a night according to the position of the cubicle which he occupies. He is entitled for those sums to the use of a cubicle and to the use of the common rooms. The lodgers can use a kitchen in an adjoining building for the purpose of cooking their food, though the practice is not countenanced by the trustees. Regard is paid to the moral and spiritual welfare of the lodgers, and efforts are made to help deserving lodgers to find situations and to assist them during illness. A certain number of the lodgers are of a better class than the "dossier" inhabitant of an ordinary common lodging-house, but substantially

the lodgers are of the "dossier" description. The lodgers either buy their own food ready cooked, or they purchase it at a bar provided for the purpose and situated close to the building, or, as above mentioned, they bring it uncooked and cook it in the common kitchen of the adjoining building. Only men are admitted as lodgers. Men who are drunk and disorderly, or who are suspected of being criminals, or who are verminous are not admitted. Save as above all comers (being men) are admitted upon payment. The building is carried on at a profit, but such profit is devoted to the charitable objects of the trust. A considerable part of the sum required for the erection of the building and the purchase of the site was subscribed by friends of the institution as a gift. The magistrate, whose decision was given before the decision in "Logsdon v. Booth," dismissed the information upon the ground that the house was not carried on for the purpose of making a profit, but solely for the purpose of assisting the poorer classes of the population, and that the facts were unlistinguishable from the case of "Booth v. Ferrett" (25 Q.B.D., 87).

Mr. JELF, Q.C. (with whom was Mr. Ryde), appearing for the London County Council, relied on "Logsdon v. Booth" (reported *ante*, p. 129).

Mr. DALDY, for the respondent, contended that the house was distinguishable from the "shelter," the subject of consideration in "Logsdon v. Booth." In the first place, the class of people who frequented it was different. The trustees of the institution strove to assist a higher stratum of society than that struck at by the Salvation Army, and a selection was exercised of the persons who were permitted to use the house. Moreover, the fact that the lodgers did not cook their own food in the house was an important variation, because one of the recognized evils of common lodging-houses was the introduction, by the inmates, of unsound food. The meaning of a common lodging-house was a house where the inmates inhabited one common room, whereas in the house under consideration, though some of the rooms were used in common, yet each inmate had separate sleeping accommodation. "Langdon v. Broadbent" (37 L.T., 434) was cited.

Mr. JELF, in reply, said that the separate sleeping accommodation provided in the house did not obviate one of the principal evils which the Act was designed to provide against—namely, the risk of the spread of infectious diseases.

The COURT allowed the appeal.

MR. JUSTICE CHANNELL said that the case was one of some difficulty, but the Court had the advantage of a recent authority upon the subject, which dealt with the question whether one of the Salvation Army shelters was, within the meaning of the Act, a common lodging-house. He was at first struck by the similarity between that case and the present. If, however, the Court were merely to say that the facts of this case were so like the other that no distinction could be drawn, it would be starting upon a progress which might ultimately result in a decision that something was a common lodging-house which no one, using ordinary language, would so describe. It was necessary, therefore, to examine "Logsdon v. Booth" to see where the line was drawn and to see whether the present case crossed that line or not. Four things had been mentioned in the cases as tests to show what was a common lodging-house. One of these was applied in "Logsdon v. Ferrett" and was that the term did not include a house not carried on for profit. That theory was disposed of in "Logsdon v. Booth." Another of the tests suggested was that a common lodging-house meant a house which a low class of persons frequented—a class of persons who were likely to be dirty and diseased. That was a necessary element, but it

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

was not conclusive. The element existed in the present case. It was true that efforts were made to raise the inmates out of that class, but it was found in the case that, though some of the inmates were better than the ordinary "dossier" class, yet substantially they were of that class. In "*Langdon v. Broadbent*" it was suggested that a common lodging-house meant a house open to all comers. That case, too, was referred to in "*Logsdon v. Booth*." If the decision meant that a common lodging-house was a place where all comers were received, it was merely negated by "*Logsdon v. Booth*," because the Lord Chief Justice said that a common lodging-house keeper might refuse to receive persons on various grounds. But if the decision was interpreted to mean in a wider sense that a common lodging-house was a house open to all comers, so that, in fact, persons who were dirty, diseased, or verminous were not excluded from it, then the fact that the house was so open to all comers remained an essential element to bring it within the mischief of the Act. And, in that sense, the house in question came within the definition. It was also suggested that a common lodging-house was a place where persons not previously known to each other inhabited a common room in the sense that they slept there, and the opinion of the law officers of the Crown, given shortly after the Act was passed, was referred to. The law officers did, in fact, describe a common lodging-house as a house where for short periods persons, strangers to each other, were allowed to inhabit a common room, and that must be taken to be a proper description. It was said that to "inhabit" a common room meant to sleep in a common room. It was not necessary to decide whether sleeping in the same bedroom was essential. It was necessary only to say that for a house to be a common lodging-house within the Act it must be a house where a certain class of persons were so congregated together as to create a risk of the spread of disease. Here, in this lodging-house, the people did associate in such a way that there was a risk of the spread of disease. The living rooms were used in common and the sleeping accommodation was not entirely separate. The divisions into cubicles were more for the sake of decency than with the object of preventing infection. The house was, therefore, a common lodging-house like the Salvation Army shelters. The difficulty in this case was that this institution was designed to help a superior class, and that greater conveniences were supplied, and a higher charge made, than in the case of the shelters. His Lordship hoped that the council would not unduly hamper the institution, because upon the facts as stated and upon a perusal of the regulations of the institution it appeared that the lodging-house was as well managed as if the Act had been enforced with regard to it.

MR. JUSTICE BUCKNILL gave judgment to the same effect.

[Solicitors—W. A. Blaxland, for the appellant; Fowler, Perks, and Co., for the respondent.]

Court of Appeal (Lindley, M.R.,
Vaughan Williams and Romer,
L.JJ.) 1900.
Feb. 3.

IN RE GENERAL RAILWAY SYNDICATE—WHITELEY'S CASE.*

Company—Winding up—Contributories—Repudiation of contract to take shares—Misrepresentation.

On a summons for judgment under O. XIV. by a company against a shareholder for calls the

latter filed an affidavit that he intended to counter-claim for rescission of the contract, on the ground of misrepresentation, and obtained leave to defend. Before the counter-claim was delivered the company was ordered to be wound up.

Held, that the shareholder had "taken proceedings" in time.

This was an appeal from a decision of Mr. Justice Wright's, dated March 15, 1899. It raised an important question as to the effect of the rule that a shareholder who desires to repudiate his contract to take shares on the ground of misrepresentation must take proceedings for that purpose before the winding up of the company. On June 15, 1896, 5,000 £1 shares in the above-named company were allotted to W. A. Whiteley. On December 22, 1897, a call was made of 5s. per share, which was payable in the following January. On June 27, 1898, the company commenced an action against Whiteley to recover the amount of the call, and on July 12 served him with a summons for leave to enter final judgment under Order XIV. On July 15 Whiteley filed an affidavit in opposition to the summons, stating that he had been induced to apply for the shares by misrepresentation on the part of the company, and that he intended to counter-claim for rescission of the contract and to have his name removed from the register of members, and on July 20 he obtained unconditional leave to defend. On July 22 a petition was presented for the compulsory winding up of the company, and on August 3 a compulsory winding-up order was made upon the petition. In the meantime, on August 2, Whiteley put in a defence to the action, and delivered a counter-claim for rescission of the contract and rectification of the register and for an injunction to restrain the company from enforcing the calls. The liquidator having settled Whiteley on the list of contributories in respect of the 5,000 shares, Whiteley issued a summons asking that his name might be struck off the list, with leave to raise the question whether it was too late for him to set up a case of misrepresentation against the company. Mr. Justice Wright held that the counter-claim would not avail the applicant, because it was delivered after the presentation of the winding-up petition, and that the affidavit stating his intention to deliver a counter-claim was not a proceeding to rescind the contract, and a threat to take proceedings was not sufficient. Therefore, as the applicant had not taken proceedings to rescind the contract before the presentation of the petition, the application failed. The applicant appealed.

Mr. Upjohn, Q.C., and Mr. Whately were for the applicant; and Mr. E. Macnaghten, Q.C., and Mr. Peterson for the liquidator.

THE COURT allowed the appeal.

THE MASTER of the ROLLS said that the Court had to consider what was the effect of the practice under the Judicature Act upon the rule laid down before the passing of the Judicature Act as to the right of a shareholder to repudiate his contract when winding-up proceedings were imminent. No one quarrelled with the rule as stated in "*In re the Scottish Petroleum Company*" (23 Ch.D., 413) that a shareholder must take proceedings before the winding up to have his name removed from the register; but it was very difficult for Judges to frame language applicable to every possible case, and the real question was whether what was done here by the applicant was not equivalent to taking proceedings for removal of his name from the register. In his Lordship's opinion it was. Before the winding up an action was commenced by the company against the applicant for calls, and a summons was taken out under Order XIV. for leave to sign first judgment. What was the effect of that? There were two courses open to the

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

applicant. He might commence a fresh action for rescission of the contract to take shares or he might put in a counter-claim. The latter course would not have been open to him under the old practice, and, although under the new practice he might still have commenced a fresh action, in his Lordship's opinion that would have been rather a vexatious proceeding in the circumstances. He took the alternative course; but he first applied for leave to defend, and he filed an affidavit which showed no defence at all, apart from the counter-claim, to have the contract rescinded. It was upon that affidavit that he got leave to defend. The difficulty arose from the fact that a winding-up petition was presented before he put in his counter-claim, but in his Lordship's opinion he had done all that was reasonably necessary to exercise his right to repudiate the contract. Whether the decision in "*In re Cleveland Iron Co.*" (16 W.R., 95), where it was decided that a defence to an action for calls founded upon the right of the shareholder to be relieved from his contract was not a proceeding to repudiate the contract for the purpose of the rule above stated, went too far it was unnecessary to decide, though it would lead to some extraordinary results. But this Court was asked to extend the principle of that decision, which was a decision under the old practice, to what was done here under the new practice, which was quite different. He thought that that was wholly unjustifiable. The appeal would therefore be allowed.

LORDS JUSTICES VAUGHAN WILLIAMS and ROMER concurred.

[Solicitors—Ward, Perks, and McKay; Hays, Schmettau, and Dunn.]

Q.B. Div. } 1900.
(Bigham, J.) } Feb. 3.

BEIGHTHEIL AND YOUNG V. STEWART.*

Principal and Agent—Undisclosed principal—
Liability of agent.

In this action the defendant was an architect engaged by building owners for the rebuilding of two public-houses, and he invited the plaintiffs to give estimates for lamps, referring in the letters to his "clients," but not naming them. The plaintiffs sent him estimates in his own name and in their letters referred to "your clients," and afterwards the defendant ordered the goods without stating that he did so as agent. The work being done, the invoices were sent by the plaintiffs to the defendant in the form "W. Stewart, Esq., Dr. to Beightheil and Young." Subsequently the defendant sent the plaintiffs his certificates for the amounts of the invoices, addressed to the builders, certifying that the plaintiffs were entitled to be paid so much by such builders. The builders declined to pay and the plaintiffs wrote them several times and then asked defendant to try and get them the money. Defendant then suggested that they should ask payment from the building owners, which they did, but payment was refused. They now brought this action against Mr. Stewart, the architect, to recover £91. When the action first came on for trial the learned Judge intimated his opinion that the builders ought to pay, and adjourned the hearing. Acting on this intimation the builders paid the plaintiffs £70, but declined to pay the balance of £21, alleging that they had not been paid that sum by the building owners.

Mr. ARTHUR POWELL, for the plaintiffs, contended that the defendant, though known to be an agent when the contract was made, was personally liable, because

he had not disclosed the names of his principals, which were unknown to the plaintiffs till long afterwards, and he cited "*Story on Agency*," s. 291; "*Thomson v. Davenport*," 2 Smith's Leading Cases, 10th edition, p. 368; and the notes thereto.

Mr. MONTAGUE LUSH, for the defendant, contended that, as the plaintiffs were informed there were principals who were afterwards named, his client incurred no personal responsibility, and he further contended that by seeking payment from the builders the plaintiffs had elected to look to them and not to the defendant.

MR. JUSTICE BIGHAM was of opinion that the defendant, by making the contract in his own name without naming his principals, and without expressly excluding his liability, had made himself personally liable, and that by endeavouring to get the money from the builders and the building owners to whom the defendant had referred them they had made no election exonerating him. He thought the plaintiffs had done right in accepting the £70 from the builders since the last hearing, and though he still considered the builders were the persons ultimately liable who ought to find the money, he gave judgment for the plaintiffs for £21 and costs on the High Court scale.

A stay of execution was applied for but refused.

Q.B. Div. } 1900.
(Bucknill, J.) } Feb. 3.
WEST AND WRIGHT V. NEWING.*

Assignment—Equitable assignment—Agreement to hand over cheques "as and when received"—
—Liability of insolvent estate.

This was an action brought under Order XIV. to recover from the defendant, as administratrix of John William Newing, deceased, the sum of £39 0s. 6d., the price of flour sold, and to recover from the defendant, personally, the sum of £44 16s. 3d. In September, 1898, John William Newing, who was a baker, made the following contract with the plaintiffs:—"The Deaf and Dumb Contract.—In reference to above, my tender being accepted, I accept your offer of flour at prices as under, scaling 22s. 9d. per 20 stones, best second, in quantities of about eight to ten sacks per week, payment in one month. I also agree to endorse the cheques from the asylum and hand over to you as received by me in payment of the accounts." Flour was delivered by the plaintiffs under the contract between September, 1898, and March, 1899, when the sum now claimed was due to the plaintiffs. On March 23, 1899, Newing died, and the defendant, who is his widow, became administratrix with the will annexed. In May, 1899, the plaintiffs showed the contract of September, 1898, to the defendant, and, later in the same month, a cheque for £44 16s. 3d. was paid by the committee of the asylum to the defendant. The plaintiffs claimed the right to have the cheque endorsed to them, but the defendant refused to hand it over and held it for the benefit of the testator's creditors. The estate was insolvent.

Mr. FOHLER, for the plaintiffs, contended that the contract of September, 1898, constituted a good, equitable assignment of the cheque and that the defendant held it as trustee for them. He cited "*In re Irving—ex parte Brett*" (7 C.D., 419), and distinguished "*Field v. Megaw*" (L.R., 4 C.P., 661).

Mr. HERBERT SMITH, for the defendant, contended that the undertaking to endorse the cheques did not constitute an assignment but was a mere additional undertaking as to the manner of payment for the flour, on which an action for damages only could be main-

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

tained. If there were an assignment an action could be brought, after notice, against the asylum committee. This, he contended, could not have been done; nor could an action for money had and received be maintained against the defendant. He cited "*Schroeder v. Central Bank*" (34 *L.T.*, 735), and "*Hopkinson v. Forster*" (*L.R.*, 19 Eq., 74). The appointment could easily have been evaded by the testator getting the committee to pay him in cash, and was too vague. The agreement being an agreement to assign a cheque and not to assign a fund, no trust was created but only a personal right of action against Newing. "*In re D'Epineuil*" (20 *C.D.*, 158) and "*Tailby v. Official Receiver*" (13 *App.Cas.*, 523) were also referred to.

MR. JUSTICE BUCKNILL gave judgment for £89 0s. 6d. against the testator's estate and, personally against the defendant, for £44 16s. 3d. He said that there was no doubt the parties to the agreement of September, 1898, intended to appropriate the cheques received from the asylum committee to the specific purpose of paying the plaintiffs for flour delivered. "*In re Irving*" was, in his opinion, an authority for saying that the agreement constituted an equitable assignment of the moneys as and when received from the asylum committee. The agreement was not an undertaking to pay out of the cheques received, but was, in the words of Chief Justice Bacon in the case referred to, "an undertaking to pay over the very fund itself."

[Solicitors—Bower, Cotton, and Bower, for Stephen and Urmston, for the plaintiffs; Kingsford, Duncan, and Co., for J. J. Williamson, Deal, for the defendant.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams, }
L.J.J.)

1900.
Feb. 5.

JONES V. BARNETT.*

Vendor and Purchaser—Title—Purchase under order of the Court—Prior encumbrancer.

Sec. 70 of the Conveyancing Act, 1881 (44 and 45 Vict., c. 41), was only intended to cure irregularities, and does not apply to a case where an order has been made to sell land on the supposition that it belonged to A when it really belonged to B.

Decision of Romer, J. (15 *The Times L.R.*, 235), affirmed.

This was an appeal against a decision of Mr. Justice Romer's (reported in *The Times* of February 27 last, and 15 *The Times L.R.*, 235). The case raised an important question as to the extent of the protection given to a *bona fide* purchaser for value by section 70 of the Conveyancing and Law Property Act, 1881, when he has purchased under an order of the Court. The facts were as follows:—On May 31, 1894, one Isaac Jones, being indebted to Philip Jones, the husband of the plaintiff, Mary Jones, executed a deed whereby, after reciting the will and death of an uncle, one John Williams, and that Isaac Jones was one of the legatees named in the will and was indebted to Philip Jones in the sum of £350, and had agreed to assign to the plaintiff all his share, right, title, and interest under the will, he, the said Isaac Jones, thereby assigned unto Mary Jones, and Philip Jones thereby confirmed, all the share, right, title, and interest to which Isaac Jones in his right was then, or should, or might thereafter be entitled under the will to Mary Jones absolutely. Subject to a question whether the words of the grant operated to pass more than a life interest to the plaintiff in the freeholds, the property included a rever-

sion expectant on the death of a life tenant in a leasehold shop and two freehold cottages at Aberavon, near Swansea. On February 26, 1895, the defendant obtained judgment against Isaac Jones for £450 in an action in the Queen's Bench Division of "*Barnett v. Jones*," and on March 14, 1895, by an order in that action, a receiver was appointed of Isaac Jones's reversionary interest in the above-mentioned freehold and leasehold property. On July 10, 1895, a petition was presented on behalf of Barnett before Mr. Justice Chitty entitled "*In the Matter of Isaac Jones and the Judgments Act, 1864*," praying a sale of the interest of Isaac Jones in the property of which the receiver had been appointed. By an order made on this petition on July 24, 1895, accounts were ordered to be taken of what was due to the petitioner under the judgment of February 26, 1895, of what interests of Isaac Jones had been delivered in equitable execution by the appointment of a receiver, an inquiry whether there were any and (if any) what liens, charges, or encumbrances on the interest in land of Isaac Jones, their amounts and priorities, and of those which were prior and subsequent to the receivership order, and which, if any, created subsequent to that order, were before the registration of that order created in favour of a purchaser for value; and it was ordered that Isaac Jones should pay what should be certified to be due within one month after the chief clerk's certificate, and it was ordered that, in default of Isaac Jones paying the amount so certified, his said interests in land should be sold, with the approbation of the Judge, free from all liens, charges, or encumbrances created subsequent to the order of March 14, 1895, except any such created in favour of a purchaser for value before the registration of that order. On January 20, 1896, the chief clerk certified that £509 19s. was due, that the property consisted of the leasehold shop and freehold cottages above mentioned, and that there were no charges or encumbrances on Isaac Jones's interest therein. Isaac Jones having paid no part of his debt, Barnett subsequently obtained an order authorizing him to bid for the property, which was put up for auction on December 16, 1896. Barnett was the highest bidder for £515, and by an order dated February 19, 1897, it was ordered that a person should be appointed to convey the interest of Isaac Jones in the houses to Barnett. The tenant for life died on March 16, 1897, and Barnett then took possession, and the deeds relating to the property were subsequently handed over to him by the executors of the will of John Williams. Neither Barnett nor his solicitors had any notice or knowledge of the assignment to the plaintiff until a letter came from the plaintiff's solicitor to Barnett's solicitor on April 15, 1897, claiming that the plaintiff, Mary Jones, was entitled to the property under the assignment of May 31, 1894. Section 70 of the Conveyancing and Law of Property Act, 1881 (subsection 1), is as follows:—"An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not." Mr. Justice Romer held that this section did not operate to give the defendant a better title to the property than that of the plaintiff, which was prior in date, and that her interest was not affected by the order for sale, and she was entitled to recover possession of the property. The defendant appealed.

Mr. Neville, Q.C., and Mr. W. F. Phillpotts were for the defendant; Mr. Bramwell Davis, Q.C., and Mr. T. B. Napier were for the plaintiff.

The COURT dismissed the appeal.

The MASTER of the ROLLS thought there was no real difficulty in the case, unless the Court were asked to

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

redraft section 70. In making the order for sale the Court supposed that it was dealing with an interest of Isaac Jones in the land. It turned out that the land was not his, and then it was said that the purchaser had obtained a good title by means of section 70. None of the cases already decided upon the effect of that section touched this aspect of it. The Court was now asked to go much further. The section was only intended to cure irregularities, and did not apply to a case in which an order had been made to sell land on the supposition that it belonged to A when it really belonged to B.

LORD JUSTICE RIGBY said that section 70 was not intended to entrap the Court into dealing with property with which it had no idea of dealing.

LORD JUSTICE VAUGHAN WILLIAMS concurred.
[Solicitors—Richard White; Riddell, Vaisey, and Smith.]

Court of Appeal (A. L. Smith, Collins, } 1900.
and Romer, L.J.J.) } Feb. 5.

SPENCER V. LIVETT, FRANK, AND SON, AND JOHN AIRD AND CO.*

Master and Servant—Master's liability to servant
—Workmen's Compensation Act, 1897—Factory
and Workshop Act, 1878, sec. 93—"Shipbuilding
yard," what is—Ship repairing in dock.

This was an appeal from the award of the Southampton County Court Judge under the Workmen's Compensation Act, 1897. The appellants, Messrs. Livett, Frank, and Son, were a firm of ships' chandlers who supplied stores to ships, and in addition they undertook the painting of ships. The applicant, Spencer, was a workman in their employment. The owners of the steamship Jelunga, which was at Southampton, employed Messrs. Livett, Frank, and Son to paint the inside of the ship, and for this purpose the ship was taken into the inner dock and moored alongside a quay. In order to paint her it was necessary to remove the ballast, and as Messrs. Livett, Frank, and Son did not do this class of work, Messrs. John Aird and Co. undertook to do it. Messrs. Livett, Frank, and Son lent some men, including the applicant, to Messrs. John Aird and Co., who paid the men so lent to them. The ballast was taken out of the ship's hold by means of a steam crane on the ship worked by the ship's crew, the crane hoisting a bucket and lowering it down into barges in the dock. The applicant was at the time of the accident working in the hold of the ship taking out the ballast, when the bucket which was being raised by the crane struck him and injured him. The applicant claimed compensation. Messrs. Livett, Frank, and Son, and Messrs. John Aird and Co. were made respondents upon the claim, and Messrs. Livett, Frank, and Son also claimed indemnity against Messrs. John Aird and Co. in case they were held liable to the applicant. The inner dock, where the ship was, was practically surrounded by warehouses, and cranes were placed at intervals along the dock quays for loading and unloading ships. The Jelunga was at the same time having some internal repairs done to her while in the dock by a firm called Day, Summers, and Co., and one of the witnesses said that it was a customary thing for Day, Summers, and Co. to do repairs to ships in this and any other dock. The County Court Judge found that at the time of the accident the applicant was solely in the employment of Messrs. Livett, Frank, and Son; that he was employed in and about the crane and machinery which were being used to discharge the ballast; that the dock in which the Jelunga was including the quay and all that part of the dock filled with water was a factory within the meaning of

section 7 of the Workmen's Compensation Act, 1897; that the ship's engine and crane used to discharge the ballast was a factory within the meaning of the Act; that it was the usual and ordinary course of business that ships should be repaired in the dock in question both as to the ship itself and as to her machinery; that the Jelunga was on this occasion in the dock for the purpose of repair and was actually in course of being repaired at the time of the accident; and that the ship's engine and crane were being used in the performance of work necessary to be performed for repairing the ship and painting the ship as described in the evidence. The learned Judge held that the dock was a "factory" within the meaning of section 7, subsection 2 of the Act of 1897, as the process of unloading the ballast into a barge came within section 23, subsection 1 of the Factory and Workshop Act, 1878, it being unloading on to a dock; and he also held that by section 93 of the Factory and Workshop Act, 1878, and Schedule 4, Part 2, the dock was a "factory." He accordingly awarded £40 to the applicant, and held that Messrs. Livett, Frank, and Son were not entitled to be indemnified by Messrs. John Aird and Co. Messrs. Livett, Frank, and Son appealed.

Mr. R. M. BAY, Q.C., and Mr. S. H. EMANUEL, for the appellants, contended that the Judge was wrong in holding that the dock was a "factory" within section 7 of the Act of 1897, which incorporated section 23 of the Factory and Workshop Act, 1878. The decision in "*Hennessey v. McCabe*" (16 *The Times* L.R., 77; 69 *L.J.*, Q.B., 173) was not given when the County Court Judge gave his decision. That case was conclusive upon the point. They also referred upon this point to "*Flowers v. Chambers*" ([1899] 2 Q.B., 142). Nor was the dock a factory within section 93 of the Factory and Workshop Act, 1878, which defined a non-textile factory as meaning any premises or places named in Part 2 of Schedule 4 to the Act, wherein steam, water, or other mechanical power was used in aid of the manufacturing process carried on there. Amongst the premises referred to in Part 2 of Schedule 4 was "shipbuilding yards—that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired." The dock here was an ordinary loading and unloading dock, not a repairing yard.

Mr. CLAVELL SALTER, for the applicant, said that he was precluded by the decision in "*Hennessey v. McCabe*" from arguing that the dock was a factory within section 23 of the Factory and Workshop Act, 1878. But it was a factory within section 93 of the Factory and Workshop Act, 1878, and Part 2 of Schedule 4 to the Act. The Judge had found that this dock was a place where ships were repaired. The dock therefore came within the definition of "shipbuilding yard," and as such was a factory within the Act, and therefore a factory within section 7 of the Workmen's Compensation Act, 1897. He also referred to section 7, subsection 3, of the Act of 1897.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the present case was decided by the County Court Judge before the decision of this Court in "*Hennessey v. McCabe*." In that case the applicant, who was injured, was on board a ship lying in a dock, and was engaged in loading the ship with cargo from a lighter by means of a steam winch attached to the ship. This Court held that the case did not come within the Act. That decision, therefore, covered the present case so far as regarded section 23, subsection 2, of the Factory and Workshop Act of 1878. It was then said that the definition of a non-textile factory in section 93 of the Factory and Workshop Act, 1878, applied to this dock. His Lordship could not see any manufacturing process carried on

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

in this dock. That definition, however, referred to Schedule 4, Part 2, of the Act. That schedule included a "shipbuilding yard" as one of the places included in section 93. Shipbuilding yard was defined as meaning "any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired." Could it be said that this inner dock was a shipbuilding yard where ships were made, finished, or repaired? As Lord Justice Romer had suggested during the argument, if it were so, then one ship going into a dock for some repairs where there were 20 or 30 other ships loading or unloading would make the dock a "shipbuilding yard," and therefore a factory. That point also was untenable. The Act of 1897 therefore did not apply.

LORD JUSTICE COLLINS concurred. He only wished to add that section 7, subsection 3, of the Act of 1897 was itself enough to show, if it were required, that the contention of the applicant was not tenable.

LORD JUSTICE ROMER concurred. With regard to the definition of "shipbuilding yard," in his opinion the Legislature contemplated premises where the business of making, finishing, and repairing ships was carried on.

[Solicitors—Speechly, Mumford, and Co., for G. Lamport, Southampton, for the appellants; French and Co., for E. R. Enser, Southampton, for the applicant; J. Robinson and Co., for John Aird and Co.]

Q.B. Div. (Channell }
and Bucknill, J.J.) }

1900.
Feb. 5.

CHAMBERS V. GOLDTHORPE.*

Building Contract—Architect—Certificate as to work done—Negligence—Liability.

This was an appeal from the Holmfrith County Court. The action was brought by Mr. J. T. Chambers, who is an architect, against Mr. Harrop Goldthorpe for fees. The defendant had employed the plaintiff to prepare plans for buildings he was then about to erect, and to superintend and measure up the work. The work was done by a contractor. The contract between the defendant and the contractor provided (Clause 20) as follows:—"A certificate of the architect, or an award of the referee hereinafter referred to, as the case may be, showing the final balance due or payable to the contractor is to be conclusive evidence of the works having been duly completed, and that the contractor is entitled to receive payment of the final balance. . . ." Clause 22 of the contract provided that, in case of any question, dispute, or difference arising between the proprietor, or the architect on his behalf, and the contractor as to various matters therein specified, arising under or out of the contract, including questions "as to the works having been duly completed," or in case the contractor shall be dissatisfied with any certificate of the architect under certain of the clauses of the contract, "or in case he (the architect) shall withhold or not give any certificate to which the contractor may be entitled, then such question, dispute, or difference, or such certificate, or the value or matter which should be certified, as the case may be, is to be from time to time referred" to arbitration. The plaintiff had incorrectly measured up certain of the materials used, the result of which was that the amount of the certificate was larger than it ought to have been. The defendant admitted the plaintiff's claim, but counterclaimed for damages for negligence. The County Court Judge gave judgment for the plaintiff on the claim and for the defendant on the counter-claim. The plaintiff appealed.

Mr. SCOTT FOX, Q.C., who appeared for the plaintiff,

contended that in giving a certificate the architect acted in a position analogous to that of an arbitrator, and that so long as he acted honestly he was not liable to an action for damages for want of skill.

Mr. LOWENTHAL, for the defendant, contended that the architect was liable under the circumstances, because in measuring up the quantities he was acting as the servant of the defendant, not as an arbitrator. He also contended that under the terms of the contract between the defendant and the builder the plaintiff was never employed in any sense as arbitrator between them. He cited "*Rogers v. James*" (8 *The Times* L.R., 67); "*Stevenson v. Watson*" (4 C.P.D., 118); "*Tharvis Sulphur Company v. Loftus*" (L.R., 8 C.P., 1); "*Pappa v. Rose*" (L.R., 7 C.P., 32; on appeal, page 525).*

The COURT allowed the appeal.

MR. JUSTICE CHANNELL said that it was not controverted that if the plaintiff was acting in a judicial position, then no action would lie for mere negligence apart from fraudulent or dishonest conduct. Mr. Lowenthal suggested that that was because an arbitrator did not enter into any implied contract that he possessed the proper skill, but the parties employing him took him for better or for worse. He, however, thought that the true reason was that it was not desirable to enter into the question whether an arbitrator had been negligent or not. He would illustrate that proposition by the case of Judges who were not liable for injurious words spoken in the course of their judicial duties, even when spoken maliciously, and were said to enjoy an absolute privilege in that respect. That was not because the law allowed Judges to be malicious, but because it was not thought desirable to hold an inquiry in such a matter. It did not signify, in his Lordship's opinion, that the person who acted as arbitrator was under contractual obligations to one or other of the parties between whom he acted. Assuming, therefore, that the plaintiff was under a contractual obligation with the defendant to act for him in certain matters, and that, being a contract between the defendant and the builder, the plaintiff was put into the position of an arbitrator, then in so far as he acted as agent only of the defendant he was liable for negligence, and in so far as he acted as arbitrator between the defendant and the builder he was not liable for negligence. The test whether a person was acting as arbitrator or not was laid down by Blackburn, J., in "*Pappa v. Rose*." The question was whether he was bound to exercise his judgment impartially between the two parties. If so he would not be liable. In this case it was clear from clause 20 of the contract between the defendant and the builder that the architect was bound, in giving his certificate, to act judicially and impartially between the parties. The effect of clause 22 was that the builder had a right of appeal from the architect, but that did not prevent the architect from being in a judicial position in the first instance.

MR. JUSTICE BUCKNILL gave judgment to the same effect.

[Solicitors—Mills and Co., Huddersfield, for the appellant; Leary and Co., Huddersfield.]

Q.B. Div. (Channell and }
Bucknill, J.J.) }

1900.
Feb. 5.

CRYSTAL PALACE GAS COMPANY V. IDRIS AND CO.†

Gas Company—Gas Works Clauses Act, 1847, sec. 20.

A gas company's common law remedy by action for damages for injury to their property is not

*[See also "*Restell v. Nye*," *ante*, p. 154.—ED.]

†Reported by G. G. WILBRAHAM, Esq., Barrister-at-Law.

*Reported by G. G. WILBRAHAM, Esq., Barrister-at-Law

ousted by the summary remedy provided by sec. 20 of the Gas Works Clauses Act, 1847.

This was an appeal from a County Court. The action was brought by the gas company to recover damages for injuries to a lamp post, caused by the negligent driving of one of the defendants' servants. Proceedings in respect of the injuries were first taken before a magistrate under the provision of the Gas Works Clauses Act, 1847, under section 6 of which and by their private Act the gas company were authorized to erect and keep lamps and lamp posts in the public streets. Section 20 of the Act of 1847 provides as follows:—"Every person who shall carelessly or accidentally break, throw down, or damage any pipe, pillar, or lamp belonging to the undertakers or under their control shall pay such sum of money by way of satisfaction to the undertakers for the damage done, not exceeding £5, as any two justices or the sheriff shall think reasonable." An objection was taken to those proceedings on the ground that the remedy provided by the Act was one against the person who did the act complained of, and not against his master, and the summons was dismissed. In the County Court the Judge gave judgment for the gas company. The defendants appealed.

Mr. BARTLEY DENNIS, for the defendants, contended that the plaintiffs' common law remedy, by action for damages, was ousted by section 20 of the Gas Works Clauses Act, and that their only remedy was the one under the section, because where a statute created a pecuniary obligation and gave a remedy for enforcing it that remedy must be adopted—"St. Pancras (Vestry) v. Batterbury" (2 C.B., N.S., 477). He further contended that, at any rate, having already taken proceedings under the Act against the servant, the plaintiffs could not now proceed against the masters, and that the liability (if any) was limited to £5.

Mr. SAUNT, for the plaintiffs, contended that the common law remedy was left undisturbed by the Act.

The COURT dismissed the appeal.

Mr. JUSTICE CHANNELL said that he could see no ground for saying that the Act afforded an exclusive remedy. The principle in "St. Pancras (Vestry) v. Batterbury" only applied where a new offence was created, and in the same Act a remedy was given. Lamps were authorized by section 6 of the Act to be placed in the street, which under the common law might have been held to be a nuisance. In addition to that provision was made for the summary recovery of some compensation in certain cases. There was nothing in that to oust the common law remedy.

Mr. JUSTICE BUCKNILL concurred.

[Solicitors—Hugh C. Godfray, for the appellants; Blyth, Dutton, and Co., for the respondents.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.JJ.) } Feb. 5.
LAWSON V. ATLANTIC TRANSPORT COMPANY (LIMITED).
Master and Servant—Master's liability to servant
—Accident arising out of employment on
machinery on a quay—Vessel discharging in
dock—Workmen's Compensation Act, 1897—
Factory and Workshop Act, 1895.

This was an appeal from the award of the Bow County Court Judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent was the widow of a workman, who at the time of his death was in the employment of the appellants, the Atlantic Transport Company. The respondent

claimed compensation under the Act on behalf of herself and children. The following facts were admitted:—The deceased man was on May 8, 1899, at work for the appellants as a stevedore, with others, in the hold of the appellants' steamship Mackinaw, which was being discharged in the West India Docks. The Mackinaw was lying in the dock moored to the quay, and the cargo, which was in bags, was being discharged from the hold of the ship on the quay by the Dock Company's hydraulic crane situate on the quay. The crane was worked by the appellants' men. There were eight men in the gang at work in the hold, of which the deceased was one, two men in each corner of the hold, and each two men made up sets consisting of 15 bags each, which they laid across a rope stop, and then fastened the stop on to the hook of the runner of the hydraulic crane, which then heaved up the set out of the hold and landed it on the quay. Between 4 and 5 o'clock in the afternoon of May 8, 1899, the deceased and another man were making up a set in the hold, and had got 12 bags across the rope stop, and were in the act of putting another bag on to the 12 bags, when some bags from the tier behind them fell on to them. The runner of the crane, at the time the tier fell, was not attached to the stop of the set which the deceased man was making up but was ashore at the time. The deceased man died from the injuries so received. The County Court Judge held that the case was not distinguishable from "Woodham v. Atlantic Transport Company" (15 The Times L.R., 51, and [1899] 1 Q.B., 15), and that therefore by section 23, subsection 1, of the Factory and Workshop Act, 1895, and section 7 of the Workmen's Compensation Act, 1897, the employment was on, in, or about machinery used in the process of unloading from a quay, and was therefore on, in, or about a "factory" to which the Act applied. He accordingly made an award in favour of the respondent. The appellants contended that the decision in "Woodham v. Atlantic Transport Company" did not apply, because in that case the accident happened while the end of the chain of the crane was on board the ship and while the cases were being placed by the deceased man in the basket attached to the chain of the crane; whereas in the present case the deceased man was not, at the time of the accident, employed on, in, or about the crane, as the chain of the crane was then on shore.

Mr. D. C. Leck appeared for the appellants.

Mr. W. M. Thompson, for the respondent, was not called upon.

The COURT dismissed the appeal, saying that they could not distinguish the case from "Woodham v. Atlantic Transport Company," and that therefore the County Court Judge was right.

[Solicitors—Holman, Birdwood, and Co., for the appellants; Griffith and Gardiner, for the respondent.]

Chan. Div. } 1900.
(Farwell, J.) } Feb. 6.

WHITTINGTON V. SEALE-HAYNE.*

Contract—Rescission—Misrepresentation—Indemnity.

In an action for rescission of a lease on the ground of misrepresentation a plaintiff is only entitled to an indemnity as to what was expended under the actual terms of the lease.

This was an action for rescission of a lease and for an indemnity. The plaintiffs, Mr. W. T. Whittington and Mr. R. A. W. Whittington, are breeders and exhibitors

of prize poultry, and the defendant, the Right Hon. Charles Seale-Hayne, M.P., is the owner of a house and premises, known as Whitton Manor-house, near Hounslow. On March 7, 1898, the plaintiffs and the defendant entered into an agreement by which it was provided that the plaintiffs should take the house and premises on lease for seven, 14, or 21 years, at an annual rent of £80 for the first period. The plaintiffs alleged that before the agreement was signed the defendant's agents, in answer to questions, represented that the house was in a good sanitary condition. In the following May the plaintiffs executed the lease at the office of the defendant's solicitor, but they did not read the document, relying, as they alleged, upon representations that its terms were in accordance with the agreement of March 7. The lease, however, contained the following covenant, "and also will execute all such works as are or may under or in pursuance of any Act or Acts of Parliament passed or hereafter to be passed be directed or required by any local or public authority to be executed at any time during the said term upon or in respect of the said premises whether by the landlord or tenant thereof," which covenant was not in the original agreement. A draft of the lease had previously been sent to the plaintiffs, but they had not read it. Before the execution of the lease the plaintiffs put a manager named Cooper into the house, erected several sheds, and stocked the premises with poultry. The plaintiffs alleged that, owing to the insanitary condition of the house, the water supply was poisoned, with the result that Cooper and his family became seriously ill, and the poultry either died or were rendered valueless. The sheds were subsequently removed. In October, 1898, the local authority declared that the house was unfit for human habitation, and required the premises to be put in order. The plaintiffs claimed rescission of the lease and an indemnity from the consequences of entering into the contract. The defendant admitted the insanitary condition of the house, but denied that he or his agents gave any warranty, and alleged that the plaintiffs had ample opportunities for inspection before completion of the lease. He counter-claimed for arrears of rent.

Mr. Bramwell Davis, Q.C., and Mr. R. D. Yelverton appeared for the plaintiffs; Mr. Hughes, Q.C., and Mr. A. Dauney for the defendant.

Mr. BRAMWELL DAVIS, after stating the facts, said that he did not contend that there had been any fraudulent misrepresentation as to the condition of the house, and so the plaintiffs could not claim damages. The plaintiffs, however, had incurred expenses in putting the poultry on the premises, which they would not have done had there been no lease. Though the misrepresentations had been innocent, he thought his clients were entitled to an indemnity from the consequences of entering into the contract. "*Newbigging v. Adam*" (34 C.D., 582) seemed to support such a proposition.

Mr. YELVERTON followed on the same side, and argued that the defendant's agents had acted carelessly and recklessly. He referred to the following cases:—"*Arnison v. Smith*" (41 C.D., 98); "*Reese River Company v. Smith*" (4 E. and L. App., 64); "*Hughes v. Twisden*" (55 L.J., Ch., 481); "*Derry v. Peek*" (14 App. Cas., 337); and "*Jolliffe v. Baker*" (11 Q.B.D., 259).

Mr. HUGHES for the defendant contended that the result of the authorities was that an indemnity only applied to whatever was actually required to be done under the contract, such as payment of rent and taxes and the doing of repairs under a covenant to repair. Here there was no obligation whatever upon the plaintiffs to erect sheds or to stock the premises with poultry. Consequently they could not recover the expenses they had incurred in so doing. Nor could the

defendant be compelled to make good his representations. "*Redgrave v. Hurd*" (20 C.D., 1) was a decisive authority against the claims of the plaintiffs.

MR. JUSTICE FARWELL said that the case raised, in the words of Lord Watson, a point of some nicety and difficulty. The plaintiffs asked for rescission on the ground of admittedly innocent misrepresentations, and also an indemnity from the consequences of having entered into the contract. He had not yet heard the evidence, but he would assume for his present purpose that innocent misrepresentations as to the sanitary condition of the premises had been actually made. The question then arose—to what extent ought the plaintiffs to be restored to the *status quo ante*? The defendant admitted by his counsel that he was bound so far as liabilities incurred and payments made under the contract were concerned. The plaintiffs, however, demanded more than this—they claimed that the consequences of the misrepresentation should be made good by the defendant. The various authorities cited had left the question rather at large, but it seemed to him that to make good the consequences of misrepresentation was the same thing as damages, and damages could not be recovered for innocent misrepresentations—"*Redgrave v. Hurd*," "*Slim v. Croucher*" (1 D.F. and J., 518), might have helped the plaintiffs, but that case had been overruled in "*Low v. Bouverie*" ([1891] 3 Ch., 82). It was true that the judgments of three Lords Justices in "*Newbigging v. Adam*" were not quite in harmony, and Lord Justice Fry seemed inclined to carry the doctrine of law somewhat further than Lord Justice Bowen. But he adopted what Lord Justice Bowen had laid down, and must hold that the plaintiffs were not entitled to anything more than what they had paid and expended under the actual terms of the lease. Anything else would be damages pure and simple.

Mr. W. T. Whittington, examined by Mr. BRAMWELL DAVIS, said that he entered into negotiations with Messrs. Chinnock, who were the agents for the defendant. On the occasion of his third visit, his son and Cooper accompanied him. Mr. Clark, whom they saw, said that the drainage would not want doing in their time, and if it did the landlord would do it. Cooper said that it was he who would have to live in the house, and asked if it was in a sanitary condition. Clark replied it was in a perfectly sanitary condition. Witness signed the agreement on the strength of that representation.

Witness was cross-examined by Mr. HUGHES, and then, after a suggestion from his LORDSHIP, Mr. HUGHES intimated that the defendant would consent to rescission of the lease and would agree to pay the plaintiffs £20 to cover what they had paid and expended under the lease.

[Solicitors—T. J. Pettigrew, for the plaintiff; E. Hilder, for the defendant.]

Q.B. Div. (Channell and } 1900.
Bucknill, JJ.) } Feb. 6.

REG. V. DE GREY—EX PARTE KING'S LYNN DOCKS,
&C., COMPANY.*

Poor Rate—Appeal—Notice of appeal—Service.
"Reg. v. Justices of Kent" (80 L.T., 622) overruled.

In this case a rule *nisi* had been obtained, at the instance of the King's Lynn Docks and Railway Company, for a *mandamus* to the Hon. John De Grey, Recorder of King's Lynn, to hear and determine, or to enter and respite, two appeals between the King's Lynn Docks and Railway Company and the assessment com-

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

mittee of the King's Lynn Poor Law Union with respect to two several rates or assessments made for the relief of the poor of the parish of St. Margaret's, in the borough of King's Lynn, dated respectively November 21, 1898, and May 26, 1899, upon the grounds:— (1) That the town council of King's Lynn were not entitled to notice; (2) that, if they were entitled to notice, they had had it; (3) that in any event the appeals ought to have been entered and respite. The King's Lynn Docks and Railway Company appealed to the Recorder from the two poor rates. The notices of appeal were addressed to "The Churchwardens and Overseers of the Poor of the Parish of St. Margaret's, in the Borough of King's Lynn, in the County of Norfolk, and to the Assessment Committee of the King's Lynn Poor Law Union." The notices were served upon the clerk of the peace of the borough of King's Lynn, who also held the office of town clerk. When the appeals were called on before the Recorder he refused to hear them, upon the ground that the notices had not been served upon the town council of the borough. The rule for a *mandamus* was then obtained.

Mr. Marshall, Q.C., and Mr. R. Cunningham Glen (Mr. A. M. Talbot with them) showed cause against the rule; Mr. Littler, Q.C., and Mr. F. K. North supported it.

The COURT held that, even though the notices had not been rightly served, the Recorder had jurisdiction to hear the appeals. In "*Reg. v. Kent Justices*" (80 L.T., 622) it was held that in a poor-rate appeal the giving proper notices was a condition precedent to hearing the appeal. That decision was given *per incuriam*. The Court was, therefore, not prepared to follow it. The decisions in "*Shrewsbury Railway Company v. Leominster Overseers*" (21 J.P., 149); "*Liverpool Gas Company v. Everton*" (L.R. 6, C.P., 414); and "*Reg. v. Surrey Justices*" (6 Q.B.D., 100) were not drawn to the attention of the Court. The decision in "*Reg. v. Kent Justices*" was wrong, and the *mandamus* must therefore go.

Rule absolute.

[Solicitors—Burton, Yeates, and Hart, agents for Coulton and Son, King's Lynn, for the respondents; Crossman, Pritchard, Crossman, and Block, agents for Seppings and Wilkin, King's Lynn, for the applicants.]

Prob., Divorce, and Adm. Div. }
(Jeune, P., Gorell Barnes, J.) }

1900.
Feb. 6.

THE RODNEY.*

Ship—Bill of lading—Damage to cargo—Bill of lading incorporating the Harter Act (Act of Congress, Feb. 13, 1893)—Negligence in the "management" of vessel.

This was an appeal from a decision of the Judge of the County Court at Newcastle, given on December 12, 1899, and raised an interesting point in connexion with the construction of the United States Act of Congress, approved on February 13, 1893, and commonly known as the Harter Act. The appellants (who were the plaintiffs in the Court below) brought their action to recover a balance of freight amounting to £40 18s. 9d., in respect of the carriage of a cargo of wheat and maize on board their steamship the *Rodney* on a voyage from Baltimore to Newcastle in January and February of last year. The cargo was shipped under a bill of lading, which incorporated the provisions of the Harter Act, by section 3 of which "neither the vessel, her owner or owners, agent, or charterers shall become or

be held responsible for damage or loss resulting from faults or errors on navigation or in the management of the said vessel." The *Rodney* sailed from Baltimore on January 17, and on the voyage she encountered exceptionally heavy weather, her decks being constantly flooded, and on her arrival at Newcastle it was found that her cargo had been damaged. The defendants counterclaimed on the action in respect of this damage, which they classified under four heads. As to two of these the plaintiffs admitted liability, and as to the third the County Court Judge decided at the trial in favour of the plaintiffs, and from this finding the defendants did not appeal. The main controversy at the trial and the only matter in dispute in this appeal was as to the fourth head of damage, which was in respect of £18 2s. 1d., damage to the cargo in No. 1 hold. It appeared that the *Rodney* was a well-decked ship, and that the entrance to the fore-castle, where the crew slept, was flush with the main deck. A 2in. lead pipe was fitted to carry off the drainage of the fore-castle into the bilge, and this pipe passed through the No. 1 hold. To prevent smell arising from the bilges a syphon trap was constructed immediately under the sink in the floor of the fore-castle, and the sink itself was, to prevent the passage of solid matter, protected by a grating. During the voyage in question this pipe became choked, and the fore-castle was, through the bad weather, flooded to the depth of some 3ft. In order to clear the obstruction the boatswain removed the grating and then endeavoured to clear the pipe by means of a poker and hammer, with the result that he drove a hole through the bottom of the syphon trap, and thereby allowed the water in the fore-castle to run into and damage the cargo in the No. 1 hold. At the trial the learned Judge decided that this act of the boatswain was not an act done in the "management" of the vessel within the meaning of the third section of the Harter Act, holding on the authority of the case of "*The Glenochil*" ([1896], P., 10) and "*The Sylvia*," an American case (16 "Federal Reporter," 230), that the word must be confined to the performance (though improper) or non-performance of such acts as are, or ought to be done, for the safety of the vessel and for her maintenance in a seaworthy condition, and he accordingly gave judgment for the defendants on their counter-claim, with costs. The plaintiffs appealed.

Mr. B. D. KILBURN, for the appellants, contended that the action of the boatswain was within the meaning of the word "management" in the section. He cited the cases of "*The Glenochil*" and "*The Sylvia*" referred to above, and also referred to the cases of "*The Ferro*" ([1898], P., 38); "*Dobell v. Steamship Rossmore Company*" ([1895], 2 Q.B., 408); "*Carmichael v. Liverpool Sailing Ship, &c., Association*" (19 Q.B.D., 242); and "*Good v. London Mutual Association*" (6 C.P., 563). He was stopped by the Court.

Mr. SCRUTTON, for the respondents, argued that where stipulations of this kind are vague or ambiguous they ought to be construed against the shipowner, "*Norman v. Binington*" (25 Q.B.D., 475), and that here the conduct of the boatswain had nothing to do with the management of the ship. He was merely doing something to the ship with an appliance of the ship, and it was obvious that any damage to this pipe would damage the cargo.

The COURT allowed the appeal.

The PRESIDENT, in giving judgment, said he was of opinion that this case was within the authority of "*The Glenochil*." In fact, there was very little difference between the two cases. The act of the boatswain was done in the management of the ship, to clear the fore-castle and enable the ship properly to carry the crew. The Judge of the Court below had

*Reported by HUGH O. S. DUMAS, Esq., Barrister-at-Law.

improperly restricted the meaning of the word "management," which should extend to the keeping of the vessel in proper condition. The appeal must be allowed, with costs here and below.

MR. JUSTICE GORELL BARNES concurred. In the judgments in "The Glenochil" the expression "safety of the vessel" occurred, but that was because it was appropriate to the facts of that case, and it was in no way intended to limit the construction of the word "management."

[Solicitors—Holman, Birdwood, and Co., for the appellants; King, Wigg, and Co., agents for H. J. Richardson, of Newcastle, for the respondents.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams, } 1900.
L.JJ.) Feb. 7.

LOW V. THE STAINES RESERVOIRS JOINT COMMITTEE.*
Lands Clauses Acts—Lands taken—Part only required—Owner willing to sell whole—Lands Clauses Consolidation Act, 1845, sec. 92—"House," meaning of.

This was an appeal by the defendants against an injunction granted by Mr. Justice Stirling restraining them in effect from taking under their statutory powers, for the purpose of the works which they are authorized to construct, a portion of premises of which the plaintiff is the lessee, without taking the whole of the property. The plaintiff is the lessee, for a term of 99 years from 1872, at an annual rent of £55, of a house and land, known as Hawthorn-lodge, in the parish of Sunbury. The property comprises a little more than two acres, and consists, in addition to the house, of a garden, and a paddock of more than an acre. There is no separate access to the paddock. The present yearly tenant uses the paddock for keeping fowls and growing fruit, carrying on the business of a poulterer and greengrocer. There is a row of fruit trees in the paddock. The defendants gave the plaintiff notice to treat for a small triangular piece of the paddock, containing 1 rood and 24 perches, and he gave them a counter-notice requiring them to purchase his interest in the whole of the property. Section 92 of the Lands Clauses Consolidation Act, 1845, provides:—"No party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." The learned Judge held that the paddock was really garden, and that it was necessary to the enjoyment of the house, and he accordingly granted the injunction from which the defendants appealed.

Mr. Butcher, Q.C., and Mr. Ingle Joyce were for the defendants.

Mr. Upjohn, Q.C., and Mr. Scrutton, for the plaintiff, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that if the Court had to decide, without the guidance of the authorities which had put a construction upon section 92—if the matter were *res nova*—he might be inclined to accede to the arguments of the appellants' counsel. But it was decided at least 50 years ago that the word "house" in section 92 must be construed in the same way as it would be in a grant in a conveyance, and that decision had been followed ever since. The word "house" did not mean merely an erection of brick and mortar. The question, therefore, was, what would have passed by a grant of this house, and his Lordship could not frame any description which would exclude

the paddock, unless it were expressly excluded. His Lordship quoted the following passage from Sheppard's Touchstone (p. 94):—"By the grant of a messuage, or a messuage with the appurtenances, doth pass no more than the dwelling-house, barn, dove-house, and buildings adjoining, orchard, garden, and curtilage—i.e., a little garden, yard, field, or piece of void ground, lying near and belonging to the messuage, and houses adjoining to the dwelling-house, and the close upon which the dwelling-house is built, at the most (vis., whatever is annexed to and enjoyed with the house, for its more convenient occupation). And so much also may pass by the grant of a house." Bearing this in mind you had only to look at the lease and see whether the grant of the house would not pass the paddock. There was no access to it except through the house or the court-yard. Any conveyancer would say that it was impossible in a grant of the house to exclude the paddock.

LORD JUSTICE RIGBY concurred, observing that he should be inclined to demur to the construction of the word "house" in section 92 as meaning all that would pass by a conveyance of the house. But that construction had been settled long ago.

LORD JUSTICE VAUGHAN WILLIAMS agreed with the criticisms which the other members of the Court had passed on the early decisions as to the construction of section 92. But those decisions were of such long standing that they could not now be attacked.

[Solicitors—Hollams, Sons, Coward, and Hawksley; Huntley and Sons.]

Q.B. Div. (Channell and } 1900.
Bucknill, JJ.) Feb. 7.

THE CRYSTAL PALACE COMPANY V. THE LONDON COUNTY COUNCIL.*

Metropolis—Buildings—Approval of County Council—London Building Act, 1894—Crystal Palace Act, 1881—Exemptions.

This was an appeal by case stated from justices of London. Informations were preferred on behalf of the Council against the Crystal Palace Company, the appellants, charging them with erecting at the grounds of the Crystal Palace certain buildings to which Part VII. of the London Building Act, 1894, applied—to wit, a 22-stall stable, a loom-box, stabling, and harness-room, a forage store and office, and a shoeing forge—without having obtained the approval of the Council required by the Act and the Act of 1898 amending the same. The Crystal Palace was re-erected by the appellants upon land acquired by them under the powers conferred on them by Royal charter in the year 1853. In addition to re-erecting the building the appellants laid out portions of the lands as gardens and recreation grounds, and from time to time erected on the lands conservatories and buildings, in some instances physically connected with, and in others detached from, the main building. The stables and other buildings in respect of which the information was preferred were erected in May and June, 1899, for use in connexion with land laid out by the appellants as a polo-ground. The buildings were situated about a quarter of a mile from the main building. By section 21 of the Crystal Palace Act, 1881, it was provided that "the main building, conservatories, and waterworks of the company, and the conveniences and other works immediately connected therewith, shall be exempted from the operation of Part I. of the Metropolitan Building Act, 1855, and of any other Act amending the same, but this exemption shall not extend to any dwelling-house or building

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

except as aforesaid upon any part of the property of the company." The Metropolitan Building Act, 1855, was repealed by the London Building Act, 1894, but by section 218 it is provided that where in any Act or document the provisions of the Act of 1855 are referred to, such Act or document shall with the necessary modification be read as if the corresponding provisions of the Act of 1894 were therein mentioned, instead of the provisions of the repealed Act. The justices convicted the appellants.

Mr. FREEMAN, Q.C. (Mr. R. C. Glen with him), for the appellants, contended that the stables were exempted from the provisions of the London Building Act by virtue of section 21 of the Crystal Palace Act, because they were "immediately connected" with the objects for which the Crystal Palace was re-erected and the grounds laid out, which included the amusement and elevation of the people.

Mr. Avory, for the respondents, was not called upon to argue.

The COURT dismissed the appeal.

MR. JUSTICE CHANNELL said that "works immediately connected therewith" meant works connected with the main building—that was to say, the physical structure, not the objects of the appellant company. The polo pony stables being a quarter of a mile away from the main building were not connected with it in the sense intended in the Crystal Palace Act, and were, accordingly, not exempted from the provisions of the London Building Act.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—Kimbers and Roatman, for the appellants: W. A. Blaxland, for the respondents.]

Q.B. Div. (Channell and
Bucknill, JJ.) }

1900.
Feb. 7.

ADAMSON V. MILLER.*

Local Government—By-law—Validity—Lights on vehicles—Tramcar.

This was an appeal by case stated from a metropolitan police magistrate. An information was laid by the respondent against the appellant, the manager of the North London Tramways Company, charging him with a breach of the following by-law, which was made by the London County Council:—"The owner of every vehicle which shall be driven or be upon any highway during the period between one hour after sunset and one hour before sunrise shall cause to be fixed outside such vehicle and on the right or off-side thereof a lamp, which shall be so constructed and placed as to exhibit a white light visible in the direction in which the vehicle is proceeding, and sufficient to afford adequate means of signalling the approach or position of the vehicle, and the person in charge of such vehicle shall during the said period keep such lamp properly lighted. This by-law shall not apply to any vehicle which is by any statutory enactment, or by any rule, regulation, or order made under any statutory enactment, and for the time being in force, required to carry a lamp outside such vehicle." It was proved that while being driven upon a highway during the hours mentioned in the by-law one of the tramcars of the North London Tramways Company bore a lamp which, instead of showing a white light in the direction in which it was going, showed a coloured light. The object of having the light coloured was to distinguish the tramcar from other tramcars proceeding to a different destination. The magistrate convicted the appellant.

Mr. C. W. MATHEWS, for the appellant, contended

that the Council had no power to make the by-law in question in so far as it related to tramcars, on the ground that tramways and tramcars were under the exclusive control of the Home Secretary. He referred to the Metropolitan Public Carriages Act, 1869, section 9, and the Tramways Act, 1870, sections 46 and 48. He also contended that the by-law was unreasonable.

The respondent was not represented.

Mr. Daldy appeared for the London County Council, but was not instructed to argue.

The COURT dismissed the appeal.

MR. JUSTICE CHANNELL said that it was clear that the Home Secretary had control over tramcars as tramcars. But the London County Council had power to make by-laws for the good government of their district, and it had been held that they had power to make by-laws enforcing the use of lights on vehicles using highways during the hours of darkness. Referring to the terms of the by-law, his Lordship said that it purported to refer to tramcars among other vehicles, but in case there might be some vehicles which were already bound to carry some kind of light, and to prevent it being supposed that the by-law overrode the regulations as to such vehicles, a proviso was introduced at the end of the by-law. If the Home Secretary had in pursuance of his powers required tramcars to carry a red light, then the by-law would not have applied. But no such regulation was ever made by the Home Secretary. It must be assumed that the Home Secretary had considered the question, and had decided that no regulation with regard to lights on tramcars was necessary. In terms the by-law purported to apply to tramcars. That being so, the only question was whether the by-law was within the power of the Council. He was of opinion that it was. He did not think it was unreasonable. The Council were making a by-law in respect of the use of highways and saying that every vehicle—and tramcars were at least as dangerous as any other vehicles—shall carry a light, and they said that that light should be a white light. If there had been another enactment containing requirements with which the by-law was inconsistent then the by-law would not have applied. He assumed that there were no such other statutory requirements. The Metropolitan Public Carriages Act, 1869, had been referred to, and section 9 of that Act did say that "no driver shall ply for hire unless the hackney carriage under his charge be provided with a lamp properly trimmed and lighted and fixed outside the carriage in such manner as is prescribed." But that provision had apparently been overlooked, for no requirements had been prescribed under it, and therefore no obligation existed.

MR. JUSTICE BUCKNILL concurred.

Q.B. Div. (Channell
and Bucknill, JJ.) }

1900.
Feb. 7.

BEARDSLEY V. WALTON AND CO.*

Adulteration—"Nature, substance, and quality demanded"—Compounded drug—Sale of Food and Drugs Act, 1875, secs. 6 and 7.

This was an appeal by case stated from justices of Wiltshire. An information was laid by the appellant against the respondents charging them with selling to the prejudice of the purchaser a drug—to wit, camphorated oil—which was not of the nature, substance, and quality demanded by the purchaser, the said camphorated oil only containing eight parts per cent.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

by weight of camphor, or less than half the quantity of camphor proper to camphorated oil as described in the British Pharmacopoeia, contrary to section 6 of the Sale of Food and Drugs Act, 1875. The justices dismissed the information on the ground that the camphorated oil was a compounded drug, and that consequently the summons could only be issued under section 7 of the Act. Section 6 of the Act provides as follows:—"No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty not exceeding £20, provided that the offence shall not be deemed to be committed under this section in the following cases—that is to say . . . (3) Where the food or drug is compounded as in this Act mentioned." Section 7 is as follows:—"No person shall sell any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of the purchaser under a penalty not exceeding £20."

Mr. F. R. RADCLIFFE, for the appellant, contended that camphorated oil was not a compounded drug, because the oil was only a vehicle to enable the camphor to be applied. He also contended that subsection 3 of section 6 did not prevent section 6 applying in the case of compounded drugs sold to the prejudice of the purchaser. He cited "*White v. Bywater*" (19 Q.B.D., 582) and "*Houghton v. Taplin*" (13 *The Times* L.R., 386).

Mr. BRUCE WILLIAMSON, for the respondent, contended that the effect of subsection 3 was to take offences in regard to compounded drugs out of section 6 and to bring them under section 7.

The COURT allowed the appeal.

MR. JUSTICE CHANNELL said that the difficulty of the case arose from the use by the justices of the word "consequently." If they had said that camphorated oil was a drug compounded as in this Act mentioned, then the consequence might have followed. The only possible explanation of the words "as in this Act mentioned" was that there was in the Bill a clause dealing with compounded drugs which was afterwards struck out. Their Lordships were not entitled to know that that was the case, but they were entitled to assume so from the language as it stood. The only section in the Act which it could be read as referring to was section 7, which did not in language correspond with it, but did deal with compounded drugs. If so, it must mean that nothing should be an offence under section 6 with reference to compounded drugs unless it was also an offence under section 7. Whatever meaning subsection 3 bore, this offence was equally within section 6.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—Wheatley, Son, and Daniel, for Cruttwell, Daniel, and Cruttwells, for the appellant; J. Trevor-Davies, for the respondents.]

Prob., Divorce, and Adm. Div. } 1900.
(Gorell Barnes, J.) } Feb. 7.

COWLEY V. COWLEY.*

Husband and Wife—Dissolution of marriage—
Wife using husband's name.

The Countess Cowley, having divorced her husband on the ground of his adultery and desertion, married again, but continued to use the style or title of Countess Cowley.

Held, that Lord Cowley was entitled to an injunction restraining her from so styling herself.

This was a motion on behalf of Earl Cowley, the respondent in the suit, to restrain the petitioner from

calling herself Countess Cowley, or bearing the earl's arms. The case was argued on December 15 last and judgment was reserved. (*Vide The Times*, December 16, 1899.)

Mr. Deane, Q.C., and Mr. Willock were for Lord Cowley; Mr. Lawson Walton, Q.C., and Mr. Barnard for the petitioner.

MR. JUSTICE GORELL BARNES, in delivering a considered judgment, said,—In this case Lord Cowley seeks to restrain a lady who was formerly his wife, but is now the wife of Mr. Robert E. Myddleton Biddulph, from using the style or title of Countess Cowley. The application is made to this branch of the Court in a suit for divorce brought by the lady against Lord Cowley and determined in her favour. It will be convenient in this judgment still to term the parties petitioner and respondent respectively. The respondent is Henry Arthur Mornington Wellesley, third Earl Cowley. The first Lord Cowley was raised to the peerage of the United Kingdom in 1828 by the title of Baron Cowley. His son, the present earl's grandfather, was by letters patent under the Great Seal, dated April 11, 1857, created Viscount Dangan in the County of Meath and Earl Cowley. On the death of his father in 1895 the respondent succeeded to these titles, which were by the letters patent aforesaid limited to the first earl and the heirs male of his body lawfully begotten and to be begotten. On December 17, 1889, the respondent married the petitioner, who is a daughter of the Marquis of Abergavenny. There is one child of the marriage—a boy, Christian Arthur Wellesley—who is now by courtesy called by his father's inferior title, Viscount Dangan. The petitioner on June 17, 1896, instituted a suit in this Court for divorce from the respondent, and on February 2, 1897, obtained a decree nisi for the dissolution of her marriage with him, on the ground of his desertion and adultery. This decree was made absolute on August 9, 1897. The petitioner afterwards married her present husband, Mr. Biddulph. Notwithstanding that her marriage with the respondent has been dissolved and that she has married again, the petitioner has without any sanction from the Crown continued to use, and still uses, the style or title Countess Cowley. For example, in her affidavit in opposition to this motion she describes herself as Violet Countess Cowley, and signs herself Violet Cowley. No objection seems to have been made by the respondent to this use of the title by the petitioner between the date of the said final decree and the lady's second marriage; but since she has become the wife of Mr. Biddulph the respondent has made formal objection to the petitioner's using the title Countess Cowley. On December 14, 1898, the respondent's solicitors wrote on his behalf to the petitioner's solicitors a letter in the following terms:—

"Dec. 14, 1898.

"Gentlemen,—We presume that you still act for the Lady Violet Biddulph, formerly Countess Cowley. We have been consulted by the Earl Cowley in reference to the fact that, although married to Mr. Biddulph, the lady continues to use the title 'Countess Cowley,' notwithstanding it was she who sought the divorce, and by her own volition obtained a dissolution of the marriage. As long as Lady Violet was unmarried there may have been some ground for her continuing to bear her late husband's name. Although we believe that this is a moot legal point, now, however, that she has remarried there cannot be the slightest doubt about the matter. While very anxious to avoid any unnecessary annoyance, we are instructed by Lord Cowley to request that the Lady Violet will cease using his name and adopt the only and very honourable one to which she is now entitled—viz., Lady Violet Biddulph. Trusting that we may hear from you that this course will be adopted.

"We are yours, &c.,

WONTNER AND SONS.

"Messrs. Lewis and Lewis."

*Reported by J. H. MURPHY, Esq., Barrister-at Law.

A letter in reply was received from the petitioner's solicitors as follows :—

“ Dec. 15, 1898.

“ Gentlemen,—We are in receipt of yours of the 14th inst. In reply to your inquiry, we have to inform you that Countess Cowley intends to retain the same name as her son, notwithstanding that she has been compelled to divorce her husband on the grounds of his desertion and adultery.

Yours,

“ LEWIS AND LEWIS.

“ Messrs. Wontner and Sons.”

On July 6, 1899, the respondent's solicitors wrote a letter to the petitioner's solicitors, in which the following passage occurs :—“ Thirdly, we are again instructed to ask that Lady Violet Biddulph ceases to call herself by the name and title of ‘ Countess Cowley.’ We have made research into the matter, and find that she undoubtedly has no right to so call herself, the only person entitled to now bear the title being Lord Cowley's mother, who since the divorce has become the only Countess Cowley, and has also instructed us on her behalf and requested us to ask that the Lady Violet should cease to bear this name and title. We are writing you this in order, if possible, that some arrangement shall be arrived at on these points, which we desire to settle amicably, but unless we can come to some settlement within the next week we shall have to apply to the Court without further delay.” To this letter the petitioner's solicitors replied on July 7, so far as is material as follows :—“ It is useless you writing again to ask that Lady Cowley shall call herself by any name other than the Countess Cowley ; all that we have to say upon that subject we have already said. We observe that you will now go to the Court. . . . We are prepared at any time to receive notice of motion on behalf of Lady Cowley.” The respondent then moved the Court in the old suit between the parties to restrain the petitioner from using the style or title aforesaid, on the ground that by so doing she was guilty of molestation. The motion was supported by the respondent's mother, the Dowager Countess Cowley. Upon the motion coming on before the Court it seemed to me that the real questions raised between the parties were not strictly questions of molestation but these—viz., whether the petitioner is entitled to use the style or title in question, and, if not, whether the respondent has any right to obtain an injunction in the High Court to restrain the petitioner from so doing ; and that these questions could not be dealt with in a divorce suit which was at an end except so far as the Court has jurisdiction to entertain applications with regard to the custody, maintenance, and education of the child of the marriage during his minority. It was therefore agreed by counsel for the parties that the motion should be heard as if it was a motion to restrain the petitioner from using the style or title Countess Cowley in a suit for that purpose brought in the High Court, and the arguments proceeded on that basis. The first question, then, is whether the petitioner is entitled to use the style or title Countess Cowley. The petitioner, although the daughter of the Marquis of Abergavenny, was in the legal sense a “ commoner.” At the time of her marriage with the respondent he had not succeeded to the peerage, but when his father died, in 1895, he became Earl Cowley and a peer. The petitioner by virtue of her union with the respondent became a peeress, for husband and wife are regarded in certain respects as one person in law, and a woman who is married to a peer of the realm becomes entitled to the same dignity as her husband, and acquires all the rights and privileges of peerage which are consistent with her sex. For instance, if she is accused of treason or felony she can only be tried by the House of Peers.

The statute 20 Henry VI., cap. 9, declared what would seem to have been the common law :—“ That ladies of great estate in respect of their husbands, peers of the land, married or sole, that is to say, duchesses, countesses, baronesses, should be put to answer and judged before such Judges and peers of the realm as peers of the realm should be if they were indicted or impeached, and in like manner and form and none otherwise.” The petitioner then on the respondent becoming a peer shared his dignity, and as his wife her style and title was countess, being the Norman feminine which corresponds with earl. (Seldon on Titles of Honour, Ed. 1672, c. 5, p. 526.) Her marriage with him has, however, been dissolved ; and she has married again to a commoner, and she has lost her dignity aforesaid, and all the rights and privileges annexed to it. What her legal name, position, or dignity was between the time of the dissolution of her first marriage and her second marriage was not discussed before me, and it is not necessary to consider this, for there can be no doubt that, being legally a commoner by birth and only a peeress by marriage with Lord Cowley, on her second marriage she took her present husband's position, and her proper legal description became Violet, the wife of Robert E. Myddleton Biddulph, and, as the daughter of a marquis, she would be called by courtesy Lady Violet Myddleton Biddulph. The law on the subject is strictly stated in cap. 3, section 83 of “ Cruise on Dignities ” as follows :—“ If a woman who has acquired a dignity by marriage afterwards marries a commoner, she loses her dignity and all the rights and privileges annexed to it, for that which is gained by marriage may be lost by marriage. Eodem modo quo quid constitutum dissolutum.” This is in accord with all the old authorities :—“ Acton's case ” (Rep., pt. 4, fol. 118 B) ; “ Countess of Cleveland's case ” (Rep., pt. 6, fol. 53 B) ; “ Brooke's Abridgment ” (Tit nosme de dignit., 69) ; Co. Litt., 166 ; 2 Inst., 50 ; “ Duchess of Suffolk's case ” (Ow., 81, “ Comyn's Digest,” Tit. Dig., c. 6) ; “ Fortesque de Laudibus,” 97. In the case of “ Hayward v. Duke of Suffolk ” in Hil. term (6 and 7 Ed. VI., reported in Dyer, 79 B) a writ of partition was brought against the Duke of Suffolk and his wife and others by Ranulph Hayward, Esq., and Lady Anne Powys, his wife, and so she was named in the suit. An exception was taken for misnomer because she ought only to have been called by the name of her husband and not otherwise. In the opinion of Montague, C.J. and Hales, J., the exception was good and the reason given was that “ by the law of God she was under the power of her husband and so her name of dignity shall be changed according to the degree of her husband notwithstanding the courtesy of the ladies of honour and of the Court.” Upon which the plaintiff brought a new writ to Ranulph Hayward and Anne his wife—late wife of the Lord Powys, deceased. Further, in “ Lady Dacres's case ” in 1661, when she had petitioned the House of Lords claiming the privilege of Parliament, the House declared (having received the opinion of all the Judges there present in point of law) that the Lady Dacres by marrying a commoner had forfeited and lost her privilege of peerage in law. (Journal, H.L., vol. 11, p. 298.) Also in 1692 the House of Lords ordered and declared that privilege of Parliament should not be allowed to minor peers, noblemen, or widows of peers saving the right of peerage, and that, if the widow of any peer should be married to any commoner, she should not be allowed the privilege of peerage. (H. of L. Journal, vol. 15, 241, Feb. 21, 1692.) I may also refer to the following passage in his work on the order of precedence by the late Sir Charles George Young, Garter Principal King of Arms (1851), p. 75 :—“ The widows of peers, baronets, knights of the order and

knights bachelors are entitled to enjoy the same style and rank which they derived from their husbands so long as they remain unmarried, but on marrying again they have no other style or rank than that which the second husband may confer upon them, it being the established law that what a woman gains by marriage she loses by marriage." So far the law is clear, and on the argument before me the petitioner's counsel did not seek to maintain that the petitioner was still entitled to her former dignity of peeress or to a legal right in the title in question; but he contended that she was justified in continuing to use her former title by some usage of society. No authority, precedent, or evidence was produced in support of this contention, and this is not surprising, for a case which would give rise to a question such as that under consideration cannot often have occurred. The only foundation for the contention was the following passage in Stephen's Commentaries, vol. 2 (12th edition), p. 605:—"By courtesy or the usage of society all dowager peeresses though afterwards married to commoners are ordinarily addressed by their former title." This statement was not supported by the citation of any further authorities; and, even if it be correct, this courtesy or usage of society (a somewhat vague term) is of no legal force or validity and cannot alter the legal positions and titles of dowager peeresses (not in their own right) who have afterwards married commoners. They no longer have any right to their former privileges, rank, and titles, and it is therefore difficult to understand why any one in such a position should without the sanction of the Crown allow herself to be addressed by a title not hers as of right even though there may be a usage of society to do so. There is this important feature in connexion with this subject—that in certain cases, of which instances are given in the affidavit filed in this case of Sir Albert William Woods, K.C.B., K.C.M.G., Garter Principal King of Arms, the Sovereign in the exercise of the Royal prerogative has expressly sanctioned the retention by dowager peeresses (not in their own right) marrying below their rank of their former titles, ranks, and precedence, and has directed memorials thereof to be recorded in the register books of the College of Arms. There is a further answer to the contention aforesaid. It is obvious that the courtesy or usage of society, if correctly stated with regard to dowager peeresses (not in their own right) who have afterwards married commoners, has no application to the present case, when the petitioner's first husband is alive and is objecting to the use by her of a style or title which she only acquired as his wife, she now being the wife of another person. It was further argued that the petitioner is justified in calling herself Countess Cowley, because a person is entitled to call himself or herself by any name, and cannot be restrained from doing so. In support of this contention certain cases were cited to show that the Courts will not restrain the use of a family name. The principal of these was the case of "Du Boulay v. Du Boulay" (L.R., 2 P.C., 430), where Lord Chelmsford in delivering the judgment of the Privy Council said:—"In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connexion with a trade or business is familiar to our law, and any person using that name after a relative right of this description has been acquired by another is considered to have been guilty of a fraud, or at least of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name which is the patronymic of a family by a stranger who had never before been called by that name

whatever cause of annoyance it may be to the family is a grievance for which our law affords no redress." The foundation of this is that, except in certain cases, when the right to exclusive use of a name in connexion with a trade or business has been acquired, there is by English law no right of property in a person to the use of a particular name to the extent of enabling him to prevent the assumption of his name by another. But the argument omitted to notice the difference between the use of a name and the use of a title. The law as to the former is as above stated, but as to the latter the position is entirely different. Titles of honour or, in the language of the law, dignities are conferred by the exercise of the Royal prerogative. Among them the principal is that of the Peerage. The dignities of the peerage having been originally annexed to lands were considered as tenements or incorporeal hereditaments wherein a person might have a real estate; and although dignities are now become little more than personal honours and rights, yet they are still classed under the head of real property. (Cruise, c. 4, s. 1; Co. Litt., 16 B.) The grant of the dignity in the present case was to the grantee and the heirs male of his body and created an estate in tail male. Lord Cowley had the exclusive right to the use of his titles, but on his marriage his wife became a sharer in his dignity and Countess Cowley. Even if she had become his widow, and Dowager Countess Cowley, she would have lost all the privileges she had acquired by her marriage if she married again to a commoner. She is now no longer the respondent's wife, but the wife of Mr. Biddulph; and, although she does not desire to represent that she is now the respondent's wife, she is still using the style or title which can only lawfully be used by a woman who is the wife of the respondent, and is not merely assuming a name to the use of which objection could not be raised. I am, therefore, of opinion that the petitioner is not entitled to use the style or title Countess Cowley. The next and more difficult question is whether the respondent is entitled to obtain an injunction to restrain the petitioner from using the style or title aforesaid. The first point made against him was that, as his marriage with the petitioner had been dissolved in consequence of his misconduct, the present motion was one which he ought not to have made and ought not to be entertained by the Court; to which it was answered that the respondent's conduct, which led to the dissolution of the marriage, did not affect the present question, and that the petitioner's real reason for using the title was to annoy the respondent and not (as alleged in the letter of her solicitors above set out and in her affidavit) to retain the same name as her son. Upon this point, whatever view may be taken of the course adopted by the respondent in bringing forward this motion, it is necessary to observe that the Court has to deal with the rights of the parties whose marriage has been dissolved and who are now strangers to each other; and, in my opinion, the legal questions now raised do not depend on the cause which led to the dissolution of the marriage in this case. With regard to the suggestion of a desire on the part of the petitioner to annoy the respondent, it is to be noted that there is nothing in the evidence to show that she is actuated by any such desire, though it seems strange that she should wish to use her former title in the circumstances instead of her present legal name, and though the reason given by her for wishing to retain the same name as her son is one which it is difficult to appreciate, seeing that during his father's lifetime the son will neither have the name nor title of Cowley. The main point made against the respondent was that the Court has no jurisdiction to grant the injunction asked for. This was based upon the cases which deal

with the right of a person to assume any name he may choose, and upon the contention that the Court will not interfere by injunction when the relations between the parties are strictly of a personal nature and no question of proprietary rights are at issue. I have pointed out the difference between the assumption of a name and of a title or dignity such as that in question. With regard to the contention last mentioned it is to be observed that it overlooks the proprietary rights which the respondent has in his dignities. He is entitled to share them with any lady whom he may make his wife, and, in my opinion, to assert that no other woman shall use the privilege which his wife should share with him. It may be observed further that if the petitioner were to assert that she was still the wife of the respondent she would be subject to a suit in this Court for jactitation of marriage, which is founded on the injury which may be done to a complainant by a person representing that he or she is the husband or wife as the case may be of the complainant, "*Lord Hawke v. Corri*" (2 Hagg. Cons. Rpts., 280). This is not the position asserted by the petitioner; yet she asserts that she is justified in describing herself in a manner which represents that she is still sharing his dignity with the respondent, and by the style or title which only describes, and can only be used lawfully by a person who is, the wife of the respondent. There has been, and is, in my opinion, an invasion by the petitioner of the respondent's rights. There is in the legal sense a wrong done to the respondent, without lawful excuse, and intentionally, although an actual desire to annoy him is not established. In conclusion, it is important to notice, upon the question of the power of the Court to interfere by injunction, that this is not a case in which a right is asserted by the petitioner to the dignity of a peerage. In cases of that character the jurisdiction of the Court is exercised on petition, which may be referred in the first instance to the Attorney-General for examination and then, if necessary, to the House of Lords for investigation (*Cruise*, cap. 6). The facts of this case are not in dispute, and, if my view of the law be correct, there is no assertion by the Court of any jurisdiction to deal with a matter which should be considered elsewhere, and the remedy by injunction seems both applicable and convenient. The result is that, in my judgment, there must be an injunction restraining the petitioner from using the title or style of Countess Cowley.

Mr. BARNARD applied that the petitioner should have the costs of this motion. Originally the motion was made on three grounds—(1) for access to the child, (2) to reduce the amount of maintenance, and (3) for an injunction. The first and second questions had been dealt with in Chambers, and the petitioner had succeeded on those points.

Mr. DEANE.—I abandoned the second point, but the first still stands adjourned.

Mr. JUSTICE GORELL BARNES.—I think the proper course is to make no order as to this part of the case, and to leave the parties to bear their own costs. The costs of the matter in Chambers will be dealt with there. The order for the injunction will not be drawn up for a week, in case the petitioner should desire to take the opinion of a higher Court, as it is highly undesirable that an injunction should issue while an appeal is pending.

Chan. Div. }
(Stirling, J.) }

1900.
Feb. 8.

IN RE PRICE—TOMLIN V. LATTER.*

Power of Appointment—Exercise by will—Foreign will.

The will of a foreigner, valid by the law of his country, though invalid by our law, held to operate as an execution of a general power of appointment over personalty conferred upon the testatrix by an English will.

This case raised a somewhat important question of private international law. Shortly stated, it was whether a will, executed by a naturalized French subject domiciled in France, and valid according to French law, could operate as an execution of a general power of appointment over personalty conferred upon the testatrix by an English will, notwithstanding that the appointment would have been invalid according to English law for the reason that it was not attested by two witnesses as required by the Wills Act. The question arose under the will of Dame Elizabeth Price, dated March 28, 1876. By it she bequeathed a sum of £2,000 to trustees upon trust for investment and payment of the income to "Maria (daughter of my late cousin Mary Ann Draper) now the wife of M. Adolphe Gay" during her life for her separate use without power of anticipation. The will then proceeded:—"And from and after her decease to pay and transfer the last mentioned sum of £2,000 in such manner as she, the said Maria Gay, shall by her last will appoint, and in default of such appointment then to such person or persons as would at the time of her decease be the next-of-kin of the said Maria Gay in case she had died intestate and without being married." The testatrix died on March 18, 1878. At the date of the will Maria Gay was the wife of Adolphe Gay, a French subject domiciled in France. M. Gay died on October 12, 1882, and on October 8, 1886, Madame Gay married M. Auguste Forfillier, also a French subject domiciled in France. Madame Forfillier on June 2, 1887, made a holograph will in the French language. By it she bequeathed to her husband, M. Forfillier, everything which she possessed at the present moment, and which she thereafter might possess, and appointed him guardian of her daughter by her first marriage; and she declared that her will annulled all the others, and should "thus be considered in England the same as in France." Madame Forfillier died on February 16, 1898; and on October 3, 1898, letters of administration with the will annexed were granted by the Probate Division to the defendant, Edward Latter, as the attorney of M. Forfillier. The case came before the Court upon a summons taken out by the trustees of Lady Price's will to have it determined who was entitled to the fund of £2,000.

Mr. A. à Beckett Terrell appeared for the trustees of Lady Price's will; Mr. Waggett for M. Forfillier, claiming under the alleged appointment; and Mr. Bovill for parties representing the next-of-kin of Madame Gay.

Mr. JUSTICE STIRLING, in giving judgment, said that the first question was whether the word "will" in the instrument creating the power meant any testamentary instrument recognized by the law of England as a will, or a will executed in accordance with the law of England. His Lordship then considered the authorities on the point, and came to the conclusion that he ought to follow the case of "*D'Huart v. Harkness*" (34 Beav., 324), which was precisely in point, and in which it was held that the will there under consideration was a valid execution of the power. He distinguished the case now before the Court from a decision to the contrary effect by Mr. Justice Kay in "*In re Kirwan's Trusts*" (25 Ch. D., 373), which had been followed by Mr. Justice Kekewich in a later case of "*Hummel v. Hummel*" ([1898] 1 Ch., 642), pointing out that the last-named learned Judge did not regard the cases of "*D'Huart v. Harkness*" and "*In re*

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

Kirwan's Trusts " as inconsistent one with the other. His Lordship (Mr. Justice Stirling) moreover thought that on principle "*D'Huart v. Harkness*" was well decided. The general rule was that, as stated by Mr. Dicey (*Conflict of Laws*, 685), "any will of movables which was valid according to the law of the testator's domicile at the time of his death is valid" in England. It followed that the provisions of an English statute prescribing formalities with reference to wills did not apply to the wills of persons not domiciled in England. Section 9 of the Wills Act prescribed that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned." Notwithstanding that language, it was the practice of the Probate Division to admit to probate (as had been done in this case) the wills of persons domiciled abroad, although executed otherwise than was prescribed by the Act. His Lordship failed to see why the provisions of section 10 (which provided that appointments by will must be executed like other wills) should apply to the will of Mme. Forfillier any more than those of section 9. In his opinion, therefore, it was competent for Mme. Forfillier to exercise the power by such a will as had been recognized by the Probate Division. He then considered the point whether, according to the construction of her will, she had done so, and came to the conclusion, having regard to the rules of English law, which he held to be applicable in this case, that the will operated as an execution of the power, and that M. Forfillier was entitled to the fund.

[Solicitors—Tomlin, Van Sandau, and Co.]

Q.B. Div. (Channell)
and Bucknill, JJ.)

1900.
Feb. 9.

EVANS V. JUSTICES OF CONWAY.*

Licensing Acts—Licence—Refusal to renew—
Appeal to quarter sessions—Licensing justices
not appearing on the appeal—Procedure.

This was a special case stated for the opinion of the Court by the justices of Carnarvonshire. The appellant, Evans, appealed to the Carnarvonshire Quarter Sessions against a decision of the licensing justices, sitting at the annual licensing meeting, held at Carnarvon on September 25, 1899, refusing to renew the licence of the Royal Oak Inn, Conway. The appeal to quarter sessions came on on October 19, 1899. The following facts were proved or admitted:—(1) The appellant was the holder of a licence for the sale of intoxicating liquors in respect of a house known as the Royal Oak Inn, Conway. (2) The appellant appeared by counsel in support of the appeal and to apply for the renewal of the licence. (3) No one appeared on behalf of the justices who sat at the adjourned annual licensing meeting. (4) A solicitor appeared for the Rev. T. Gwynedd-Roberts, who had objected to the renewal of the licence at the adjourned general annual licensing meeting. (5) It was contended on behalf of the appellant that the solicitor for the Rev. T. Gwynedd-Roberts had no *locus standi*, and that, as no one appeared on behalf of the justices, the appellant was entitled to have his appeal allowed and his licence renewed. (6) The Court of quarter sessions overruled these contentions and decided to hear the appeal. Thereupon counsel for the appellant, having formally proved that due notice of the appeal had been served upon all the justices who sat at the adjourned general annual licensing meeting, and that the appellant, together with two sureties, had duly entered into the required recognizances, applied for the renewal of the licence. The Court, without opposition

to the renewal of the licence, dismissed the appeal and refused to renew the licence. The question for the opinion of the High Court was whether the Court of quarter sessions were right.

Mr. TREVOR LLOYD, for the appellant, submitted that the Court of quarter sessions were wrong. Since "*Boulter v. Kent Justices*" ([1897] A.C., 556) and "*Tynemouth Corporation v. Attorney-General*" ([1899] A.C., 293) it was clear that the only parties to the appeal to quarter sessions were the appellant and the justices, and a private objector alone could not be heard. Here the justices did not appear. "*Sharpe v. Wakefield*" ([1891] A.C., 173) showed that upon an appeal from a refusal to renew the burden of proof that the appellant was not entitled to his renewal was on the respondent. Section 42 of the Licensing Act, 1872, showed that *prima facie* the applicant for a renewal in the Court below was entitled to the renewal, and "*Whiffin v. Malling Justices*" ([1892] 1 Q.B., 362) showed that the same was true at the Court of quarter sessions. Section 27 of 9 Geo. IV., cap. 61, was the appeal section. The Court of quarter sessions had simply said, "You shan't have the licence."

Mr. ELLIS GRIFFITH, for the justices, submitted that at quarter sessions, although it was a rehearing, the onus of proof, if any, was upon the appellant. He cited "*Archbold's Quarter Sessions*," 4th Edition, p. 724, and "*Paley on Summary Convictions*," p. 307. The hearing before the quarter sessions was, like that before the licensing justices, a mere inquiry by the justices to see if it was proper to grant the renewal. The quarter sessions, which conducted such inquiry, were no more a Court acting judicially than were the licensing justices (see "*Reg. v. Staffordshire Justices*" [1898], 2 Q.B., 231). The rule usually followed that on the appeal the licensing justices were heard first was a mere matter of procedure and implied no onus of proof. If the appellant's contention were accepted, unless the licensing justices appeared upon the appeal, the whole of the inquiry before the licensing justices would go for nothing. That was an absurdity too great to be supported.

Mr. TREVOR LLOYD, in reply, contended that, if the justices were right, the appellant on his appeal would be in a worse position than he was before the licensing justices, for without having any objection to meet he would be obliged to give affirmative evidence of the good character of his house. If the appeal was a rehearing, it was a rehearing *de novo*, and the rule applied that all evidence of objection must be taken on oath. If no such evidence was forthcoming, the appellant was entitled to the renewal of the licence.

The COURT dismissed the appeal.

MR. JUSTICE CHANNELL said that the case was one of very considerable difficulty, and he hoped that the parties would be able to take the opinion of another tribunal. The difficulty arose in this way:—Licensing law, although it had from time to time been much altered by legislation, was a matter of old standing. Practices had grown up in regard to it based upon an idea which, in "*Boulter v. Kent Justices*," the House of Lords had now decided was wrong. Before the decision in that case it had been supposed that proceedings relating to licences before justices were litigation of the ordinary kind, that persons who objected to the granting or renewal of licences were parties to the proceedings, and that questions as to costs were to be decided as in an ordinary Court of justice. "*Boulter v. Kent Justices*," however, decided that in the proceedings at the annual licensing meeting the objector was not a party, and that the quarter sessions had no power to order costs against him. In an appeal to quarter sessions the quarter sessions were substituted for the licensing justices. In "*Tynemouth Corporation v. the Attorney-General*"

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the question arose as to the costs of an objector at quarter sessions. The question was whether the costs of a municipal corporation, who appeared as objectors to the renewal of a licence on an appeal to quarter sessions, were payable out of the borough fund. In considering that question it was necessary to consider the nature of the appeal, and it was held that the corporation had no power to appear at the quarter sessions. The licensing justices, on the other hand, might appear to support their decision, but it did not follow that they were bound to do so. They might prefer to take up an independent position and not to appear as litigants in a matter on which they had given their decision. That was a very proper attitude for them to adopt. If an objector to the renewal of a licence did appear at quarter sessions it could only be by leave of the Court and as *amicus curiæ*. The question now was, when an objector came to the quarter sessions and it was pointed out to them that he had no right to appear, what, in those circumstances, this administrative tribunal was to do. The appellant proved that he held a licence for the preceding year. He was, therefore, in the position of a person having a *prima facie* right to a renewal. The question was how were the quarter sessions entitled to deal with that right? His Lordship thought that the justices at quarter sessions, being an administrative tribunal, and knowing that the licensing justices had refused the renewal of the licence, were entitled to hold some inquiry before they granted it; and he did not think that the justices were the less entitled because, if the licensing justices appeared, the quarter sessions generally called upon them to begin. He assumed that what took place before the quarter sessions was as follows:—No one was present to represent the licensing justices, so the justices inquired of the appellant's counsel what he had to say; he replied that he had nothing to say; the justices, who may have thought that there was possibly something behind, thereupon refused to grant the renewal. The case was a puzzle, and his Lordship had very great doubt about it. But to hold the contrary of what he now held would be ridiculous. To hold that, while those who succeeded before the licensing justices were not entitled to be heard on the appeal before the quarter sessions, the appellant was entitled to have his licence renewed as a matter of course, if the licensing justices did not appear, was so absurd that it was necessary to find a way out of that conclusion. The way out of it, in his Lordship's opinion, was that, though the appellant had a *prima facie* right to a renewal, yet the decision of the licensing justices was sufficient to displace that right if the appellant refused to go on and give evidence of his qualification to hold the licence.

MR. JUSTICE BUCKNILL said that he had no doubt that when, on September 25, the licensing authority had to consider the question of the renewal of the appellant's licence, the appellant came before them having a right to a renewal unless it were displaced on good grounds. The licensing justices thought that that *prima facie* right was displaced, and that the appellant was not a proper person to have a renewal. The next step was taken by the appellant when he appealed to the quarter sessions. At the hearing at quarter sessions an advocate got up and stated that he appeared on behalf of a person who had objected to the renewal in the Court below. The appellant's counsel objected that he had no *locus standi*. The quarter sessions overruled the objection; but, instead of calling on the objector to give evidence, they called on the appellant's counsel to proceed. The appellant's counsel confined himself to proving the notices of appeal and the recognizances, and refused to give the quarter sessions any further information. Considering that the quarter sessions were

entitled to have information about the appeal and that the appellant had refused to give it, he could not say that the quarter sessions were wrong in refusing to upset the decision of the licensing justices.

Leave to appeal was granted.

[Solicitors—Belfrage and Co., for Chamberlain and Johnson, Llandudno, for the appellant; Edwards and Cohen, for D. Owen and Griffith, Bangor, for the respondents.]

Chan. Div. }
(Farwell, J.) }

1900.
Feb. 10.

POUEY V. HORDERN AND OTHERS.*

Power of Appointment—Execution—Validity—Foreign law.

The execution of a power of appointment validly created and given to a foreigner is not affected by any disability which he may be under to dispose of his own property by the laws of his domicile.

This action, which began on Thursday last, raised two questions of private international law. The facts, which were not in dispute, were as follows:—On November 23, 1859, Miss Mary Hamilton Twemlow, the daughter of an English clergyman, married in England a Mr. Alphonse Huber, who was a Prussian subject and domiciled in Rhenish Prussia, where French law was in force. They had three children, the plaintiff, Mme. Pouey, Alexandre Joseph Huber, and the defendant, Mme. Ginestet. About 1866 Mr. and Mrs. Huber separated, and never lived together again. On April 9, 1879, Mrs. Huber's father died intestate, and letters of administration of his estate were granted to another daughter, she and Mrs. Huber being the only two children. On June 7, 1879, Mrs. Huber commenced an action in the Chancery Division against her husband to enforce her equity to a settlement. This action was compromised upon the terms that £2,420 should be paid to Mr. Huber out of his wife's moiety of her father's estate, and that he should release his interest in the residue to trustees for her separate use. Accordingly on June 16, 1880, a deed was executed in which it was witnessed that Mr. Huber should permit his wife to live separate from him and that he released to trustees named therein all the property of his wife and all his own property in her right (except the said £2,420) in trust for his wife for her separate use, so that she might dispose thereof either by deed or will. By a settlement executed on June 17, 1880, Mrs. Huber directed that the trustees named therein should hold £4,000, being part of her share of her father's estate, on trust to pay the income thereof to herself for life and after her death in trust for such of her issue as she should by deed or will appoint. The trustees named in the settlement were the defendants, Herbert Horder and William Burn. An order of the Court was then obtained sanctioning the compromise of June 16, and in pursuance of the same order on August 5 the trust funds were paid to the defendant trustees. By her will, executed in France and dated June 2, 1890, Mrs. Huber, in pursuance of the power of appointment reserved to her in the settlement of June 17, 1880, directed the trustees to pay to her daughter, the defendant, Mme. Ginestet, the sum of £1, to pay to her son A. J. Huber the like sum of £1 and an annuity of £50 for life, and that after the death of her son the said annuity should be paid to her other daughter, the plaintiff, Mme. Pouey, who was also to have the income of the remainder of the trust funds for life, and further

* Reported by W. H. PORTER, Esq., Barrister-at-Law.

directed that after the plaintiff's death the residue of the funds should be divided equally among her grandchildren other than the children of her son. Mrs. Huber died in France on May 7, 1895, and letters of administration were granted in England with the will annexed, but limited so far only as concerned all such personal estate as she by virtue of the settlement had a right to appoint and had appointed. (See "In the goods of Huber" [1896], P. 109.) The defendants, R. A. Ginestet and A. L. Ginestet, both infants, are the children of the defendant Mme. Ginestet. The plaintiff claimed a declaration that the will of Mrs. Huber operated as a valid exercise of the power of appointment conferred on her by the settlement. Mme. Ginestet resisted this claim, on the ground that, since Mrs. Huber either acquired on marriage the same domicile as her husband, or had a French domicile at the date of her death, the exercise of the power of appointment by will, by which Mrs. Huber practically disinherited her daughter, was invalid as contrary to French law, and she claimed to be entitled by French law to one-third of the trust funds. The defendant, Jean Pierre Gautron, raised a different issue. In 1897 proceedings were instituted by one Louise Poincelin, a creditor of Mr. Huber, before the Civil Tribunal of the Seine, against the plaintiff and all the defendants in the present action, except the infant defendants, claiming in effect that according to French law there had always been a community of goods between Mr. and Mrs. Huber, and that consequently, as Mr. Huber could not pay his debts, an administrator should be appointed to manage all the undivided assets of the said community, specifically including the funds in question in the present action. The defendant trustees did not enter an appearance in the French proceedings. On November 27, 1897, the Civil Tribunal found that, as the domicile of Mr. and Mrs. Huber was Rhenish Prussia, a community of goods had been established between them by marriage, and that consequently the compromise of June 16, 1880, was void by French law; and the defendant Gautron was appointed receiver of the funds belonging to the said community, and the defendant trustees were ordered to hand over the funds to him. The defendant Gautron accordingly counterclaimed in the present action that he was entitled to the funds in the hands of the defendant trustees.

Mr. Hughes, Q.C., and Mr. E. J. Schuster appeared for the plaintiff; Mr. Bramwell Davis, Q.C., and Mr. J. G. Wood for J. P. Gautron; Mr. H. J. H. Mackay for Madame Ginestet; and Mr. Buckmaster for the trustees and infants.

Mr. HUGHES, after stating the facts, said that briefly his contention as against the counterclaim of Gautron was that his Lordship could not go behind the order of the High Court, by which the compromise and settlement had been sanctioned. The trustees had not appeared in the French proceedings, but it was not necessary for them to do so—"Sirdar Gurdayal Singh and the Rajah of Faridkote" ([1894] A.C., 670)—and they were not bound by them.

Mr. BRAMWELL DAVIS referred to "De Nichols v. Curlier" ([1900] A.C., 21). Community of goods was established between Mr. and Mrs. Huber by marriage, and the consequent incapacity to contract was never brought to the notice of the Judge who made the order. He would call evidence as to what the French law was.

MR. JUSTICE FARWELL.—The order of the English Court was never brought to the notice of the French Court.

M. Gorostazu, in answer to Mr. BRAMWELL DAVIS, said that he was a French advocate practising in London. The compromise of the Chancery action was void by French law. Community of goods could be dissolved

only by death, divorce, or judicial decree. The settlement was also void by French law.

TO MR. JUSTICE FARWELL.—Even if the order of the English Court had been before the French tribunal, he believed the compromise would have been held to be void as against the policy of French law.

Herr Eisenmann, formerly a German Judge and now practising as an advocate in Paris, confirmed the previous witness.

MR. JUSTICE FARWELL said that the case raised a curious question. The defendant Gautron counterclaimed as receiver appointed by the French tribunal to be entitled to the funds settled by Mrs. Huber in 1880. He would treat the case as if Huber himself were the plaintiff in the counterclaim, for no creditor had a specific charge, and consequently no creditor subsequent to 1880 could have any greater rights than Huber himself. He assumed that Huber was domiciled in Rhenish Prussia. In 1880 Huber took £2,420 in satisfaction of his claims, and assented to a settlement of the remainder of the property coming to his wife. After 20 years he now came forward and said that he was not bound, because the compromise was contrary to French law. But that compromise was sanctioned by an order of the High Court, and in his Lordship's opinion Huber and every one claiming through him were bound by that order. The money was in England, and Huber voluntarily appeared and submitted to the jurisdiction. The order was a judicial recognition of the validity both of the compromise and of the settlement. It was now argued that the judgment of the French tribunal should be given effect to. He could hardly believe that if the order of the English Court had been before the French tribunal their judgment would have been what it was. He declined to go behind the order of the High Court, and the counter-claim must be dismissed with costs.

MR. MACKAY, on behalf of Mme. Ginestet, then submitted that Mrs. Huber, by French law, could not disinherit her daughter. She had no capacity to exercise the power of appointment contrary to French law. It did not matter for his argument whether Mrs. Huber acquired the domicile of her husband, or was domiciled in France at the time of her death.

MR. HUGHES contended that either the fetter in capacity applied only to Mrs. Huber's own property, whereas she had only a life interest in the trust funds, or the exercise of the power of appointment must be read as part of the settlement which had just been held to be valid. "Tomlin v. Latter" (reported *ante*, p. 189) seemed a similar case.

MR. JUSTICE FARWELL said that he would reserve judgment.

MR. JUSTICE FARWELL delivered the following judgment:—I have already held that the settlement of June 17, 1880, was a valid settlement, giving Mrs. Huber a life interest with remainder to her issue as she should appoint, and in default of appointment for her children at 21 or marriage. This is an English document to be construed according to English law. Mrs. Huber, being a domiciled Frenchwoman, made her will in France on June 2, 1890, and died May 7, 1895. Her will has been admitted to probate in this country after litigation (*Re Huber, sup.*). This grant of probate is conclusive that the instrument proved is the will of the testatrix, but is not conclusive as to its construction or the rights to the property disposed of by the will—"D'Huart v. Harkness" (34 Beav., 324). It is contended that the testatrix could not, by French law, dispose of property at all, or, at any rate, having regard to the number of her children, dispose of more than one-fourth. But the power in this case is a special power, and the execution of such a power does not bring the appointed property into the will at all,

but operates as a nomination of the persons whose names are to be inserted in the settlement as entitled in remainder in lieu of the power of appointment. There is, therefore, no disposition of property belonging to the testatrix. I desired to make some search to see if I could find any authority against the opinion that I formed yesterday in favour of the will, but so far from having discovered one, I find that Mr. Justice Kay and the learned counsel who argued the case of "*Re Kirwan*" (25 C.D., 373), all treated the will as a good execution of the power, which in that case was a special power, although the learned Judge held that the will, being ambulatory, became a fraud on the power by subsequent events. In my opinion this appointment is perfectly good. Further, it appears from the report of "*Tomlin v. Latter*" (*ante*, p. 189), to which I was referred, that Mr. Justice Stirling came to a similar conclusion in a similar case where the power was general. If the foreign testatrix can exercise a general power, *a fortiori*, can she exercise a special power? But the distinction between power and property is well settled, and it is really not relevant to the consideration of the execution of a power to inquire whether the donee of such power can dispose of his property, unless, of course, it be the absolute incapacity to execute any document arising from lunacy or the like. Thus it has been held by the Court of Appeal and Sir George Jessel that an infant can exercise by deed a general power of appointment over personalty, at least, if it be not limited to himself in default of appointment—"*Re D'Angibau*" (15 C.D., 228)—although he can, of course, have no disposing capacity over his own property, because the authority to dispose proceeds from the donor of the power and not from the donee. It follows, therefore, that the execution of any power of appointment validly created and given to a foreigner is in no way affected by any disability which he or she may be under to dispose of his or her own property by the laws of his or her domicile. I, therefore, agree with Mr. Justice Stirling, and on this ground also hold the appointment good.

[Solicitors—A. W. Burn, for the plaintiff; A. Herbelet, for Mme. Ginestet; Gerrish and Foster, for Gautron; Crosley and Burn, for the trustees.]

Q.B. Div. } 1900.
(Kennedy, J.) } Feb. 10.

WARD AND CO. V. WALLIS.*

Mistake—Settlement of claim—*Mala fides*.

The rule that money paid under compulsion of legal process cannot be recovered back does not apply if there is an absence of *bona fides* on the part of the person enforcing the legal process, and the same principle governs the converse case where a plaintiff claims too little, having by mistake credited the defendant with a payment which he had not in fact made.

In this case the plaintiffs were cement specialists carrying on business at 15, Great George-street, Westminster. The defendant was Walter Wallis, of Lincoln-house, Ramsden-road, Balham, a builder. The action was brought to recover £75 for work and labour done and materials supplied, and, alternatively, as money had and received by the defendant to the use of the plaintiffs. The facts were as follows:—In January, 1898, the defendant entered into a contract with a Miss Barry for the erection of a mission-hall at Bethnal-green for £2,277. The contract provided that certain patent concrete pavings in the building were to be supplied by the plaintiffs for £126 5s., and this sum

was included in the bill of quantities upon which the defendant tendered. The plaintiffs did their work and obtained a certificate from the architect that £125 5s. was due to them, the amount having by agreement been reduced by £1. The plaintiffs applied several times to the defendant for payment. The defendant in answer to one of the applications wrote that, if he did not pay the plaintiffs, the architect was entitled to do so, and to deduct the amount from the contract price, and the defendant stated that he had written to the architect directing him to pay. The architect, however, when applied to by the plaintiffs, said that the defendant had repeatedly promised to pay the plaintiffs and must do so. On April 19, 1899, the plaintiffs issued a writ against the defendant, but instead of claiming the whole amount they gave credit, in error, for a payment on account of £75, leaving a balance due of £50 5s. This mistake arose through the plaintiffs having been paid £75 by a person of the same name as the defendant in respect of another matter, which payment they wrongly credited to the defendant. After being served with the writ, the defendant paid to the plaintiffs the balance of £50 5s. alleged to be due and the costs of the writ, and obtained from the plaintiffs a receipt showing that the whole of their account had been paid by him to them. The defendant forwarded the receipt to the architect, and was paid the balance due to him under the contract, including the full amount of the plaintiffs' account. The plaintiffs subsequently discovered the mistake which they had made in crediting the defendant with a payment of £75 on account and brought this action. On an application under Order 14 the Master gave the plaintiffs liberty to sign judgment for the amount claimed. The defendant appealed, and it was ordered that the case should be tried as a short cause. The defendant had filed an affidavit in which he stated that he considered that the architect was the person liable to the plaintiffs, but that, in the circumstances of the plaintiffs giving him credit for £75, he paid the balance claimed by way of settlement instead of contesting the action, to which he considered he had a good defence. It was contended on behalf of the defendant that the present action would not lie, there having been a settlement of the plaintiffs' claim in the previous action. The case was argued a few days ago and was adjourned in order that the defendant might, if he desired, go into the witness-box and give evidence. To-day counsel stated that the defendant did not desire to give evidence.

Mr. Loehnis appeared for the plaintiffs; Mr. Alan Macpherson for the defendant.

MR. JUSTICE KENNEDY, in delivering judgment, after stating the facts, said that the defendant had not availed himself of the opportunity which had been given him to go into the witness-box, and the conclusion which his Lordship came to was that the defendant knew, when he was served with the writ in the first action, that he was being wrongly credited with a payment on account of £75, and the defendant's counsel could not deny that after the defendant had received the money due under the contract from the architect he ought, acting conscientiously, either to have returned the £75 to the architect or to have paid it over to the plaintiffs, explaining to them the mistake which had been made. Instead of doing that the defendant retained the money. His Lordship could not understand the defendant's position, for there could only be one opinion of such conduct. Then the present action was brought, and the defendant then said that he would pay, but only on the terms that the plaintiffs paid the defendant his costs. The defendant said that he had a legal defence to the first action and that there was injustice in suing him again. The defendant was of course entitled to take his stand upon his strict legal rights, and if he had a defence to the present action effect must be given to it.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The points raised by the case were not free from difficulty. In the first place the plaintiffs claimed to recover the £75 for work and labour done and materials supplied. Now as to that there had been a settlement of the plaintiffs' claim, in the sense that the defendant had satisfied the claim in the terms of a legal process demanding payment. According to the principle of the English law, an example of which was to be found in the case of "*Marriot v. Hampton*" (2 Smith's Leading Cases, 10th edition, 409), a settlement of a claim made under legal process could not be reopened. "*Marriot v. Hampton*" was the converse of the present case, for there a person being sued for the price of goods sold, and having lost his receipt, which was his only proof of payment, submitted to judgment. He afterwards found the receipt, and sought to recover the amount which had been wrongfully recovered from him. It was held that after a recovery by process of law the matter could not be reopened. In "*Moore v. Vestry of Fulham*" ([1895] 1 Q.B., 399) it was attempted to be shown that "*Marriot v. Hampton*" was decided on the ground of *res judicata*; but that was not so, the ground of the decision was that it was in the interests of public policy for there to be an end to litigation. The present case, though the converse of that case, was, in his Lordship's opinion, governed by it in principle, and the plaintiffs were not entitled to bring a fresh action for work and labour done, or to sue for money had and received to their use, which was the second and alternative head of claim, except under certain special circumstances. What were the circumstances under which such an action might be maintained? It was clear from the cases cited in the notes to "*Marriot v. Hampton*" that the principle that money paid under process of law was not recoverable did not apply if there was an absence of *bona fides* on the part of the person enforcing the legal process, and his Lordship was of opinion that the same principle applied in the converse case, such as the present, in which the settlement under legal process was not merely owing to the mistake of fact on the part of the plaintiffs in crediting the defendant with a payment which he had never made; but there was the further fact that the defendant knew at the time that the mistake had been made. It was not conscientious of the defendant merely to pay the alleged balance, remaining silent as to the mistake which had been made, and the settlement, although under legal process, was not *bona fide*. It did not seem to make any difference that the plaintiffs sought to recover as money had and received money which the defendant had not actually received, but for which they had been given credit, for it was clearly settled that money allowed in account was equivalent to payment. On these grounds his Lordship held that the plaintiffs were entitled to recover the £75 as money had and received by the defendant to their use. A further point had been raised, that the payment of the money by the architect to the defendant made it money had and received for the plaintiffs, but his Lordship did not agree with this view. The money had been paid by the architect under a mistake of fact, and it was not received by the defendant on behalf of the plaintiffs.

Judgment for the plaintiffs for £75, and costs.

[Solicitors—Crump, Sprott, and Co.; Alexander Pope.]

House of Lords (Lord Halsbury, L.C., } 1900.
Lords Macnaghten, Morris, Shand, } Feb. 13.
James of Hereford, and Brampton)

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY
V. WALKER AND ANOTHER, TRADING AS THE RUGBY
PORTLAND CEMENT COMPANY.*

Lands Clauses Acts—Railway company—Arbi-

tration—Award—Duty to take up award—*Mandamus*.

Decision of the Court of Appeal (15 *The Times* L.R., 329) affirmed.

The question in this appeal was of a purely technical character. The appeal was from an order of the Court of Appeal (Lords Justices A. L. Smith and Romer, Lord Justice Collins dissenting), affirming an order of Mr. Justice Wills and Mr. Justice Kennedy, and dated April 24, 1899. The case is reported below. (15 *The Times* L.R., 329; L.R. [1899], 1 Q.B., 921; 68 L.J., Q.B., 685, *sub nom.*, "*Reg. v. London and North-Western Railway Company*."*) The Divisional Court ordered that a writ of *mandamus* should issue commanding the appellants to take up an award made by Mr. T. F. Brown under an Act of 1846, by which the London and Birmingham Railway was amalgamated with the appellant company. The award fixed the amount of compensation or purchase money to be paid by the appellants to the respondents in respect of certain mines and minerals belonging to the latter which the cement company had recently formed the intention of working. The questions were whether the rights and liabilities of the railway company and the adjoining owners in relation to minerals lying under or adjacent to such railways as were made before 1846 were still governed by the provisions of the Acts of Parliament under which such railways were made or were altered by the incorporation of the Railway Clauses Consolidation Act, 1846, into the private Act of 1846 above referred to; and, secondly, if the Railway Clauses Act was inapplicable the appellants were entitled to a refusal of the rule for a *mandamus* to take up the award. Lords Justices A. L. Smith and Romer were against the appellants on the first point. Lord Justice Romer, however, expressed no opinion on the second, on which also Lord Justice A. L. Smith was against the appellants.

Sir Edward Clarke, Q.C., Mr. Page, Q.C., and Mr. Arthur Underhill were for the appellants; Mr. Cohen, Q.C., Mr. Dugdale, Q.C., Mr. Noble, and Mr. Pease for the respondents were not heard.

The LORD CHANCELLOR, in moving that the appeal be dismissed with costs, said that this was an arbitration properly constituted under the Railway Clauses Act, and the questions whether or not the subject matter of the arbitration was properly entered into and the rights of the parties regulated by the earlier or later statutes were really irrelevant. In these circumstances the railway company was bound to take up the award although the rights of the parties were not thereby concluded but might be decided at a later period by an action upon the award. *Prima facie* the award was valid. If it could be made out that the proceedings were *coram non iudice* it might be different, but it was admitted that the umpire was rightly appointed and that the proceedings were regular. In these circumstances the appeal must be dismissed.

The other noble and learned Lords concurred.

[Solicitors—C. H. Mason, for the appellants; Whitfield and Harrison, for the respondents.]

House of Lords (Lord Halsbury, L.C., } 1900.
Lords Macnaghten, Morris, Shand, } Feb. 13.
James of Hereford, and Brampton)

THE OWNERS OF THE STEAMSHIP *MEDIANA* V. THE
OWNERS, MASTERS, AND CREW OF THE LIGHTSHIP
COMET.*

Ship—Collision—Damage—Assessment—Loss of
use of lightship.

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

Decision of the Court of Appeal (15 *The Times* L.R., 205), affirmed.

This was an appeal from a decision of the Court of Appeal, dated February 15, 1899, whereby was reversed a judgment of Mr. Justice Phillimore, sitting in the Admiralty Division, dated January 27, 1899. The hearing below is reported in 15 *The Times* L.R., 205; L.R. [1899], P., 127; and 68 *L.J.*, P., 26. The action was brought by the respondents to recover damages in respect of a collision between the appellants' steamship *Mediana* and the respondents' lightship *Comet*, which was then being employed upon the Crosby station, off the River Mersey. The appellants admitted their liability, subject to a reference to the district registrar assisted by merchants. On December 3, 1898, the appellants agreed with the respondents all the items of the respondents' claim except No. 8, loss of the use of the lightship *Comet*, or hire of the services of the lightship *Orion* on the station from April 23, 1898, to July 6, 1898, 74 days at £4 4s., £310 16s. The appellants agreed that the amount claimed in respect of this item was correct, if such claim was recoverable. The reference was heard before the district registrar on December 8, 1898, and by his report, dated December 12, 1898, he allowed such item No. 8. The appellants carried in notice of objection to the registrar's report, and Mr. Justice Phillimore allowed the objection. The appeal was heard before Lords Justices Smith and Collins, who allowed it with costs. The respondents, the Mersey Docks and Harbour Board, the owners of the *Comet* and *Orion*, who are a public body charged by Act of Parliament with the duty of lighting the approaches to the River Mersey, keep six lightships, four of which are always in use on four stations, a fifth is kept to replace the lightship, and at a time when they are being overhauled, and the sixth is kept in the River Mersey in readiness to take the place of any lightship which may be damaged by collision or other accident. During the last 25 years there have been 23 cases of damage by collision with lightships, in 11 of which it has been necessary to replace the lightship by the one kept in readiness in the River Mersey, and during the same period there have been four cases in which it has been necessary to withdraw one of the lightships in consequence of damage not occasioned by collision. The expense of maintaining the sixth lightship, including interest on capital invested in her, was stated by the marine surveyor to the respondents to amount to about £1,000 a year. The *Orion*, the sixth lightship, took the place of the *Comet* after she had been damaged by collision, and it was admitted that during the 74 days on which she took the place of the *Comet* she was not required for any other purpose. The admitted items of claim covered all the actual out of pocket expenses to which the respondents were put by reason of the substitution of the *Orion* for the *Comet*, and the only question in dispute was whether the respondents were entitled to be paid for the loss of the use of the *Comet* during the 74 days she was under repair, or were entitled to hire of the *Orion* which took her place. It was contended on behalf of the appellants that inasmuch as the work of the *Comet* was performed by the *Orion*, another of the respondents' lightships, which would not have been otherwise employed, the respondents sustained no loss or damage in respect of their not being able to use the *Comet*, and that they were not entitled to any hire for the use of the *Orion* as they expended no extra money or sustained no loss or damage through not having the use of her owing to the collision, and that it was immaterial whether she was merely laid up at anchor in the River Mersey, as it was stated she generally was, or placed on an anchorage as a lightship, and further that if the

decision of the district registrar was right the respondents would actually, through the happening of the collision, obtain a profit which they would not otherwise have received, and that they could not legally do so. It was contended on behalf of the respondents that they were entitled to compensation for the loss of the use of the *Comet* whether or not they could in fact show any actual loss or expense, and further that inasmuch as they had spent moneys in providing a spare lightship to replace others damaged by collision they were entitled to remuneration for the use of the *Orion* when she was replacing the *Comet*.

Mr. JOSEPH WALTON, Q.C., and Mr. GARDNER HORRIDGE, for the appellants, distinguished the case of "*The Greta Holme*" (13 *The Times* L.R. 552; L.R. [1897], A.C., 596; 66 *L.J.*, P., 166) in this House, and relied upon the decision of the Privy Council in "*The City of Peking*" (L.R., 15 App.Cas., 438; 58 *L.J.*, P.C., 64) as discharging the appellants from liability.

Mr. CARVER, Q.C., Mr. B. C. ASPINALL, Q.C., and Mr. MAURICE HILL, for the respondents, were called upon only in respect of the City of Peking.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said that the case was really governed by the principles laid down in that House in the *Greta Holme*, the basis of which decision was that the respondents were deprived, by the negligence of the appellants, of the use of their dredger, and entitled on that ground to the damages awarded. Lord Watson observed that the effect of this compulsory withdrawal of the dredger from its proper work was the accumulation of silt which in itself was an injury sounding in damages. That decision had a much wider application than was assigned to it by the appellants' counsel, and Lord Herschell in terms stated the proposition that, when by a man's wrongful act something belonging to another is injured or taken away, a claim for damages may be sustained, and that the damages in such a case are not merely nominal. Damages were not necessarily nominal because they were small in amount. The term was a technical one which negated any real damage, and imputed only that a legal right had been infringed in respect of which a man was entitled to the verdict and judgment. The term was by no means synonymous with small damages. The whole region of inquiry into damages was one of extreme difficulty; and no fixed principle could be laid down to a jury as to the amount of compensation which ought to be given. How, for example, could any one measure the amount of pain and suffering caused by an accident in terms of moneys current? By a manly mind pain and suffering once endured were soon forgotten. In the case before their Lordships the broad proposition was that the respondents were deprived of their vessel. He purposely did not use the words "the use of their vessel," for the wrongdoer had no right to inquire what or whether any use would have been made of the vessel of which the respondents were deprived. Suppose, for example, a man's house were entered and one of his chairs carried away and detained for a twelvemonth. Could any one say that the owner was entitled to no reparation on the ground that he had other chairs or was never in the habit of sitting on the particular one which was abstracted? The jury's task in cases of that character was often a difficult one, and an arbitrator or jury was often driven to take an artificial hypothesis; such as, in the case he had assumed, what it would cost to hire such a chair. The broad principle applicable to the appeal before the House was quite independent of the particular use which the respondents might have made of the *Comet*. It was wholly different from a case of special damage where it was necessary to ascertain the specific loss of profit or

other advantage which could otherwise have accrued. When special damage was alleged, the claimant must show precisely the nature and extent of the injury sustained; and the person liable must have an opportunity of inquiring into the details before the case came into Court. In cases, however, of general damage no such principle was applicable; and the jury have only to give a proper equivalent for the unlawful withdrawal (in a case like the present) of the particular subject-matter. That broad principle comprehended this and many other cases, and the jury might assess damages which were not nominal damages, though the amount might be trifling. It appeared, therefore, to his Lordship, that what the learned Lords in the *Greta Holme* intended to point out, and Lord Herschell expressed in plain terms, was that the unlawful keeping back what belongs to another person was a ground for real and not nominal damages. He put aside questions of trespass, involving high-handed procedure and insolent behaviour, and other cases which have been held to entitle to aggravated and punitive damages. The principle, he repeated, must be the same in all forms of the unlawful detention of another man's property. That seemed to him so plain that he had been puzzled to learn that in the Admiralty Court the loss of the use of this vessel had been treated as something for which no money damage could be allowed. He was glad such a principle had not been affirmed by the Court of Appeal, as it seemed to him wholly unreasonable. The only difficulty he had felt was in connexion with the decision in the Privy Council in the *City of Peking*. But he had, he thought, discovered a clue to the real grounds of judgment in that case. It was to be observed, in the first place, that there was a difficulty in understanding the decision of the Judicial Committee without the report of those persons who had to assess the damage. The report, so far as it was quoted, was not a model of clearness. The effect seemed to be that no charge could be made for the detention of the vessel when allowance had already been made for the use of the substituted one, and if further allowance had been made payment would have been made twice over. If that was the *ratio decidendi*, the decision of the Privy Council was not inconsistent, but was on the same lines with the judgment of the Court of Appeal. He was not able to say whether the question of the absolute use of the vessel was raised or not in the *City of Peking*. For the reasons he had stated, he had no difficulty at all in arriving at the conclusion that the judgment below ought to be affirmed.

LORD MACNAGHTEN concurred, and said that he took part in the hearing of the *City of Peking*, but could not pretend to remember very accurately whether this question was or was not directly raised. His impression, however, distinctly was that the present question was not involved in that case, and he also observed that the *City of Peking* was not cited in the Court of Appeal.

LORD MORRIS agreed, and said that, in his opinion, this appeal was governed by their Lordships' decision in the *Greta Holme*, which overruled the principles of previous cases with regard to the assessment of damages.

LORD SHAND expressed his entire concurrence with the motion of the Lord Chancellor. It had been shown that the *Orion* was kept expressly for the purpose of meeting such a contingency as happened. It appeared that no fewer than 11 cases had occurred during the last 25 years in which a substitute had been called for to replace lightships damaged by collision on the Mersey. If the Commissioners had hired a ship for the purpose of doing the duty for which this sixth vessel was kept, there could be no answer to the claim for the cost of hiring. It seemed to him, therefore, if there

was no answer in that case neither could there be any in the present.

LORD JAMES of HEREFORD also concurred, and thought there was a distinction between the case at the Bar and that determined by the Judicial Committee.

LORD BRAMPTON was of the same opinion. The Docks and Harbour Board were under no obligation to keep the *Orion* in reserve; and, having her, they were not obliged to use her, but might have hired another vessel to replace the *Comet*. If they had done so, there would have been no answer to the claim. Why should the appellants claim to have the services of the *Orion* gratuitously? They might as well claim the services of any of the skilled workmen employed by the respondents who happened at the moment to be idle. That could not be the law, and, in his opinion, the services ought to be paid for in the shape of damages.

The appeal was accordingly dismissed.

[Solicitors—Thomas Cooper and Co., for the appellants; Rowcliffe, Rawle, and Co., for the respondents.]

Chan. Div. }
(Stirling, J.) }

1900.
Feb. 13.

IN RE THOMAS—EVANS v. GRIFFITHS.*

Solicitor—Remuneration—Property sold in lots—
One title—Fees for deducing title, &c.—Solicitors' Remuneration Act, 1881, Schedule—
Orders.

This case raised a question of some importance to solicitors upon the construction of the rules under the Solicitors' Remuneration Act and Order, 1881. The question was whether, in cases where property held under one title is sold by auction in lots, the vendor's solicitor is entitled to charge the *minimum* fee prescribed by the rules for deducing title, &c., in respect of each lot sold to a different purchaser. The facts giving rise to the question were as follows:—By an order made in the action on November 12, 1898, liberty was given to the plaintiffs to sell out of Court the residuary real estate of the testator in the cause. Accordingly the plaintiffs put up the real estate for sale by auction on January 24, 1899, in 11 lots. Lots 1 to 6 were sold to one purchaser, Phoebe Williams, for £1,685 15s. The remaining lots were sold as follows:—Lot 7 to Thomas Williams for £28, lot 8 to John Lewis (No. 1) for £27, lot 9 to Mr. Griffiths for £32, and lots 10 and 11 to John Lewis (No. 2) for £24. The property was freehold and was held under one title. Separate abstracts were delivered to each of the five purchasers. The solicitor of the plaintiffs delivered his bill for deducing title to the property and perusing and completing the conveyances on the basis that the scale of charges established by Schedule 1, part 1, to the general order under the Solicitors' Remuneration Act and the rules annexed thereto were applicable. No objection to this was taken by the plaintiffs before the Taxing Master. It was suggested at the hearing of this application that the scale did not apply, but his Lordship thought that if there was any foundation for the objection (as to which he was not satisfied) it came too late, and he declined to entertain it. By his bill the solicitor claimed, under Rule 8 of the rules annexed to the schedule, a *minimum* fee of £3 in respect of each of the sales to the four last-named purchasers. The Master held that Rule 8 did not apply, and allowed by his certificate 15s. in respect of each of these four sales. This was a summons taken out by the plaintiffs to review the Master's taxation.

Mr. Loehnis appeared for the plaintiffs in support of

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

the summons; and Mr. W. L. Richards for the defendant.

The provisions of the rules, upon the application of which the question depended, are stated in his Lordship's judgment.

MR. JUSTICE STIRLING, in giving judgment, after stating the facts, said,—Rule 1 is as follows:—"The commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance, and only one abstract is delivered, the commission is to be chargeable upon the aggregate prices of the lots." That applies to all sales by auction in lots, whether the property is held under one title or not, except only where in the former case the same purchaser buys several lots, and takes one conveyance and only one abstract is delivered. The exception applies in this case to the sale of lots 10 and 11 to John Lewis No. 2, but no further; consequently the commission is chargeable on each lot sold to a different purchaser, and the Master has so held. Rule 7 says that "Fractions of £100 under £50 are to be reckoned as £50, and fractions of £100 above £50 are to be reckoned as £100." The Master has applied this rule in allowing 15s. in respect of each of the four sales as above mentioned. Rule 8 is that relied upon by the solicitor. It provides:—"Where the prescribed remuneration would, but for this provision, amount to less than £5, the prescribed remuneration shall be £5, except on transactions under £100, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagee, or mortgagee is to be £3." The Taxing Master has refused to apply that rule on the ground that the "transaction" to which the rule refers was, in this case, the sale of the whole property referred to in the order of November 12, 1898. It is contended on behalf of the solicitor that each of the five sales resulting from the auction was a separate transaction within the meaning of Rule 8. The question which I have to decide is which of these views is correct. The question is one of construction of the rules, and in deciding it little guidance is to be gained from the consideration that in a particular case, or class of cases, the remuneration provided may seem to be excessive. It was observed by Mr. Justice Chitty in "*In re Field*" (29 Ch.D., 608) that "solicitors take these matters for better or worse. There is, as I have often heard the late Master of the Rolls observe, a kind of give and take in these matters. They get more in one case and less in another, and for this reason very likely in settling this scale some rough and ready rule for regulating the remuneration was laid down." These observations apply with some force with reference to Rule 1 here considered. It applies to all sales by auction in lots, whether all the lots are held under the same title, or whether each lot is held under a separate title. The labours of deducing title in the former case may often, perhaps most often, be less than in the latter; still cases might occur where the remuneration at the *minimum* rate in respect of a large number of lots at a price under £50 would be inadequate. The scale of remuneration presumably has been fixed so as roughly to strike a just average in the different cases which may occur. Rule 8 speaks of transactions under £100. "Transaction" there means the transaction of some piece of business. Whose business is it? The £100 spoken of is obviously not a sum with which the solicitor is concerned, but one which concerns the person who employs him; the business therefore is the business of the client. Further, it must be a piece of business to which No. 14.—VOL. XVI.

the rule is applicable; the title of this schedule shows that the rule is applicable to sales, purchases, or mortgages. For the present purpose therefore the rule may be read as if the word "sales" were substituted for "transactions." The rule also speaks of "prescribed remuneration." What is the "prescribed remuneration" in the present case? It is that spoken of in Rule 1 as commission for deducing title, &c., on a sale by auction, and is thereby made chargeable on each lot of the property sold. If Rule 1 be read in connexion with Rule 8, modified in the way I have just mentioned, the natural meaning of the sales referred to in it is sales of the separate lots. The object of Rule 8 appears to be to prevent injustice being done to a solicitor in cases where the sum in respect of which his remuneration is payable is small, and that is a matter just as necessary to be provided for in cases where Rule 1 applies as where it does not. If, as the framer of the rules must have considered, it was right that solicitors should be remunerated for deducing title and perusing and completing conveyance on a sale by auction in lots by giving them commission chargeable on each lot separately, it seems reasonable that they should be protected against insufficient remuneration in cases where the price for each lot might be small. I therefore come to the conclusion that the contention of the solicitor is well founded, and think that the summons must be allowed.

[Solicitors—Greig, Meikle, and Briggs, for Evans and Thomas, Llandissil, for the plaintiffs; Fielder and Fielder, for W. Hugh Jones, Aberystwith, for the defendant.]

Q.B. Div. } 1900.
(Kennedy, J.) } Feb. 13.
THE TYNE AND BLYTH SHIPOWNING COMPANY (LIMITED)
V. LEECH, HARRISON, AND FORWOOD.*

Ship—Charter-party—Demurrage—Delay in loading—Liability.

Once a vessel is on demurrage, the demurrage continues payable so long as there is no act or default of the owners excusing the charterers.

This was a claim for demurrage, and was heard upon an agreed statement of facts, from which it appeared that the steamship *City of Newcastle* was chartered to proceed to Poti and there load a cargo of ore. The vessel was ready to load, and her lay days began on February 11, 1899, and expired on February 24, 1899, up to which time a quay berth had not been provided for her. While she lay at anchor in Poti Roads she was injured by a collision on March 4, and was in consequence compelled to go to Constantinople to repair. A quay berth would have been provided for her on March 8. The vessel returned to Poti, and was again ready to load on April 19, but, owing to the crowded condition of the port, with a number of other steamers waiting to load, no quay berth was provided for her until June 2; her loading was completed on June 9, and she sailed on June 10 for Philadelphia, where certain hours were saved in the discharge. The owners now claimed demurrage under the charter-party for 54 days 18½ hours, making a sum of £994 17s. 6d. The charter-party provided, by Clause 4, that "the act of God . . . and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature or kind, and all unavoidable accidents or incidents, and all causes beyond the control of the shippers, consignees, or the charterers which might pre-

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

vent or delay the delivery of the ore at the port of shipment . . . were always mutually excepted"; Clause 5 was as follows—"the act of God . . . collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners"; by Clause 9 the cargo was to be loaded in ten running days, Sundays and holidays excepted, and all hours on demurrage over and above the said days were to be paid for at the rate of 15s. per hour. Clause 12 provided that, subject always to the exceptions enumerated in Clause 4, charterers guaranteed cargo and quay berth ready at Poti, counting from the time steamer had received free pratique and written notice had been given to charterers' agent to that effect, or lay days to count in accordance with Clause 9. It was admitted by the defendants that they were liable for demurrage from February 24 to March 4. The plaintiffs made no claim for demurrage between March 4 and April 19, and the liability of the defendants for demurrage from April 19 to June 10 was now in issue.

Mr. Carver, Q.C., and Mr. Adair Rochee appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. T. Gardner Horridge for the defendants.

Mr. CARVER argued that the collision on March 4 was a calamity for which the plaintiffs were not responsible; that under the contract the ship was to go to Poti and there be loaded in ten days, and that the whole of the risk, subject to the exceptions in Clause 4, was on the charterers. The cause of the delay was the presence of other steamers at Poti. He referred to "Jones v. Adamson" (1 Ex. D., 60). In that case the vessel was kept at the port for all the days now claimed.

Mr. JOSEPH WALTON said that "Jones v. Adamson" did not apply. That was a case of damages, but here there was no breach of contract, the demurrage days being provided by the contract, and therefore the exceptions in Clause 4 applied, and these exceptions were mutual. The loss of the quay berth by reason of the ship's being driven to Constantinople was within the exceptions. The effect of Clause 12 was exhausted when the lay days once began on February 11. The exceptions applied to everything done or to be done under the contract, but not to damages which were suffered because the contract was broken. The crowded condition of the port from April 19 to June 2 was a cause beyond the control of the charterers.

Mr. CARVER, in reply, cited "Kay v. Field" (10 Q.B.D., 241).

MR. JUSTICE KENNEDY, in giving judgment, said that he had come to the conclusion that when the vessel was once in a position where the owner could say that she was on demurrage, unless there was some act or default of the owners excusing the charterers, then demurrage continued payable. In this case, after the demurrage obligation had begun to operate, the vessel was run into by another ship, and the master properly went to Constantinople to repair. Very rightly no claim was made for demurrage during the period of repair. She was not at Constantinople by reason of any violation of the charter-party; she was there for a good reason excusing her as between owner and charterer. During that time no claim could be made by or against the owner. The period of demurrage was renewed on her return to Poti. It could not be said that there was an exception that protected the charterer from liability, nor that because the charterer could not get a berth he was protected, because it was a cause beyond his control. Once the demurrage period began it continued until the occurrence of some act for which the shipowner was responsible.

Judgment for the plaintiffs.

[Solicitors—Maples, Teesdale, and Co., for Bramwell and Bell, Newcastle-on-Tyne; Field, Roscoe, and Co., for Batesons, Sons, and Wimahurst, Liverpool.]

Q.B. Div. }
(Kennedy, J.) }

1900.
Feb. 14.

FAWCETT AND CO. V. BAIRD AND CO.*

Ship—Charter-party—Demurrage—"Cargo to be discharged with customary steamship despatch as fast as steamer can deliver"—Port of West Hartlepool—Insufficient supply of railway wagons.

In this case the plaintiffs were the owners of the steamship Atlantic, and the action was brought to recover £231 under a charter-party for demurrage, expenses, and freight, but at the trial the only item in the plaintiffs' claim which was not admitted was a claim for £80 for demurrage at West Hartlepool, the port of discharge. The cargo was a timber cargo, consisting of 571 standards of short pit-props. The charter-party provided that the cargo should be discharged "with customary steamship despatch as fast as steamer can deliver." The vessel arrived at West Hartlepool on July 15 and the discharge began on that day. The method of discharge adopted at West Hartlepool is for the ship to discharge the cargo on to the quay, and for the receiver to load it from the quay on to railway trucks which stand on rails parallel to, but not alongside, the ship. In this case the ship employed a stevedore to carry out the discharge, and the receivers of the cargo, the defendants, employed a different firm to load the timber, which was stacked on the quay by the ship's stevedore, into the railway trucks. The discharge was completed on Friday, July 21. The plaintiffs alleged that it ought to have been finished on Wednesday, the 19th, and that the delay was due to the default of the defendants in not having sufficient men at work so as to clear the quay, whereby the quay became blocked, and the discharge from the ship was hindered. The defendants' case was that the quay was never blocked, and that delay, if any, was due to an insufficient supply of railway wagons, for which the defendants said they were not liable. The defendants also called witnesses to prove that, according to the custom at West Hartlepool, the receiver is not bound to remove any of the cargo from the quay until the whole cargo has been put out of the ship and stacked on the quay, and that if the quay space at one berth is not sufficient for this to be done the ship must go to another berth. The case was heard on two days last week, when a large number of witnesses were called by both sides, the existence of the alleged custom being denied by the plaintiffs' witnesses, and the case was adjourned to yesterday for argument.

Mr. Robson, Q.C., and Mr. J. Southall appeared for the plaintiffs; Mr. Rufus Isaacs, Q.C., and Mr. H. F. Manisty for the defendants.

MR. JUSTICE KENNEDY, in delivering judgment, after referring to the terms of the charter-party, said that he did not think there was any doubt as to the law applicable to this case. *Prima facie* the receiver was bound to receive the cargo as fast as the steamer could deliver; but his obligation was usually qualified by words, such as "customary steamship despatch" or "ordinary custom of the port," which meant, as explained judicially, the user of those facilities which the customary method of discharge at the port gave for the particular kind of cargo. His Lordship expressed surprise at hearing that at West Hartlepool, there being the facilities there were, the defendants were setting

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

up for the first time in Court a custom not to use those facilities. The custom alleged was one which would be injurious to the port, and had not been proved to his Lordship's satisfaction to exist. According to the case of "*Lyle Shipping Company v. Corporation of Cardiff*" (reported *ante*, p. 66), the facilities of the port must be used by the receivers so as to give the ship as quick a discharge as possible, but the current of the authorities was that if there was a failure in the supply of facilities of the port, that was to say, in the present case, railway wagons, the charterer was not to blame where the words "custom of the port" were used in the charter-party. His Lordship reviewed the evidence, and held that the custom alleged was not proved and, moreover, would be unreasonable; that there had on one day been some delay owing to the defendants not having sufficient men at work, but that this delay was made up for by overtime; and that the plaintiffs had not proved that the defendants could have obtained more railway wagons. His Lordship, therefore, came to the conclusion that there was no delay for which the defendants were responsible. There would be judgment for the defendants. His Lordship disallowed the costs of the witnesses called by the defendants to prove the alleged custom.

[Solicitors—Holman, Birdwood, and Co.; Bell, Brodriek, and Gray, for Harrison and Barker, West Hartlepool.]

Q.B. Div. }
(Bucknill, J.) }

1900.
Feb. 14.

REGINA V. EDMUND LAW.*

Criminal Law—Practice—Costs—Prosecution for illegal practices at a municipal election—Municipal Elections (Corrupt and Illegal Practices) Act, 1884.

Private prosecutor ordered to pay defendant's costs of an unsuccessful prosecution for illegal practices at a municipal election.

The facts of this case sufficiently appear from the following written judgment of his Lordship:—

MR. JUSTICE BUCKNILL said:—The question I have to decide is whether in this prosecution of Edmund Law, which was tried before me at the last assizes holden at Cardiff, the defendant, who was acquitted, is entitled to recover from the prosecutor his costs sustained by him by reason of such indictment. The indictment was preferred by a private prosecutor under the Municipal Elections (Corrupt and Illegal Practices) Act, 47 and 48 Vict., cap. 70, for treating at a municipal election, and after the case for the prosecution was closed I directed the jury to find a verdict of acquittal. Application was then made to me by the learned counsel for the defendant that I should make an order giving him his costs, but, for reasons which I need not now repeat, I declined to exercise such a discretion if it was open to me to do so, but I reserved the question whether the defendant was entitled to his costs for further consideration as there was no opportunity at the time to consider the statutes relating to the subject. The matter has now been argued before me and my attention has been drawn to those Acts of Parliament which govern the question. They are three in number. I will first refer to the latest of them. It is the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 and 48 Vict., cap. 70. By section 30, it is enacted that "Subject to the other provisions of this Act, the procedure for the prosecution of a corrupt or illegal practice or any illegal payment, employment,

or hiring committed in reference to a municipal election, and the removal of any incapacity incurred by reason of a conviction or report relating to any such offence, and the duties of the Director of Public Prosecutions in relation to any such offence (including the grant to a witness of a certificate of indemnity) shall be the same as if such offence had been committed in reference to a Parliamentary election, and sections 45 and 46 and sections 50 to 57 (both inclusive) and sections 59 and 60 of the Corrupt and Illegal Practices Prevention Act, 1883, shall apply accordingly as if they were re-enacted in this Act with the necessary modifications." Now one of these sections so applied to that Act is the 53rd, and that section is in the following terms:—"Sections 10, 12, and 13 of the Corrupt Practices Prevention Act, 1854, and section 6 of the Corrupt Practices Prevention Act, 1863 (which relate to prosecutions for bribery and other offences under those Acts), shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act. . . ." It is therefore clear that section 12 of the Corrupt Practices Prevention Act, 1854, is to be read into the Act of 1884 and that its provisions extend to any private prosecution on indictment for the offence of any corrupt practice within the meaning of that, the 1884, Act. The 12th section is as follows:—"In case of any indictment or information by a private prosecutor for any offence against the provisions of this Act, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, such costs to be taxed by the proper officer of the Court in which such judgment shall be given." Now, going back to the 30th section of the 1884 Act, we see by reference to the Acts of 1883 and 1854 that section 12 of the 1854 Act applies to the procedure for prosecutions under the 1884 Act, and all other proceedings in relation thereto with the necessary modifications. It was urged by counsel for the prosecution that section 30 of the Act of 1884 applies only to the procedure for the prosecution of a corrupt or illegal practice, and not to a question of costs, but that cannot be so for two reasons, the first of which is that the section provides that the incorporated sections of the Act of 1883 apply not only to the procedure for the prosecution in such cases, but to all other proceedings in relation thereto, and the second reason is that section 12 of the Act of 1854 deals only with costs, and the right of a defendant who has had judgment given in his favour to recover them from the private prosecutor. That section deals with nothing else. It is, therefore, clear to me that the defendant in this prosecution is entitled to recover from the private prosecutor the costs sustained by him by reason of the indictment which was preferred against him, such costs to be taxed by the proper officer of the Court in which the judgment of acquittal was given.

Mr. B. Francis-Williams, Q.C., Mr. Ivor Bowen, and Mr. Bowen Davies appeared for Law; and Mr. S. T. Evans for the prosecutor.

[Solicitors—Riddell, Vaisey, and Co., for Viner, Leader, and Morris, Swansea, for Law; T. J. Hughes, for the prosecutor.]

Q.B. Div. (Channell and }
Bucknill, JJ.) }

1900.
Feb. 14.

FARNHAM FLINT, & CO., COMPANY V. FARNHAM UNION.*

Rating—Rateable value—Mode of assessment—Occupation of gravel pits.

This was an appeal by case stated from the justices of

*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Surrey sitting in quarter sessions. The Farnham Flint, Gravel, and Sand Company, the appellants, appealed from a poor-rate for the parish of Farnham, in which the appellants were rated as occupiers of a gravel pit. The special sessions confirmed the rate, and dismissed the appeal. The quarter sessions allowed the appeal, subject to the case, and amended the rate, assessing the value of the gravel pit at £252 gross, and £240 rateable. The question raised and the facts on which it was based appear from the judgments.

Mr. R. C. Glen appeared for the appellants; and Mr. Marshall, Q.C., and Mr. Ryde for the respondents.

MR. JUSTICE BUCKNILL, in giving judgment, said,—The question for our opinion is whether the Court of quarter sessions for the County of Surrey has rated the Farnham Flint, Gravel, and Sand Company, in a rate for the relief of the poor, on a principle which can be upheld in law. The material facts may be shortly stated. The Farnham Flint, &c., Company, whose business is that of gravel and sand merchants, entered into three agreements, amongst others, with the owner of a bed of gravel, which were dated June 24, 1897, April 15, and November 14, 1898, respectively, by which they bought of him the gravel in three separate plots of ground which were marked out for the purpose. The purchasers had a certain time in which to remove the gravel, level the ground, replace the top soil, and restore the plots to the owners. There is, in my opinion, no statement in the case to justify this Court in treating the land comprised in these agreements as forming one continuous area. By the agreement of June 24, 1897, the gravel in one acre and a half was sold to the company, the price being £150, and the period of possession one year and a half, but in the other two agreements the plots of land were one acre each and the price for each was £150, the period of possession being one year from the date of the respective agreements. The poor-rate which is the subject of this appeal was made on December 8, 1898. At that time the company was in rateable occupation of the three plots, but in November they had exhausted all the ground from the acre and a half which they bought on June 24, 1897, and on September 1 they had exhausted all the ground bought on April 15, 1898. Those two and a half acres were at the time of making the rate used as storage places for gravel in connexion with other lands occupied by the company. The gravel bought by the company on November 14, 1898, was being worked by them on December 8, 1898. On these facts, the Court of quarter sessions held that the annual value of the three and a half acres at the time of the making of the rate ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let on a yearly tenancy, regard being had to the value of the gravel in the unexhausted acre, added to the value of the two and a half acres which were exhausted of gravel, but were used for storage purposes only, and on that the Court found that the amount at which the three and a half acres would, in fact, be so let was £252, at which sum they fixed the gross estimated rental and assessed the rateable value at £240. On the part of the guardians of the Farnham Union it was argued that the rateable value should be assessed either on the output of gravel during the year preceding the making of the rate from so much of the respective plots of land as was in the occupation of the company at any time during that year, based upon a royalty measured by the market value of the gravel, or, secondly, that, as at the time of making the rate the company were and had been working gravel at the rate of at least two acres a year, they must be rated at the full annual value of such two acres. In support of the first contention “*Reg. v. Abney Park Cemetery Com-*

pany” (L.R., 8 Q.B., 515) was cited, and in support of the second “*Reg. v. Whaddon*” (L.R., 10 Q.B., 230). His Lordship having discussed and distinguished these two cases proceeded:—So long as there was any gravel in these three plots of land it may be that the rateable value would be unaffected. I offer no opinion on that point, but, as soon as any one or more of them were exhausted of the gravel that had been in them and they were incapable of beneficial occupation except as storage places for gravel, I am of opinion that they could only be rated upon their actual existing value at the time when the rate was made—in other words, it is not the past, nor the prospective, but the actual value of the hereditament that is to be taken as the basis of assessment, or, as Mr. Justice Blackburn said in “*Staley v. Overseers of Castleton*” (33 L.J., M.C., 182), “The Legislature intended the rate should be made upon the rent which might reasonably be expected from a tenant who took the property from year to year *rebus sic stantibus*. . . .” In my judgment, the present case is more like a brickfield or a mine both of which are, whilst being worked, approaching the period of final exhaustion. So long as they are being worked as brickfields or mines and there is nothing to show that the profits of the rating year may not be as good as the profits of the past year, then that year may be taken as the basis of the next if no better can be found; but where the brickfield or the mine has been worked out and exhausted, as in the case of these two and a half acres, and can therefore be no longer worked for the sole purpose for which they were acquired, I cannot agree to the proposition that their rateable value remains unaffected simply because they are still occupied under the terms of the respective contracts made with the owner of the land. Referring to “*Rex v. Bedworth*” (8 East, 387), which he cited with approval, his Lordship said:—I think the Court of sessions has proceeded in this case on the same principle (as in that case)—that is to say, that the two and a half acres were valueless for the purpose for which they were acquired, and that they could only be assessed at the actual value of their occupation at the time of the making of the rate in question. For these reasons I am of opinion, although I say so with much misgiving, being in disagreement with my Brother Channell, that this appeal should be dismissed.

MR. JUSTICE CHANNELL, after stating the facts as above, proceeded,—The appellants take the land from the landowner from time to time in small plots, usually of one acre at a time. They buy the gravel under the plot, or, rather, so much of the gravel under it as they can get in a limited time (usually a year), pay a lump sum (usually £175) for the gravel, and also pay for the levelling of the land at the end of the year or other period for which they take the plot, which levelling costs about £40 per acre. They also pay some sums for costs. Under one agreement (that of June, 1897) they paid less than under the other agreements, apparently because the bed of gravel in the plot was less deep or not so good in quality as the gravel under the other plots. They have no contract with the landowner whereby he is bound to sell them gravel under other land when the plots they hold are exhausted, but, in fact, he has other land adjoining under which there is gravel, and he had, prior to the rate in question, been in the habit of making successive agreements with them, and he has continued to do so since the rate. Now, as a general rule, property is rated at its existing value at the time of the making of the rate. You have to find what the hypothetical tenant from year to year might be expected to give for the hereditament in its state at that time. If, therefore, the gravel had prior to this rate been taken from the two and a half acres in some way other than by the user of the land in respect of which the rate has to be imposed, I think the quarter sessions

here would have been right in rating the two and a half acres at storage value only. The case would then be the same as that of buildings on a property being burnt down shortly before the rate, and the rate then would be on the value of the land without the buildings. But I am of opinion that where the rateable user itself causes the diminution of value the rule is not quite so simple. The rule then is, I think, that any partial exhaustion of the subject-matter, so long as the special user continues, in no way affects the rateable value, and that it is only when the special user ceases, by reason of the complete exhaustion of the subject-matter or otherwise, that the rateable value is affected. It then, of course, ceases altogether. The cases which throw most light on the mode of rating such properties are "*Reg. v. Westbrook*" and "*Reg. v. Everest*" (reported together 10 Q.B., 178), and "*Reg. v. Abney Park Cemetery Company*" (L.R., 8 Q.B., 515) and "*Reg. v. Whaddon*" (L.R., 10 Q.B., 230). The rating of such properties, without allowing for a renewal fund, is somewhat anomalous, but it is clearly established by "*Reg. v. Westbrook*" that they are to be so rated. And, indeed, it is obvious that any allowance to keep the property in a state to command the rent would in these cases absorb the whole rateable value arising from the special use of the property. If the exhaustion of the material by the working in respect of which the rate is imposed is to be taken into account in the same way as an alteration in the value of the property caused in another way, the rateable value of the hereditament must vary from day to day, and be continually diminishing. That, I think, cannot be. The value of the hereditament for rating purposes depends not on the quantity of the material—in this case gravel—remaining on the property to be worked, but on the amount of the profitable working which is going on at the date of the rate. In these cases it is all important to remember that the value for rating purposes depends on the value of the occupation and not on the value of the *corpus* of the property occupied. The latter in these cases is constantly diminishing, but the former is or may be constant, until at last it ceases altogether by the exhaustion of the *corpus*. To rate such properties you first have to find the amount or rate of working, and then find how much a hypothetical tenant from year to year would give by the year for the right to work at that rate. It may be that there is not enough gravel remaining for any one to work for a whole year, but that is immaterial. The problem is to find the value for a year of that enjoyment of the property which the occupier is in fact having at the date of the rate irrespective of the question whether that enjoyment by the occupier can or cannot continue for a year. His Lordship discussed "*Reg. v. Whaddon*," which he considered to be an authority in point, and "*Reg. v. Abney Park Cemetery Company*," and proceeded:—It seems to me that where the overseers or assessment committee have to rate a property in respect of a beneficial use which is being made of it, which use is self-destructive, what they have to do is this—They must ascertain what amount of use the actual tenant has been making and continues to make of the property, and then ascertain what a tenant would give for liberty to make that amount of use of the property from year to year, independently of the question whether there is or is not enough of the property remaining for the tenant to be able to go on making that use for a whole year. Thus in the case of a gravel pit they must find at what rate per annum the tenant is digging, and then find the annual value of the right to dig at that rate. Applying this in the present case and going back as far as the facts stated in the special case enable us to do, we find that on June 24, 1897, the appellants acquired the right to dig,

and, as I understand, then began to dig, gravel under an acre and a half, which they completely dug out in March, 1898. On April 15, 1898, they acquired the like right under one acre, which they completely dug out by September 1. On November 14, 1898, they acquired another acre, which they were digging on December 8, 1898, when the rate was made. When they completely dug out that acre does not appear (nor, of course, could it be known when the rate was made), but as they took another plot on March 21, 1899, it was probably shortly before that. The subsequent taking is only material to show now that which might at the time have been shown by direct evidence—viz., that at the date of the rate, December 8, the appellants were digging as before and had not begun to dig slower than the average rate at which they had been digging. That average rate appears to me to be about the rate of two acres per annum, rather more if anything, as they exhausted the acre taken April 15, 1898, in four months and a half. I think, therefore, that just as in "*Reg. v. Whaddon*" the appellants were rated at coprolite value on ten acres (though at the date of the rate $6\frac{1}{2}$ acres had been already exhausted, and only $3\frac{1}{2}$ of the ten acres then in their occupation still contained coprolites) because they were working out the $3\frac{1}{2}$ acres at the rate of ten acres per annum, so here the appellants, though at the date of the rate they were only working gravel in one acre, must be rated for the $3\frac{1}{2}$ acres on the gravel pit value of at least two acres inasmuch as they were working both during the preceding year, and up to and at the date of the rate so far as appears at the rate of two acres per annum. In this case there seems no reason for not taking the sums paid by the appellants as a measure of what the hypothetical tenant would be likely to pay, and, in fact, the quarter sessions did so, as I understand they assessed the gravel pit value at £220 per acre, being the £175, the £40 cost of restoring, and the £5 costs. If, therefore, the appellants ought to have been rated for their occupation on the footing that they were working at the date of the rate as they had been previously at the rate of two acres of gravel per annum, the original rating at £420 gross was not excessive, and although the calculations which I have made from figures in the special case are probably not quite accurate, and the dates in the special case are probably not sufficient to enable us, if we had to do so, to fix exactly the proper amount at which the appellants should be rated, it is enough for me to say that the facts stated in the special case show no ground for reducing the rate. I have dealt with the case so far as I think it ought to be dealt with, as one occupation of the $3\frac{1}{2}$ acres. It really was one gravel pit, and occupied and worked as such. But I think that even if the exhausted $2\frac{1}{2}$ acres on the two earlier lettings are to be treated separately and rated at storage value only, the remaining acre should be rated at approximately double the sum at which the quarter sessions have rated it, because I think the appellants were working it, at the date of the rate, at the rate of getting two acres of gravel per annum. And I do not think we are excluded from considering that question by reason of the quarter sessions having found the value in fact. They only so found subject to the case, and state the facts with a view to our deciding it. I put the case thus:—If a man pays £100 for the privilege of taking all the gravel out of a plot of land in a year, and he digs uniformly throughout the year, I should say that the gross value of his occupation during the year is £100, and that is so all through the year, though he exhausts the land by digging the last load of gravel on the last day of the year. I think that must be admitted. I think also that if he does not dig uniformly but digs out all the gravel in the first six months, continuing to occupy during the second six months, the gross annual value

during the second six months as well as during the first is still £100, but if not, and if, as the quarter sessions have held, the value during the second six months is *nil* (or storage value only which for the purposes of the argument is the same thing), then it follows that the value of the first six months' occupation is the whole £100 which he pays—that is to say, that the annual value during that six months is £200 per annum. In either way, therefore, the quarter sessions seem to me wrong. His Lordship concluded—I think, therefore, that the proper order to be made is to allow with costs the appeal to us, quash the order of quarter sessions, and, making the order which the quarter sessions should have made, dismiss with costs the appeal to quarter sessions against the rate; but, as the Court is equally divided, I am of opinion that the appeal fails, and consequently that the order which has to be made is that the appeal be dismissed. Under the circumstances it will be dismissed without costs, and leave to appeal, if necessary, is given.

[Solicitors—Jackson, Farnham, for the appellants; Johnson, Wetherall, and Sons, for Potter and Crundwell, Farnham, for the respondents.]

House of Lords (Lord Halsbury, L.C.,) 1900.
Lords Macnaghten, Morris, Shand, }
James of Hereford, and Brampton } Feb. 15.

EARL GREY V. THE ATTORNEY-GENERAL.*

Revenue—Estate duty—Settlement—Reservation of interest to settlor—Duty payable on death of settlor—Finance Act, 1894, secs. 1 and 2 (1).

Decision of the Court of Appeal (14 *The Times* L.R., 585) affirmed.

This was an appeal under the Finance Act, 1894, the question being whether or not the present, the fourth, Earl Grey is liable to pay estate duty on the principal value of the whole of the property the third earl comprised in two indentures of 1885 and 1894, the latter of which was executed within 12 months of the third earl's death. The appeal was from an order of the Court of Appeal (Lords Justices A. L. Smith, Rigby, and Vaughan Williams) dated August 10, 1898, affirming a decree of the Queen's Bench Division (Mr. Justice Grantham and Mr. Justice Channell) dated December 13, 1897. By a deed dated October 19, 1885, and made between the late Henry, third Earl Grey, of the one part, and the appellant, the fourth Earl Grey, then Albert Henry (George Grey, Esq., of the other part, reciting (*inter alia*) that the appellant was the nephew of the third Earl Grey and heir presumptive to the peerage, and that the third Earl Grey was desirous of giving his real and personal estate to the appellant, subject to the provisions therein contained, in consideration of natural love and affection, and for the other considerations therein appearing, the third Earl Grey conveyed to the appellant all his real and leasehold estates in the county of Northumberland and elsewhere, subject to the payment of certain life annuities and mortgages affecting the same to the use that the third Earl Grey should thenceforth during his life receive an annual rent-charge of £4,000, to be issuing out of the said hereditaments (other than such part as the third Earl Grey was to occupy and enjoy under the trusts thereafter declared) and subject thereto to the use of the appellant in fee simple, but as to the mansion-house at Howick and the premises to be enjoyed therewith subject to the trusts thereafter contained. And the third Earl Grey assigned to the appellant all rents,

arrears of rent, owing in respect of the said real estates, and all furniture and effects in or about the said mansion-house and premises at Howick, and all stock, crops, and effects, and other personal property belonging to him (except money, private papers and correspondence, his wardrobe, and ornaments and effects in his own personal use), to hold the same (subject as to parts thereof to the trusts thereafter declared) to the appellant absolutely for his own use and benefit. It was then declared that the mansion-house at Howick, together with the pleasure gardens, kitchen and fruit gardens, stables, vineries, green-houses, outbuildings, and appurtenances as then occupied and enjoyed by the third Earl Grey, and all the furniture, plate, books, pictures, and articles of household use or ornament, wines, stores, garden implements, horses, carriages, and other things whatsoever in or about the said mansion-house and premises, should be held upon trust to permit the said third Earl Grey to use and enjoy the same as theretofore during his life. The appellant then, by the same deed, covenanted with the third Earl Grey to (1) Pay certain annuities mentioned in the schedule to the deed and all other annuities (if any) charged on any part of the property or payable by the third Earl Grey so long as the same should be payable. (2) Pay a mortgage debt of £200,000 and interest and all other mortgage debts and charges affecting any part of the property, also a bond for £1,000 payable to the Honourable George Grey with interest, and discharge all liabilities of the third Earl Grey in respect of the property. (3) Pay the said annual rent-charge of £4,000 to the third Earl Grey. (4) Keep the mansion-house and buildings at Howick insured at the appellant's cost and expend all money received on any insurance in restoration, repairs, or rebuilding, and keep in repair and properly uphold and maintain the said mansion-house, buildings, gardens, and effects to be enjoyed by the third Earl Grey, and stock and manage the said gardens as the same had theretofore been managed, and at the request of the third Earl Grey or his agent forthwith do and make any repairs in any of the premises so to be enjoyed which the said earl or his agent might desire to have made or done. (5) At the like cost supply to the third Earl Grey farm and garden produce for the use and consumption of the household at Howick. (6) Upon the death of the third Earl Grey pay all his funeral and testamentary expenses, including all stamp and other duties, and also all his debts to the full exhaustion of all the property, real and personal, of the said third earl. (7) The lands at or near Howick then farmed by the said third Earl Grey were not to be sold or disposed of or let during his life, but were to be farmed by the appellant personally in like manner as the same had been farmed by the third earl, and no buildings were to be erected or works established thereon without the consent in writing of the said third earl. (8) Receipts, &c., to be produced. The deed also contained a provision that, in the event of the appellant dying in the lifetime of the third earl (or of any breach of covenant by the appellant and failure to remedy the same within 30 days after notice), it should be lawful for the third Earl Grey to revoke the deed, either wholly or in part, but without prejudice to the title under any sale or mortgage prior to such revocation. The average net annual income (after deducting terminable and other charges, repairs, &c.) of the property comprised in the deed for the five years next preceding the date thereof was a little over £4,000. By an indenture, dated September 26, 1894, the third Earl Grey, in consideration of £5,000 stated to be paid to him by the appellant, released to him the said rent-charge of £4,000 and also released the power of revocation contained in the deed of October 19,

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

1885, and the covenant by the appellant to retain unsold and to farm certain lands near Howick. This indenture contains a recital that the rent-charge had been paid and all the covenants in the deed of October 19, 1885, performed by the appellant up to the date thereof. The third earl died on October 9, 1894, whereupon the appellant succeeded to the earldom. The net annual income of the said estates now considerably exceeds £4,000. Under the Finance Act, 1894, estate duty was claimed from the appellant on the principal value (less encumbrances) of the whole of the property comprised in the said deed of October 19, 1885, as property passing on the death of the said third Earl Grey within the meaning of sections 1 and 2 (1) (c) of the said Act (which incorporates the provisions of section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 (1) of the Customs Act, 1889), and the appellant having refused to pay estate duty (save as to the mansion-house and effects) an information was filed on January 21, 1896, praying a declaration that such duty had become payable and for consequential relief. The effect of the legislation was thus expressed by Lord Justice A. L. Smith:—
 "The real personal or movable property to be included in an account shall be property of the following description—viz., (a) Any property . . . taken under a disposition . . . made by a person dying after August 1, 1894, purporting to operate as an immediate gift *inter vivos* . . . which shall not have been *bona fide* made 12 months before the death of the deceased . . . or property taken under any gift whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." The case is reported 14 *The Times* L.R., 585; L.R. [1898], 2 Q.B., 534; 67 L.J., Q.B., 947.

Mr. Haldane, Q.C., and Mr. Bremaer were for the appellant; the Attorney-General (Sir R. E. Webster, Q.C.), the Solicitor-General (Sir R. B. Finlay, Q.C.), and Mr. Vaughan Hawkins for the respondent were not heard.

The LORD CHANCELLOR.—My Lords,—There are some cases so extremely plain that it is difficult to give any better exposition of the question than that which the statute itself provides. In the present case I did not at first quite understand the argument presented to your Lordships, and I am not absolutely certain that I have got much further now; but, at all events, forming my own judgment upon the statute, nothing appears to me much more plain than this, that what the Act of Parliament intended to prevent was that what has been described as a gift *inter vivos* should nevertheless reserve to the settlor some benefit, or some part of that which purported to be given *inter vivos*. In this case can anybody doubt that something has been reserved to the settlor? The settlement itself has reserved £4,000 a year, and has reserved a right also on the part of the settlor that all his debts up to the period of his death should be paid and the payment secured by the estate. It seems to me that it is burning daylight to say that that is not within the express language of the statute, and I am really wholly unable to understand why these words are not as plain in the statute itself as any explanatory exposition could make them. That, my Lords, is really all I have to say upon the subject. It seems to me it is a particularly plain case, and I move, your Lordships, that this appeal be dismissed with costs.

The other noble and learned lords concurred, and the appeal was dismissed.

[Solicitors—G. Flux and Leadbitter, for the appellant; F. C. Gore, for the respondent.]

Court of Appeal (Lindley, M.R.,
 Rigby and Vaughan Williams,
 L.JJ.) } 1900.
 Feb. 15.

STEWART V. RHODES.*

Practice—Charging order—Deceased judgment debtor—1 and 2 Vict., c. 110, sec. 14.

A charging order upon stocks and shares under sec. 14 of 1 and 2 Vict., c. 110, cannot be obtained against the executor of a deceased judgment debtor without obtaining a judgment against the executor.

This appeal, against a decision of Mr. Justice Stirling's, raised a question of considerable importance, viz., whether a charging order upon stock, under section 14 of the Act 1 and 2 Vict., cap. 110, can be obtained against the executor of a deceased judgment debtor without obtaining a judgment against the executor. In the present case the plaintiffs, on January 30, 1899, obtained a judgment in an action in the Queen's Bench Division against John Rhodes for £959 and costs. On March 27 Rhodes died. On June 16 an action was commenced for the administration of his estate in the Chancery Division. On June 17 the judgment creditors obtained from a Master an order in the Queen's Bench Division action giving them liberty to issue execution against the executor of Rhodes, under Order XLII., rule 23, of the Rules of the Supreme Court, and it was also ordered that, unless cause should be shown to the contrary before the Judge in Chambers on June 28, the defendant's interest in a sum of Consols in Court should stand charged with the payment of the amounts due on the judgment. On June 22 judgment was given in the Chancery action for the administration of the estate of Rhodes. The Queen's Bench action was afterwards transferred to the Chancery Division, and the plaintiffs applied to make the charging order absolute. Mr. Justice Stirling held that the charging order was invalid, because it purported to charge "the interest of the defendant"—i.e., of the judgment debtor who was dead, and had no interest, and that it did not operate to charge the interest which had become vested in the executor. The plaintiffs appealed.

Mr. Jenkins, Q.C., and Mr. Whinney were for the plaintiffs; Mr. Harman was for the executor; Mr. Upjohn, Q.C., and Mr. E. S. Ford were for the plaintiffs in the administration action.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the case was an important one, and it had occupied a long time, but, now that it had been threshed out, it did not present much difficulty. Though these charging orders had been in operation for many years no one had ever until now obtained, or, so far as his Lordship knew, had discussed the possibility of obtaining, a charging order against an executor for the debt of a deceased judgment debtor. His Lordship did not say it could not be done. But the proceeding was a statutory one, and the statute must be looked to for the method of obtaining the order and its effect. Section 14 showed that the Court must have before it the person against whom the judgment had been obtained, and he was the judgment debtor who must show cause against making the order absolute. He must therefore be living. It was decided in "*Finney v. Hinde*" (4 Q.B.D., 102) that a charging order *vis-à-vis* against a dead man was of no avail. If the creditor wanted to get a charging order against an executor, he must obtain a judgment against him first. The real objection to the experiment which the present plaintiffs had made was that they had attempted to get a charging order against the executor without

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

obtaining a judgment against him. No doubt under Order XLII., rule 23, leave could be obtained to issue execution against an executor without obtaining a judgment against him. There were two views of the effect of such an order—(1) that it was equivalent to a judgment; (2) that it dispensed with the necessity of a judgment. The appellant's counsel adopted the former view, the respondent's counsel the latter. His Lordship thought the latter view was the true one. The order had not the effect of a judgment. The result was that the plaintiffs, who were seeking to obtain a charging order, had not complied with the essential condition, imposed by section 14, of obtaining a judgment against the executor. It was said that, as they had obtained judgment against the testator, they could not now obtain a judgment for the same debt against his executor. If so, it would follow that they could not obtain a charging order at all. Their proper remedy would then be in the administration action. This was probably the reason why no one had hitherto attempted to obtain a charging order against an executor in such a case as this. The only case which raised any doubt was "*Haly v. Barry*" (L.R., 3 Ch., 452). But then it may have been that, under the old procedure before the Judicature Act, the creditor had done what was equivalent to obtaining judgment against the executor. But the decision of the Court was only that they would not interfere by injunction to prevent an order *nisi* being made absolute. They would not deprive the creditor of the advantage which he had obtained. The order *nisi* in the present case was altogether wrong. The plaintiffs' experiment had failed, and the appeal must be dismissed with costs.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS delivered judgments to the same effect.

[Solicitors—Markby, Stewart, and Co.; May, Sykes, and Co.; Johnson, Weatherall, and Sturt.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } Feb. 15.

DOBELL AND CO. V. GREEN AND CO.*

Ship—Charter-party—"Subject to colliery guarantee"—Vessel ordered to a colliery on strike—Tender of guarantee—Reasonableness.

Decision of Bigham, J. (15 *The Times* L.R., 158), affirmed.

This was an appeal by the plaintiffs from the judgment of Mr. Justice Bigham, reported in 15 *The Times* L.R., 153. The following facts are taken from the judgment of the learned Judge:—This was an action brought by shipowners against charterers for the alleged breach of a coal charter, the question being whether a colliery guarantee issued from a colliery where work had stopped by reason of a strike was such a guarantee as the shipowner was bound to accept. The facts were as follows:—On January 14, 1898, the defendants, Messrs. F. Green and Co., of London, chartered the plaintiff's ship *Curzon* to carry a cargo of South Wales coal from Cardiff to Iquique. The vessel was at the time homeward bound to Liverpool, and was not expected to arrive at that port before April or May. The charter-party provided that after discharging her inward cargo at Liverpool the vessel should sail to Cardiff and "shall proceed to such loading berth as the freighters may name, and shall there load a cargo of steam coal as ordered by charterers, which they bind themselves to ship (except in the event of strike of shippers' pitmen)." The vessel to be loaded as customary, but subject in all respects to "the colliery guarantee in [blank] colliery working days as may be arranged; any

claim for demurrage in loading to be settled with colliery direct." Having made this charter-party, the defendants on February 3, 1898, bought two cargoes of Hood's Merthyr Colliery coal, one of which they intended for the *Curzon* and the other for some other vessel which they had also chartered or were about to charter. On April 6, 1898, the South Wales coal strike began and work at Hood's Colliery stopped. While this condition of things existed—viz., on April 26—the defendants procured from Hood's Colliery the usual colliery guarantee, whereby the colliery proprietors undertook to load the *Curzon* in 20 days after she should be ready to receive cargo, subject to the usual exception as to strikes. This guarantee was sent on in ordinary course by the defendants to the ship's agents. The ship's agents returned it in a letter, saying, "We decline to accept it, having regard to the fact that Messrs. Hood's Merthyr Colliery is on strike. As there are numerous other collieries which are not on strike and from which coal can be obtained, the owners require to be loaded by a colliery which is now working." To this the defendants answered (as the facts were) that the coal had been bought from Hood's weeks before the strike began, and that the plaintiffs could have had the colliery guarantee at the time had they desired it; and they insisted that the ship should load from Hood's Colliery. From this position the defendants never receded. On May 14 the plaintiffs sent the *Curzon* from Liverpool to Cardiff, and she arrived at the latter port on May 16; she was ready to load by May 17, from which date, but for the strike, the 20 days mentioned in the colliery guarantee would begin to run. No doubt at this time, as appears from the correspondence, there was good reason to expect that the strike would speedily end; in fact, that it would end in time to enable the loading to be completed within the stipulated time. These hopes, however, proved to be vain, for the strike did not end till September 1, and the loading of the vessel did not finish till September 27. There was no complaint of delay in loading after the ending of the strike, but the plaintiffs insisted that they were entitled to have a guarantee from a colliery which was at work on the date of the guarantee, and they claimed damages based upon the loss of the use of their ship for three months or more, which they estimated at a sum equal to about half her selling value. The only other fact necessary to mention was that during the whole of the strike a certain proportion, estimated at 15 per cent., of the South Wales collieries were at work, so that South Wales coal was obtainable, although at a very high price. The learned Judge held that the colliery guarantee tendered to the plaintiffs was a good guarantee within the meaning of the charter-party, and he gave judgment for the defendants.

Mr. Joseph Walton, Q.C., and Mr. Horridge appeared for the plaintiffs; Mr. Carver, Q.C., Mr. Scrutton, and Mr. F. D. MacKinnon appeared for the defendants.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that he entirely agreed with the judgment of Mr. Justice Bigham. By the charter-party the defendants undertook to load subject to a strike. Any loss arising from a strike was by the charter-party put upon the plaintiffs, the shipowners. After the strike began the defendants gave the plaintiffs notice that they were going to load Hood's Merthyr steam coal. At this time there was good reason to expect that the strike would come to an end so as to enable the ship to be loaded within the time. Why was not that a good notification to the plaintiffs as to the coal which the defendants were going to load? It was said not to be so, because there was a strike at Hood's Merthyr Colliery, and the defendants ought to have tendered a colliery guarantee from a colliery not under strike. Where was that to be found? The loss from a strike

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

in the colliery was by the charter-party to fall upon the plaintiffs. In his opinion, in the circumstances, the tender of the colliery guarantee of Hood's Merthyr Colliery was a reasonable one.

LORD JUSTICE COLLINS concurred. As between these two business firms the risk of any difficulty arising from a strike was deliberately placed upon the shipowners. That being so, the very event stipulated for by the charter-party had arisen. The charterers were under an obligation by the charter-party to load steam coal from a colliery which they had a right to select, and they undertook to load subject to a strike. What right had the shipowners to complain when they were told to proceed to a loading place to load from a colliery where there was a strike? It was *nihil ad rem* at that time. The charter-party had made the obligation to load subject to a strike, and the shipowners had undertaken to go to the place named and take the coal on board. At this time the existence of a strike in the colliery was *nihil ad rem*. In the event of there being a strike at the colliery when the ship arrived at the loading place, and when the charterers were called upon to load, the question would then arise whether they had not been relieved of the obligation to load by reason of the strike. The discussion as to the operation of the exception would arise if and when the exception arose. The charterers would then be relieved, because the strike clause in the charter-party would then come into operation. In his opinion it would be unreasonable to impose on the charterers the obligation of naming a colliery where no strike was going on. It might well be, when the uncertainty of strikes was considered, that, though there might be a strike at the time of the order to proceed to the loading place, yet at the only material time—namely, the time of the commencement of the loading—the strike might be over. Until the time for loading arrived there was nothing to fetter the discretion of the charterers.

LORD JUSTICE ROMER concurred. He agreed that the charterers were bound to make a reasonable selection of a colliery for loading coals from. He would assume, though it was not necessary to decide it, that the right time to see if a reasonable selection had been made was the time when the name of the colliery was notified to the shipowners. Assuming that to be so, upon looking at this charter-party, especially at the strike clause, he came to the conclusion that the selection of the colliery in the present case was not an unreasonable selection by reason of the existence of the strike, which, as matters then appeared, might have ended at any time. The shipowners, therefore, could not decline to accept the guarantee of that colliery.

[Solicitors—Walker, Son, and Field, for Weightman, Pedder, and Weightman, Liverpool, for the plaintiffs; Parker, Garrett, and Holman, for the defendants.]

Chan. Div. } 1900.
(Buckley, J.) } Feb. 15.

THE WELSBACH INCANDESCENT GAS LIGHT COMPANY (LIMITED) V. THE NEW INCANDESCENT (SUNLIGHT PATENT) GAS LIGHTING COMPANY (LIMITED) AND OTHERS.*

Patent—Infringement—Utility of invention—
"Utility," meaning of, discussed.

This was an action for an injunction, damages, and other relief in respect of alleged infringements by the defendants of the plaintiffs' patent (granted to Mr. Oliver Imray and numbered 3,592 of 1886) for an improvement in an illuminant appliance for burners. At the conclusion of the arguments and evidence, which occupied

the Court for several days, his Lordship reserved judgment.

Mr. Moulton, Q.C., Mr. T. Terrell, Q.C., Mr. Roger Wallace, Q.C., and Mr. A. J. Walter were for the plaintiffs; and Mr. Bousfield, Q.C., and Mr. W. Neill for the defendants.

MR. JUSTICE BUCKLEY, in giving judgment, said the complaint of the plaintiffs was not as to the form of the mantles used, which was originally protected by a patent of 1885 which had now expired, but in respect of the use of the oxides of certain rare metals as brilliant illuminants in the making of the mantles; it was restricted to the use of materials in hoods and mantles, and was not for hoods and mantles formed in a particular way. The patent was in respect of pure thorium or thorium oxide alone or in connexion with other oxides. There was nothing about pure thorium, and what was then known as thorium was not pure, but consisted to the extent of 25 per cent. of other substances. It was said on behalf of the defendants that the plaintiffs had not improved on what was used under the 1885 patent, but that there was a falling off. The answers were that what was patented was not claimed as an improvement in the illuminating powers of the materials used, but that it offered a useful choice. It had other advantages—viz., rigidity, flexibility, or durability. There was a great advantage in having greater toughness in the mantles used. Utility, in patent law, did not, as his Lordship understood it, mean either abstract utility, or comparative or competitive utility, or commercial utility. It was described by Mr. Justice Grove in "*Young v. Rosenthal*" (1 Rep. Pat. Cas., 34) as meaning an invention better than the preexisting knowledge of the trade as to a particular fabric. His Lordship adopted that definition if the word "better" was understood as meaning better in some respect and not necessarily better in every respect, so that, for instance, an article which was good, although not so good as that previously known, but which could be produced more cheaply by another process, was better in that it was better in point of cost, although not so good in point of quality. So here he conceived that a mantle constructed according to prescription No. 1 in the specification of thorium pure according to the knowledge of 1886, and which gave only three candles, or of thorium pure in fact, which would give only 1·3 candles, although it was worse as an illuminating appliance than the mantle of 1885, which gave four or 4·5 candles, was nevertheless better if it possessed in a greater degree the qualities of rigidity, durability, or stability. He might illustrate this by saying that in point of fact subsequent knowledge had shown that it was useful because, by the subsequent discovery that a small quantity of cerium would increase its luminosity, the step which was taken in 1886 had led to the possibility of making subsequently to 1893 a mantle which was not only durable and stable, but possessed also high illuminating power. Again, he might take another test of utility—viz., that an invention was useful for the purposes of the patent law when the public were thereby enabled to do something which they could not do before, or to do in a more advantageous manner something which they could do before, or, to express it in another way, that an invention was patentable which offered the public a useful choice. Now the patent of 1886 offered the public an opportunity of making with thorium an appliance which up to that date it had been suggested could be made only with zirconium, lanthanum, or yttrium, and, whether the thorium mantle gave a higher or lower illuminating light, it might well have been, and it was now known, that it was useful to give the public the choice of using that rare earth instead of some of the rare earths mentioned in the specification of 1885. A very small amount of utility was sufficient to

*Reported by F. EVANS, Esq., Barrister-at-Law.

support a patent, and the suggestion to the public of this other rare earth as a means to an end gave utility to the patent for the purposes of the patent law. His Lordship then dealt with the question of infringement, which he also decided in favour of the plaintiffs, and gave them an inquiry as to damages, an order for destruction or delivery of the infringing articles, and the costs of the action as between solicitor and client.

[Solicitors—Faithfull and Owen; Michael Abrahams, Sons, and Co.]

Q.B. Div. }
(Bigham, J.) }

1900.
Feb. 15.

MONTI V. BARNES.*

Fixtures—Movable chattels—Annexation to freehold—Mortgagor and mortgagee.

In this action the plaintiff sued for the delivery up to him of certain fittings, fixtures, and effects, or for £287 12s. as their value, and for damages for their detention. The defence was that the defendant had never deprived the plaintiff of the articles in question; that their return had never been refused; and that the goods and chattels in question were the property of the defendant. The defendant also counterclaimed for the return of 11 dog-grates or their value.

Mr. A. T. Lawrence, Q.C., and Mr. CANNOT appeared for the plaintiff; and Mr. Rufus Isaacs, Q.C., and Mr. Macarthy for the defendant.

The facts of the case were shortly as follows:—In 1890 Mr. P. St. L. Grenfell was the owner of a house known as Long Walk-house, Windsor. He mortgaged that house to Lady Ross, and in 1893 the present defendant, Miss Barnes, became mortgagee in fee of the premises by a transfer to her by Lady Ross of the mortgage security dated August 27, 1890. In or about July, 1893, Mr. Grenfell sold the equity of redemption in the mortgage to the plaintiff, Mr. P. Monti, and on March 22, 1898, the defendant foreclosed the mortgage and became owner in fee of the premises. After the first mortgage was effected, and prior to its transfer to Miss Barnes by Lady Ross, Mr. Grenfell had effected great decorative improvements in the house, and it was with regard to certain articles then put upon the premises that the present action was brought. The most important of these were what is known as a "fitment" in one of the dressing-rooms and a mirror in the drawing-room. These articles were claimed by the plaintiff on his leaving the house, and the claim was resisted by the defendant on the ground that they were affixed to the freehold of the premises, and had become her property as mortgagee. The first of these articles, the "fitment," was described as a piece of furniture specially designed for the room. It was made for that room and no other. It consisted of a series of different parts, which were fastened together with nails or screws. The different parts consisted of a wardrobe, dressing table, washhand-stand, and such things as are usually found in a dressing-room. It was fastened to the walls of the room by means of battens, which themselves were nailed to the walls, and the "fitment" screwed on to them. The drawers of the wardrobe and the cupboards had no backs, except such as the walls of the room afforded, and the whole could not be removed without doing some harm to the realty. The other article in dispute consisted of a large looking-glass, reaching from the floor nearly to the ceiling of the drawing-room. At the top of that looking glass, forming the architrave, was a painting surrounded by a moulded frame. This looking glass was fixed by nails or screws to the freehold, and it covered up the central

division of a large window giving light to the drawing-room. The defendant counterclaimed for damages for the removal of 11 dog-grates, which had been substituted by Mr. Grenfell for the grates he found upon the premises.

Mr. CANNOT, for the plaintiff, contended that the sole question was, How were the articles in question fixed, and with what intention were they fixed? They were not an essential part and parcel of the character of the house as a dwelling-house, and consequently were not fixtures passing to the mortgagee. There was no difference in principle as to what were fixtures as between landlord and tenant and between mortgagor and mortgagee. "*Mather v. Fraser*" (25 L.J., Ch., 361) decided that these dog-grates could not be fixtures. He also referred to the cases of "*Crosby v. Shaw*" (19 L.R., Irish, 317) and "*Astbury, ex parte Lloyd's Banking Company*" (L.R., 4 Ch., 630).

Mr. RUFUS ISAACS, for the defendant, said that the principle upon which the plaintiff tried to show that these were not fixtures was a principle only applicable to the case of a landlord and tenant, and not to that of mortgagor and mortgagee. The old common law rule was originally definite and fixed on this subject, but it became relaxed, for the purpose of encouraging trade, in favour of a tenant. The old rule as it stood before being modified must be applied in this case. The case of "*Smith v. Maclure*" (32 W.R., 459) covered the whole of the present case. It was said there that things which are substantially part of the house, so that they cannot be removed without depriving the building of that which was intended to be used with it, ought to be regarded as fixtures. The defendant was also entitled to the dog-grates as passing with the freehold. They were not fixed, but they stood by their own weight, as was the case in "*Smith v. Maclure*." Being substituted for the original grates, they passed with the land, and were just as much the mortgagee's property as the original grates would have been. He referred to the cases of "*Hellawell v. Eastwood*" (6 Exch., 295); "*D'Eyncourt v. Gregory*" (L.R., 3 Eq., 382); "*Holland v. Hodgson*" (L.R., 7 C.P., 328); "*Longbottom v. Berry*" (L.R., 5 Q.B., 123); "*Norton v. Dashwood*" (65 L.J., Ch., 737); "*Viscount Hill v. Bullock*" ([1897] 2 Ch.D., 482).

HIS LORDSHIP, in giving judgment, said for the purposes of this action the plaintiff represented Mr. Grenfell; if the articles in question belonged to him as against the mortgagee, they were now, as he understood it, the plaintiff's as against the mortgagee. And so the question in the action was simply this, Have these "fitments" passed to the mortgagee by reason of the mortgage. It was a question of fact whether these things passed to the mortgagee or not, but it was a question of fact which had to be determined with reference to certain well-known rules of law. It was said to be a question of intention whether a thing attached to the freehold, or introduced into the freehold, or upon the freehold, passed to the realty so as to become part of the realty. If it was a question of intention, that intention was to be ascertained with reference to certain well-known rules. In this case he had to ascertain whether the things put in by Mr. Grenfell were put in for a temporary purpose merely, or whether they were put in so as to form part of the house, whether they were put in to improve the inheritance—that is to say, to make it a better house than it was before—or were they put in merely for a temporary purpose, to be removed whenever the person who put them in thought fit. Having considered the nature of the articles in question, and the intention with which they were put in, he came to the conclusion that they both formed part of the freehold passing to the mortgagee. He need hardly say that, if this were a question

*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

between landlord and tenant, he might come to a very different conclusion. If a tenant had put these things into his landlord's house, he might, and very likely he should, have found his intention quite different from the intention he had attributed to Mr. Grenfell. With regard to the dog-grates, he also came to the conclusion that, although these grates were not fixed and could be removed without injury to the freehold, yet they formed part of the freehold, and passed to the mortgagee. He therefore gave judgment for the defendant with costs on the claim, and on the counter-claim for £30 and costs.

[Solicitors—M. S. Rubinstein, for the plaintiff; Calkin, Lewis, and Stokes, for the defendant.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams, } 1900.
L.JJ.) Feb. 16.

IN RE THE TRENCH TUBELESS TYRE COMPANY (LIMITED)
—BETHELL V. THE SAME COMPANY.*

Company—Winding up—Liquidator—Appointment, validity of—Notice convening meeting.

In this appeal against a decision of Mr. Justice Kekewich's the question was whether the liquidator appointed in the winding up of the above company had been duly appointed. The action was brought by debenture-holders of the company for the realization of their security. An order was made in the action appointing a receiver, who took possession of some documents of the company. After this had been done a general meeting of the company was held on November 1, 1899, at which resolutions were passed for the voluntary winding up of the company, and a Mr. Walker was appointed liquidator. Notice was then given to the shareholders that a meeting would be held on November 16, when the following resolutions, duly passed at the meeting on November 1, would be submitted for confirmation as special resolutions:—(1) That the company be wound up voluntarily; (2) "that Mr. Walker be and is hereby appointed the liquidator to conduct the winding up." The meeting was accordingly held on November 16, when the first resolution was passed, but the second was rejected, and instead of it a resolution was passed appointing Mr. W. F. Marreco liquidator. Afterwards a motion was made on behalf of the company that the receiver might be ordered to deliver up to the liquidator some books and documents of which the receiver had taken possession, but which were not comprised in the debentures. The plaintiffs were willing that these documents should be delivered to a properly appointed liquidator, but they contended that Mr. Marreco had not been duly appointed, because the notice of the second meeting only stated that the resolution appointing Mr. Walker would be submitted for confirmation, and said nothing about the appointment of any other person as liquidator. Mr. Justice Kekewich held that Mr. Marreco had not been validly appointed liquidator. His Lordship was of opinion that it was not competent to the company to amend a resolution of which notice had been given. A shareholder who received the notice was entitled to consider whether it was worth his while to attend the meeting, and when he was told that a specified person, in whom he might have confidence, was to be appointed liquidator he might think it unnecessary to attend. The company appealed.

Mr. Ward Coldridge was for the company; Mr. Warrington, Q.C., and Mr. Martelli were for the plaintiffs.

The COURT allowed the appeal.

The MASTER of the ROLLS said that the learned Judge

had proceeded upon the view that a notice ought not to be misleading, and that this notice might have been misleading, and for some time he (the Master of the Rolls) thought there might be something in that, because no doubt when the shareholders were summoned to this meeting of November 1 all that was called to their attention by the notice was whether the company should be wound up and whether Mr. Walker should be appointed liquidator. But upon looking further into the matter, and bearing in mind that it was now well settled that as soon as a resolution was passed for the winding up of the company it was competent for the company without notice to appoint a liquidator, the case assumed a somewhat different aspect. He did not believe himself that Walker's supporters had in fact been misled. It was, however, suggested that other shareholders kept away from the meeting in the belief that all that could be done was either to accept or reject Walker; but if that was their view they were wrong in law. There were two answers to that. In the first place, the second resolution was not an amendment of the former one, but was a different resolution, and, in the second place, if the Court gave effect to that objection they would be giving to directors the power to palm off their nominee upon the company unless the meeting was postponed and a fresh notice given. That ought not to be allowed. Every one connected with companies should know that directly a resolution for a voluntary liquidation had been passed the appointment of a liquidator could be proposed and carried. There could be no doubt that the appointment of Mr. Marreco was valid, and therefore the documents ought to be delivered up to him.

LORD JUSTICE RIGBY agreed. He said that the first meeting at which a liquidator could be appointed was the confirmatory meeting, and when the directors found that the appointment of Mr. Walker would not be agreed to they took the right course in dropping the resolution for his appointment altogether, thereby leaving it open to those who wished to appoint another person to propose a resolution for that purpose.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Phillips and Boyle; Francis and Johnson.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams, } 1900.
L.JJ.) Feb. 16.

KIMBER V. ADMANS.*

Covenant—Construction—"House," meaning of.

Building a block of flats on a plot of land held not to contravene a covenant not to build more than one house upon it.

This was an appeal from a decision of Mr. Justice Cozens-Hardy's. The plaintiff and the defendant were owners of adjoining plots of land forming part of a building estate. Each plot was subject to a covenant not to build more than one house upon it. The defendant proposed to build a block of flats upon each plot of land belonging to him. The plaintiff complained of this as a breach of the covenant and moved for an injunction to restrain the defendant from erecting these buildings. Mr. Justice Cozens-Hardy refused the motion, being of opinion, upon the construction of this covenant, that each block of flats was one house only, and not a series of houses. The plaintiff appealed.

Mr. W. H. Cozens-Hardy was for the plaintiff; and Mr. Buckmaster for the defendant.

The COURT dismissed the appeal.

The MASTER of the ROLLS thought that the learned

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

Judge was clearly right. What was the meaning of the word house in this covenant? In his Lordship's opinion it did not refer to the mode in which the building was to be subdivided and let, but to the aggregate of the rooms making up the building. No doubt a portion of a house might be a house for some purposes, as for purposes of rating or franchise, but when the word was applied to a covenant of this description it did not refer to the interior portions of the building, but to the whole thing. This covenant was directed not to the parts, but to the aggregate.

LORD JUSTICE RIGBY agreed.

LORD JUSTICE VAUGHAN WILLIAMS also agreed. In construing this restrictive covenant he thought that the question to be asked was what was the object of it, and if he could see no object in the covenant if it was simply limited to the brick and mortar erection, he would be disposed to put upon the word house a meaning which would cover the user of the house as distinguished from the physical erection. But he did not think that any one familiar with building estates in London would have any difficulty in ascertaining the object of this covenant, if the word house were construed as meaning the physical erection.

[Solicitors—Todd, Dennes, and Lamb; Cree and Son.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } Feb. 16.

SMITH V. BUTLER.*

Vendor and Purchaser—Conditions of sale—Deposit—Forfeiture.

If the vendor fulfils the conditions of sale any time before the date fixed for completion he has performed his part of the contract.

This was an appeal by the defendant from the judgment of Mr. Justice Bucknill. The action was brought to recover a deposit of £100 paid by the plaintiff to the defendant upon a contract, whereby the plaintiff agreed to purchase from the defendant the latter's interest in the lease of a publichouse, called the Black Boy, at St. Mary Cray, Kent. The publichouse was owned by Mr. Kidd, a brewer, and he had granted a lease of it for a term of years to the defendant. Mr. Kidd had lent the defendant £900, upon mortgage of the house, payable on demand, there being an understanding that the loan should be paid off by annual instalments of £50. On September 10, 1898, six-and-a-half years of the lease having expired, the defendant entered into an agreement with the plaintiff, whereby the defendant, in consideration of the sum of £100 then paid to him by way of deposit, and of the further sum of £1,700, to be paid to him at the time fixed for completion, agreed with the plaintiff to assign to him (the plaintiff) the lease of the Black Boy, and all the defendant's interest therein for the remainder of the unexpired term, amounting to about 22 years, subject to the performance of the covenants therein contained. The time fixed by the agreement for the completion of the purchase was November 10, 1898. The agreement contained a provision that in case of default by the purchaser the deposit money was to be forfeited, and also the following clause:—"This agreement is entered into conditionally that C. N. Kidd, Esq., of the Steam Brewery, Dartford, will transfer his present loan of £850. . . ." At the time of the agreement, £50 had been paid off the loan of £900. The deposit of £100 was paid. On October 4, the plaintiff, the defendant, and the broker, acting for both parties, had an interview with Mr. Kidd, when the latter

refused to lend more than £700, to be repaid by instalments of £50 a year. The learned Judge came to the conclusion that the plaintiff, from that moment, determined to treat the agreement as at an end, on account of the refusal of Mr. Kidd to transfer his loan of £850, and that the plaintiff at the interview at once said that the contract was at an end. Later on the same day the broker saw Mr. Kidd again, though not with the authority of the plaintiff, and, after some discussion, Mr. Kidd agreed to transfer the loan of £850 on condition that it was paid off by yearly instalment of £50. On November 11, 1898, the plaintiff brought this action to recover the £100 deposit paid to the defendant. Mr. Justice Bucknill gave judgment for the plaintiff.

Mr. R. M. BRAY, Q.C., and Mr. C. L. ATTENBOROUGH, for the defendant, contended that the plaintiff was not entitled to repudiate the contract on October 4, when Mr. Kidd at first refused to transfer the loan. The defendant had a reasonable time within which to get Mr. Kidd's consent to the transfer. The condition would be fulfilled if Mr. Kidd's consent was obtained at any time before November 10, the day fixed for completion, or at any rate within a reasonable time. The plaintiff therefore could not recover the deposit. The purchase did not go off on account of the default of the defendant. They referred to "Day v. Singleton" ([1899] 2 Ch., 320, at p. 327).

Mr. BLAKE ODGERS, Q.C., and Mr. F. O. ROBINSON, for the plaintiff, contended—first, that Mr. Kidd never did consent to transfer the £850 simply. He only agreed to do so upon condition that it was repaid by annual instalments. That was not a fulfilment of the condition in the agreement. Secondly, even if Mr. Kidd did subsequently to the interview on October 4 consent to transfer the loan, Mr. Kidd's absolute refusal at that interview entitled the plaintiff to treat the contract as at an end from that moment, and to bring an action to recover the deposit, it being the duty of the defendant to obtain the consent of Mr. Kidd. The time fixed for completion was not the time for getting Mr. Kidd's consent. The time for obtaining the consent was a reasonable time after the date of the agreement. By arranging to go and see Mr. Kidd on October 4 the parties had fixed that interview as the time for getting Mr. Kidd's consent, and upon Mr. Kidd's absolute refusal at that interview the plaintiff was entitled to treat the contract as at an end. "Davis v. Nisbett" (10 C.B., N.S., 752) was in point. The vendor could not expect the purchaser to wait any longer to see if the consent could be obtained. It was necessary to have Mr. Kidd's consent some time before the date fixed for completion to enable the plaintiff to provide the purchase money and to avoid the expense of preparing the conveyance. They also referred to "Weston v. Savage" (10 Ch.D., 736); "Farrer v. Nash" (35 Beav., 167); "Lloyd v. Crispe" (5 Taunt., 249).

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that it seemed to him to be clear upon the construction of the agreement that if the defendant was able to fulfil the condition as to the transfer of the loan by November 10, the date fixed for completion, he would have performed his part of the agreement. That was his view of the construction of this contract. It was clear that at the interview of October 4 Mr. Kidd said that he would only transfer the loan to the amount of £700, and thereupon the plaintiff put his foot down and said that the agreement was off. Subsequently, on the same day, Mr. Kidd agreed to have the whole of the £850 on mortgage subject to the condition that the principal sum was paid off by annual instalments of £50. In his opinion the plaintiff had no right to treat the agreement as at an end at

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

the interview of October 4, inasmuch as the defendant had until November 10 to fulfil the condition as to the transfer of the loan. The plaintiff might have subsequently receded from the position he then took up as soon as he ascertained that Mr. Kidd would transfer the loan. It was clear from the correspondence that he never did recede from that position, but from first to last he said that he adhered to the position he so took up. The plaintiff, who had no right to treat the agreement as at an end and was therefore himself in default, could not recover the deposit. The appeal must be allowed and judgment entered for the defendant.

LORD JUSTICE COLLINS concurred. The case seemed to him to be clear when once the facts were understood. The crucial question, in his opinion, was whether the plaintiff was justified in treating what happened on October 4 as a final declaration by the defendant of his inability to carry out the contract. If he was justified in so treating it, then he was justified in rescinding the contract. He need not, however, in such a case have treated the contract as at an end; he would have been entitled to refuse to treat it as rescinded. But his rights, if he treated what happened as a repudiation of the contract, and therefore as a rescission, would be one thing; his rights if he elected not to rescind would be quite another thing. Those two sets of rights were incompatible and could not be simultaneously asserted. In the present case it was proved beyond all question that the plaintiff on October 4 finally withdrew from the contract, and he never receded from that position. By that position only were the plaintiff's rights to be ascertained. He treated what happened on October 4 as a final refusal by the defendant to carry out the contract. If the plaintiff had legal grounds for so treating it, he was right. If not, he was wrong. What ground had he for treating that which took place on October 4 as a final refusal by the defendant to carry out the contract or a declaration by the defendant of his incapacity to complete the purchase? It was true that at the interview on October 4 the defendant was not in a position to say that he had performed the condition. But the contract did not say that the condition was to be performed before the date fixed for completion. That being so, if inability to perform the condition before the date fixed for completion was relied upon, it must be in consequence of some independent agreement by which the parties had agreed to treat it as such. There was no evidence of any such agreement, nor, he might add, was there any evidence of a custom to that effect. The defendant remained therefore with his rights unimpaired. The plaintiff had wrongfully treated what passed at the interview as a final repudiation by the defendant of the contract and as a declaration by the defendant of his inability to carry it out. The plaintiff could not now, having then taken up that position, aver his readiness and willingness to carry out the contract. He could not aver any excuse relieving him from the obligation of showing readiness and willingness to carry it out. The plaintiff therefore could not succeed in this action. It was endeavoured to show that the plaintiff was entitled to succeed on the alternative ground—namely, that he had not treated the contract as at an end on October 4, and that the defendant had not performed the condition before the date fixed for completion. That right could not co-exist with the right to treat the contract as at an end. How could a person, who treated the contract as at an end on October 4 and consistently adhered to that position, pursue the other remedy which was based upon his readiness and willingness to complete? The point was nowhere better treated than by Lord Esher in "*Johnstone v. Milling*" (16 Q.B.D., 460, at p. 467). It was quite unnecessary therefore to discuss what Mr. Kidd would have done or what he did sub-

sequently thereto as to giving his consent to the transfer of the loan.

LORD JUSTICE ROMER concurred. The law applicable to such conditions as appeared in this contract was well settled. These conditions were not uncommon in contracts between vendors and purchasers of real estate, that was to say, a condition that the vendor would procure the person who had lent money on mortgage of the property to accept the purchaser as the mortgagor in lieu of the vendor. The vendor had until the time fixed for the completion of the purchase, or, if there was no time fixed for completion, then until after the lapse of a reasonable time, for performing the condition. Until the time for completion had arrived he was at liberty to prove the assent of the mortgagee to accept the purchaser as mortgagor. It was true that though the condition need not be fulfilled until the day fixed for completion, the purchaser was not bound in all cases to wait until that date. He (the Lord Justice) knew of four such exceptions, though he did not say that the list was an exhaustive one. First, the purchaser might show by sufficient evidence that the condition had been practically fulfilled before the day fixed for completion. Secondly, the purchaser might show that the vendor had substantially and practically admitted that the condition was incapable of fulfilment. Thirdly, there might be an agreement between the vendor that a particular refusal by the mortgagee to accept the purchaser as mortgagor should be treated as final and conclusive, and that agreement need not be expressed, but might be implied from the circumstances. Fourthly, it might be that a particular refusal of the mortgagee was so acquiesced in and treated by the vendor as to justify the purchaser in coming to the conclusion that the matter was at an end, and in treating the refusal as final. Those were the four cases. It lay upon the purchaser to prove the special circumstances which would justify him in treating the contract as at an end. If he treated the contract as at an end before the time for completion without any justification, the vendor could treat the purchaser as having broken the contract, and the vendor would be relieved from further carrying out the contract or performing the condition. The purchaser in such a case could not recover any deposit paid by him. Certain cases as between vendor and purchaser had been referred to in which the purchaser before the time for completion ascertained that the vendor had not the title to give him which he professed to have, and that there were no legal means of completing the title before the time fixed. It was clear that in such a case the purchaser was entitled at once to treat the contract as at an end, upon the simple ground that the vendor could not ask the purchaser to wait on in the mere hope of the vendor being able to buy or otherwise acquire his title. Those cases had no application to the present case. The only case which had any bearing upon the point was "*Davis v. Nibbett*," which was a case of an agreement to assign the lease of a farm subject to the approval of the assignee as a tenant by the landlord. The case was heard on demurrer, and the plea that was demurred to was treated by the Court as an averment of a final and irrevocable disapproval of the proposed tenant by the landlord. The case, therefore, fell within one of the four cases stated above. In the present case the plaintiff was not justified upon the facts in assuming that the first refusal of Mr. Kidd to transfer the loan was to be treated as final and conclusive. There was no agreement that it should be so treated, and it was not treated as such by the vendor, nor did he lead the purchaser to think that he was so treating it. On the contrary, the vendor treated it as temporary only, and he was intending to make further efforts to have the condition fulfilled. The plaintiff was, therefore, not entitled to

treat the contract as at an end. That being so, it was not necessary to inquire into what happened subsequently. But, if it had been necessary to inquire whether the condition had been subsequently fulfilled, he should hold that it had. The mortgagee consented to leave the mortgage standing for the whole amount, subject to the condition that the principal should be paid off by annual instalments. Seeing that the principal money due under the mortgage was repayable on demand, it was clear to him that the condition in no way prevented the assent of the mortgagee from being a fulfilment of the condition in the contract, for two reasons. In the first place, because, upon the facts, the mortgagee was only insisting as against the purchaser upon the same terms as those on which the vendor had the mortgage. If so, the purchaser had nothing to complain of, as he was only entitled to get the transfer of the mortgage on the same terms as the vendor had it. In the second place, the purchaser could not complain of the condition as to repayment of the principal money by annual instalments because the principal money due under the mortgage was repayable on demand and the sole result of his not paying an instalment would be a liability to pay the whole sum on demand. All that it meant was that the mortgagee by accepting payment by instalments would be doing what he was not bound to do. If it were necessary, therefore, he should hold that the condition had been fulfilled.

[Solicitors—Benwell and Norfolk, for the plaintiff.]

Q.B. Div. (Channell } 1900.
and Bucknill, JJ.) } Feb. 16.

UPPERTON V. SIR MATTHEW WHITE RIDLEY AND
ANOTHER.*

Metropolis—Police Acts—Pension—Annual pay
—Special service allowance—Pension, how
calculated.

This was an appeal by case stated from the justices of London. Frederick Upperton, the appellant, a police-constable, appealed to the London quarter sessions from the decision of the Chief Commissioner of Police for the metropolis refusing to reconsider a claim made by the appellant for an increased amount of pension. The quarter sessions dismissed the appeal subject to a case stated for the opinion of the High Court. The appellant joined the metropolitan police force on December 30, 1872, and retired on January 2, 1899, whereupon he became, by virtue of the Police Act, 1890, entitled to a pension equal to two-thirds of his annual pay at that date. He was awarded a pension of £55 9s. 4d. a year, being 52 times the sum of £1 1s. 4d., such sum being two-thirds of £1 12s., the ordinary pay of a constable of the appellant's rank and service. For nine years prior to 1894 the appellant had served on special duty at the Houses of Parliament during the sittings of Parliament, receiving 7s. a week special service allowance in addition to his ordinary pay while so doing. In 1894 he was selected for permanent special duty at the House of Lords, and continued upon such special duty, receiving the special service allowance, until the date of his retirement. This 7s. a week was payable by the Commissioner of Police, and was paid partly as a recognition of good conduct and partly because by being withdrawn from ordinary duty the appellant to some extent lost his chance of promotion. The sum of 7d. a week was deducted from the appellant's ordinary pay as a contribution towards the pension fund in accordance with section 15 of the Police Act, 1890, but no deduction was made from the 7s. special service allowance. During absence owing to sickness the special service

allowance is usually stopped and is paid to the constable who actually performs the special duty. Schedule 1 of the Police Act, 1890, provides that the pension of a constable on his retirement shall be within the *maximum* and *minimum* limits therein prescribed, "so, however, that the pension shall not exceed two-thirds of his annual pay." Two points were raised on behalf of the appellant—(1) that in calculating the pension the 7s. a week special service allowance should be taken into account, and (2) that the annual pay was 365 times the daily pay, and not 52 times the weekly pay.

Mr. E. H. Pickersgill appeared for the appellant, and Mr. Macmorran, Q.C., and Mr. Grain for the respondents.

The COURT differed in opinion upon the first point, and the appeal on that point accordingly failed. They allowed the appeal on the other point.

MR. JUSTICE CHANNELL said the main difference between the Police Act, 1890, and the prior Acts was that in the Act of 1890 police-constables were given a pension as of right. The Act did not fix the amount of the pension, but provided that the pension should be in accordance with the scale adopted by any police force, and such scale was to be within *maximum* and *minimum* limits mentioned in the schedule. In the metropolitan police force the *maximum* allowed by the Act had been adopted, so that the pension of the appellant must be dealt with according to the *maximum* laid down by the Act. Schedule 1, where the provisions as to pensions were to be found, ended as follows:—"So, however, that the pension shall not exceed two-thirds of his annual pay." The appellant's pension had been granted on the assumption that it was two-thirds of his annual pay. The question, therefore, was, What was the meaning to be given to "annual pay"? Schedule 1 was the only part of the Act in which the term "annual pay" was used. But the term "pay" was used in other parts of the Act. Pay and allowances seemed to be treated separately. In the case of the metropolitan police force the staff appeared to have been entitled under the Metropolitan Police Staff (Superannuation) Act, 1875, to pensions in respect of allowances as well as in respect of their pay. Section 32 (5) of the Act of 1890 provided that "the rate and conditions of pension of the Chief Commissioner of Metropolitan Police and the Assistant Commissioners shall be regulated by the provisions of this Act, and not under the Metropolitan Police Staff (Superannuation) Act, 1875, but the Chief Commissioner and the Assistant Commissioners shall be entitled to pension under the provisions of this Act in respect of any emoluments in respect of which they are entitled to superannuation allowances under the Metropolitan Police Staff (Superannuation) Act, 1875." Those officers were, therefore, to come under the Act of 1890 as regards pension calculated upon their pay, and they were to have the additional benefit of the Act of 1875. That implied that "pay" in the Act meant pay strictly so called, and that there were other things which were not strictly pay. Pay in the ordinary sense would cover any money remuneration for services, and *prima facie* the 7s. a week special service allowance came within that definition. But in the Act the word pay was evidently used in the special meaning in which it had got to be used between police-constables and those who employed them. The appellant was employed on duty at the House of Lords. A considerable number of police-constables were employed about the Houses of Parliament while the Houses were sitting, and these men received, while they attended on that duty, a shilling a day out of money provided by Parliament for that purpose. A weekly sheet was made out which the constables signed

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

[Solicitors—Mann and Crimp, for the appellant ;
Wontner and Sons, for the respondents.]

Mr. Asquith, Q.C., and Mr. Vaughan Hawkins appeared for the appellants; Mr. Upjohn, Q.C., and Mr. Danckwerts, Q.C., for the respondent.

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

tents. Their Lordships could not agree with the views so expressed. The respondent admitted in his evidence (as, indeed, is plain without his admission) that what was proposed to be reduced was the £35,000 to below £30,000, or (in other words) that the two sums are co-extensive. It was not, therefore, a mere question of the meaning of the words "the total cost of the works" standing alone, but the meaning of "the estimate of £35,000" had also to be considered. Those words point to something which was known to and in the contemplation of both parties to the contract, and with reference to which they contracted, and in order to construe and apply the contract they must ascertain what was included in "the estimate of £35,000," on the reduction of which the contract depended. Extrinsic evidence was always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about. The rule was thus stated in "Taylor on Evidence" (eighth edition, vol. 2, section 1,194):—"It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers must of necessity be received." In "Grant v. Grant" (L.R., 5 C.P., 727, at p. 728) Mr. Justice Blackburn quoted judicially the following passage from his valuable work on "Contract of Sale" (p. 49):—"The general rule seems to be that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected." Various cases might be cited in which those principles had been applied. In "Ogilvie v. Foljambe" (3 Mer., 53) Sir William Grant said:—"The defendant speaks of 'Mr. Ogilvie's house,' and agrees 'to give £14,000 for the premises,' and parol evidence has always been admitted in such a case to show to what house and to what premises the treaty related." In "Macdonald v. Longbottom" (1 E. and E., 977) Lord Campbell said:—"This was an offer made to the plaintiffs and accepted by them of 16s. per stone for 'your wool,' to be delivered in Liverpool. The only question, therefore, is what was the subject-matter of the contract described as 'your wool'? I am of opinion that when there is a contract for the sale of a specific subject-matter oral evidence may be received for the purpose of showing what that subject-matter was of every fact within the knowledge of the parties before and at the time of the contract. Now, Stewart, the defendant's agent, had a conversation before the contract with one of the plaintiffs, who stated what wool he had on his own farm and what he had bought from other farms. The two together constituted 'his wool,' and with the knowledge of these facts the defendant contracts to buy 'your wool.' There cannot be the slightest objection to the admission of evidence of this previous conversation, which neither alters nor adds to the written contract, but merely enables us to ascertain what was the subject-matter referred to therein." And in "Smith v. Thompson" (8 C.B., 44) evidence was admitted of previous letters to show that a sum of money transmitted by an employer to his clerk for "business purposes" was properly applied by the clerk in payment of his own salary. Of course, if the words in question had a fixed meaning not susceptible of explanation, parol evidence was not admissible to show that the parties meant something different from what they had said. That was not so in the present case. Their Lordships thought that "the total cost of the works" might mean the cost to the owner of the

completed railway, and they thought that any person receiving the letter with a knowledge of the previous circular and of the conversation of the previous day according to Chapman's version (which the jury evidently believed) might, and would, have so understood it. Their Lordships were, therefore, of opinion that the evidence objected to was admissible, and Mr. Justice Cohen was right in the course which he took at the trial of declining to construe the contract without the assistance of the jury. The weight and import of the evidence were for the jury to consider, and their verdict in favour of the present appellants was decisive of the view they took as to the effect of it. In the opinion of their Lordships there were no sufficient grounds for disturbing it, even if they dissented from it, which they were far from doing. Their Lordships would, therefore, humbly advise her Majesty that the order of the Supreme Court be reversed, and, instead thereof, it be ordered that the rule nisi be discharged, with costs to be paid by the respondent, who must also pay the costs of the appeal.

[Solicitors—Light and Galbraith, for the appellants; Bell, Brodrick, and Gray, for the respondent.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } Feb. 17.

MASON V. A. R. DEAN (LIMITED); MOORE AND SONS,
THIRD PARTIES.*

Master and Servant—Master's liability to servant
—Workmen's Compensation Act, 1897—
"Undertakers," who are.

Where a building is being constructed by several persons, not jointly, but each doing a separate part, each and all of them are "undertakers" within the meaning of sec. 7 of the Workmen's Compensation Act, 1897.

This was an appeal from a judgment of the Judge of the County Court of Lancashire, holden at Salford, on a special case stated by an arbitrator, who had been appointed by the County Court Judge to hear an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was Jane Mason, the widow of Frederick William Mason, who had been killed in the course of his employment by a fall from a scaffold. The employers of the deceased man were A. R. Dean (Limited), who carried on business at Birmingham as furnishers and decorators. The accident happened on February 10, 1899, at the Lyceum Theatre, Eccles, near Manchester. The theatre was then an incomplete building, exceeding 30ft. in height, and it was being constructed by means of a scaffolding. Messrs. Moore and Sons had prior to the date of the accident contracted with the building owner for the construction of the building and for the erection of the scaffolding from which the deceased man fell. Under powers reserved in Messrs. Moore and Sons' contract the architects let off to A. R. Dean (Limited) certain decorative work. The scaffolding used by the deceased and his fellow-workmen was erected by Moore and Sons at the expense of the building owner. At the time of the accident the deceased man was engaged in doing for his employers, A. R. Dean (Limited), part of the work which they had contracted with the building owner to do—namely, painting the ceiling of the theatre. He was walking on the scaffolding when one of the planks gave way, and he fell to the pit floor and was instantly killed. The applicant made the employers respondents to the arbitration, claiming compensation

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

from them. The respondents delivered a defence, in which they denied liability on the ground that the employment of the deceased was not an employment to which the Workmen's Compensation Act applied; and they also alleged that Messrs. Moore and Sons or their workmen erected the defective scaffolding and were the persons responsible for the scaffolding. The respondents delivered to Moore and Sons a notice of claim to indemnity against all liability on account of any accident caused by the scaffolding. At the hearing of the arbitration before the arbitrator appointed by the County Court Judge, it was contended on behalf of the applicant that the respondents were undertakers within the meaning of section 7, subsection 2, of the Workmen's Compensation Act, and that they were engaged on work of construction in a building exceeding 30ft. in height, and then being constructed by means of a scaffolding. It was contended on the part of the respondents that the work which they had contracted to do was not work of construction within the meaning of the Act, and that they were not undertakers within the meaning of the Act. The arbitrator held that the respondents were undertakers, and that they were engaged in the construction of a building exceeding 30ft. in height, such building being then in the course of construction by means of a scaffolding, and he awarded the applicant the sum of £300, with costs. At the request of the respondents the arbitrator stated a case for the opinion of the County Court Judge, submitting the following questions:—(1) Whether the respondents were undertakers in the construction of a building within the meaning of the Act; (2) whether the employment in the course of which the said personal injuries were caused to the deceased workman was employment to which the Workmen's Compensation Act applies. The County Court Judge set aside the award of the arbitrator with costs, on the ground that, though the respondents were undertakers engaged in the construction of a building within the Act, yet the case of "*Wood v. Walsh and Sons*" ([1899] 1 Q.B., 1,009) showed that painting the ceiling of the theatre was not an employment within the Act. The applicant appealed.

Mr. R. W. Harper appeared for the applicant; Mr. C. A. Russell, Q.C., and Mr. Byrne for the respondents; and Mr. Ames for the third parties.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the respondents were liable in this case. The County Court Judge had held that they were not liable, thinking himself bound so to hold by reason of the decision in "*Wood v. Walsh and Sons*." But that case really had nothing to do with the present. Messrs. Moore and Sons, a firm of builders, had undertaken the work of building a theatre at Eccles. By the terms of the contract the building owner was at liberty to give some portions of the work to other persons, and he accordingly placed a portion of it in the hands of the respondents. While the respondents were carrying out their part of the work the deceased man, who was in their employment and was engaged in the work, met his death by falling through a scaffolding. The question was whether the respondents were undertakers within the meaning of the Workmen's Compensation Act. The Act only applied to certain classes of employers, as shown by section 7, subsection 1. Did it apply to the respondents? It applied to "employment by the undertakers, as hereinafter defined, on, in, or about any building which exceeds 30ft. in height and is either being constructed or repaired by means of a scaffolding or being demolished." Here the building was not completed. The respondents were put on to do certain work which would help to bring it to completion. The contract of the respondents with the building owner showed that the work they had to do included the

putting up of a ceiling, the erection of a proscenium, and the fixing the private boxes with columns, caps, &c. No doubt a good deal of the work was decoration pure and simple. But there was ample to show that they had also to perform structural work. The building was over 30ft. high, and it was being constructed by means of a scaffolding. It was clear that the deceased man was employed on a building within the Act. Was he employed by undertakers within the meaning of the Act? By subsection 2 of section 7 "undertakers" meant, in the case of a building, the persons undertaking the construction, repair, or demolition. Ought that to be construed as meaning the persons undertaking the construction of the whole building or did it also include the persons undertaking the construction of a substantial part of a building? In his opinion a person who undertook the construction of a substantial part of a building was an undertaker within the Act. He therefore thought that the judgment of the County Court Judge was wrong, and that the applicant was entitled to the compensation which had been awarded to her by the arbitrator.

LORD JUSTICE COLLINS was of the same opinion. The respondents' specification clearly embraced work which must be described as construction rather than decoration, and the judgment of the County Court Judge could not be supported on that ground. With regard to the other question, it seemed to him to be immaterial what particular sort of work the workman was doing at the time of the accident. The point to consider was whether his employment was an employment within the Act and whether it was employment by undertakers within the meaning of the Act. Here the respondents were persons undertaking the construction of part of a building, and, in his opinion, they were undertakers within the Act.

LORD JUSTICE ROMER agreed. He thought that where a building was being constructed by several persons, not jointly, but each doing a separate part, each and all of them came within the definition of "undertakers" in section 7. But only that undertaker was liable to pay compensation in whose employment the workman was at the time of the accident.

Mr. AMES said that the third parties had been served with notice of the appeal, and asked that their costs might be allowed.

The COURT refused to make any order as to the costs of the third parties.

[Solicitors—Alfred Bates, for the applicant; Hargreave and Heaton, for the respondents.]

Court of Appeal (Lindley, M.R., Vaughan Williams and Romer, L.J.J.) 1900.
Feb. 19.
ALLEN V. THE GOLD REEFS OF WEST AFRICA (LIMITED).
Company—Articles of Association—Alteration—Lien on shares.

Held (Vaughan Williams, L.J., dissenting), that a company can alter its articles so as to extend the lien which it previously had over unpaid shares for debts due to it from its members to fully paid-up shares issued to the vendor before the date of the alteration.

This was an appeal by the company against a decision of Mr. Justice Kekewich's. It raised a question of company law of great importance—viz., as to the right of a company to alter its articles so as to extend the lien which it previously had over unpaid shares for debts due to it from its members to fully paid-up shares issued before the date of the alteration; and a further question—whether, assuming this right to exist, it was

affected by the fact that the fully paid-up shares were vendors' shares. There was also a subsidiary question as to the validity of a notice of a meeting sent to the registered address of a member known by the company to be dead. The action was brought by the executors of Emilio Zuccani, who was the registered holder of vendors' fully paid-up shares and also of partly-paid shares in the defendant company, for a declaration that the defendants had no lien upon the fully paid up shares, and for an injunction to restrain the forfeiture of the partly-paid shares. Mr. Justice Kekewich held that the forfeiture was bad because the notice threatening forfeiture claimed too much interest, and also because it was wrongly addressed; and he also held that the company had no lien on the paid-up shares of the testator, because the notice of the meeting to be held for the purpose of altering the articles by extending the lien to these shares was bad as being wrongly addressed. His Lordship also doubted whether the company had power to alter its articles for the purpose of retrospectively affecting the existing rights of the owner of a particular group of shares without his consent. The facts are fully stated in the judgment of the Master of the Rolls.

Mr. Warrington, Q.C., and Mr. Dunham were for the company; Mr. Renshaw, Q.C., and Mr. D. M. Kerly were for the plaintiffs.

The appeal was heard on January 18, 19, and 20 last. The Court then gave judgment upon the question of forfeiture, affirming the decision of Mr. Justice Kekewich upon the ground that the notice claimed too much interest; but they reserved judgment upon the question of the right of the company to a lien on the fully-paid shares. Upon this point their Lordships delivered judgment allowing the appeal (Lord Justice Vaughan Williams dissenting).

The MASTER of the ROLLS said:—This is an appeal from a judgment of Mr. Justice Kekewich granting an injunction restraining the defendants from enforcing a lien on some fully paid-up shares in the company and belonging to a deceased shareholder named Zuccani. The appeal is not only important to the parties to it but it raises several questions of great general interest relating to the power of limited companies to alter their articles, and especially to their power to alter their articles so as to affect shares standing in the names of deceased shareholders, and to the effect of an alteration duly made on vendors' fully paid-up shares issued before the alteration is made. The facts are as follows:—The defendant company was formed and registered under the Companies Act, 1862, with limited liability. Its memorandum of association declared its nominal capital to be £90,000, divided into 360,000 shares of 5s. each. The fifth clause of the memorandum declared that the original shares, or any of them, or any other shares which might be afterwards created, might be issued fully paid up and with such preference, privileges, or priority over or postponement to the remaining or any other shares of the company in respect of dividends or otherwise as might be determined. The memorandum was accompanied by articles of association, which will be referred to presently, and which made a marked distinction as regards lien and transfer between shares fully paid up and shares not fully paid up. Both classes of shares were issued. Zuccani, as the nominee of the vendor to the company, had a number of fully paid-up shares allotted to him, and he held 27,885 of these when he died. It was not suggested that these shares were not his own. There is no evidence of any special bargain conferring upon Zuccani any special rights in respect of these shares. In addition to these fully paid-up shares Zuccani applied for and had allotted to him 60,000 ordinary 5s. shares, not paid up. These were applied for and allotted on the terms of the com-

pany's prospectus and articles of association: Nothing in this appeal turns on the prospectus. Calls were from time to time made in Zuccani's lifetime on the unpaid-up shares of the company. He did not pay these calls when they became due, and as early as May, 1896, and thenceforward during his life letters were sent to him pressing for payment of his arrears. Although Zuccani did not pay his calls, he constantly paid up quantities of shares in full before their amounts had been called up. In other words, he from time to time not only paid all the calls due on some of his shares, but he also prepaid the uncalled-up amounts of the same shares. He did this constantly all through 1896, and in that way he was able to sell and transfer the shares so paid up free from all liability to calls and from all lien in favour of the company. From the money so obtained by him he made remittances to the company on account of his calls in arrear. His object in fully paying up batches of these shares in the way described obviously was to obtain shares which he could put on the market free from all claims and demands by the company. Why the directors allowed him to do this is not explained. It was obviously an accommodation to him, and I cannot find any evidence to show that it was anything more. All the shares thus paid up were transferred by him in his lifetime; he did not hold any of them when he died, and it is unnecessary, therefore, to consider what special rights, if any, his executors might have had in respect of such shares if he had continued to hold any of them up to the time of his death. Zuccani died on February 4, 1897. He left a will which was proved in March, 1897, by the plaintiffs, his executors. When he died he held the 27,885 fully paid-up vendors' shares already mentioned. He also held 36,435 other shares not fully paid up, and he owed the company over £8,000 in respect of these. This sum did not include interest, which amounted to a large additional sum. The plaintiffs did not register themselves as members of the company in respect of Zuccani's shares, and they had not assets enough to pay his liabilities. No one can blame the directors for endeavouring to obtain payment of the money due from Zuccani's estate to the company by any legal means. Steps were taken to have his estate administered in the Chancery Division, and the company could, of course, have carried in a proof for its debt. But other and more summary means were had recourse to. The articles of association as they stood when Zuccani died contained a power to forfeit shares in respect of which any money was due to the company. The company attempted to exercise this power, but the Court has held that, owing to mistakes made by the company, the forfeiture declared was invalid. The power of forfeiture only extended to shares not fully paid up. The articles gave to the company no power to refuse to register a transfer of fully paid-up shares. The directors did, however, refuse to register a transfer of some paid-up shares on January 29, 1897. But they were wrong in so doing, and that transfer was ultimately passed. Again, the company had no lien whatever on fully paid-up shares. A lien on such shares or the possibility of a lien on them renders them unquotable on the Stock Exchange, and it is usual in articles of association conferring a lien on shares expressly to exclude fully paid-up shares from any lien. Article 29 did this. The articles of the company gave it a lien on unpaid-up shares, not only for money due from their holder to the company in respect of such shares, but for all debts, liabilities, and engagements of the holder to the company; and on proper notice and default of payment power was given to the company to sell the shares subject to such lien. Moreover, the directors were empowered to refuse to register a transfer of any shares on which the company had a lien. The lien so conferred by the articles clearly extended to

all Zuccani's unpaid shares, and did not cease on his death. It continued to be as available against his executors (although not themselves members) as it was against him in his lifetime. (See Article 45.) But, independently of any article, a lien on property does not cease on the death of the owner of the property. So far, therefore, as Zuccani's unpaid-up shares are concerned, the company was entitled to the lien and power of sale conferred by Articles 29 and 30. I do not understand that this was disputed. The directors, however, desired to extend the lien and power of sale and power to refuse to register transfers to Zuccani's fully paid-up shares, for he was the only person entitled to fully paid-up shares from whom any calls were due. Accordingly steps were taken to pass a special resolution to alter Article 29 by striking out the words "not being fully paid," and a resolution to that effect was passed on February 18, 1897, and was confirmed on March 8, 1897. Notice convening these meetings was sent addressed to Zuccani at his registered place of address; and the notice came to the knowledge of his executors. The directors knew that he was dead; but I cannot agree with the learned Judge that the resolution was invalid by reason of any defect in the notice. Notices of meetings have only to be given to members and the executors were not members. If no notice at all had been sent to the executors or to Zuccani's registered address the omission would not, in my opinion, have affected the propriety of holding the meetings or the validity of the resolutions passed at them. Article 45 expressly provided that notices of meetings need not be sent to executors who had not become members. To hold that meetings of companies could not be properly held unless the notices convening them were given to the unregistered legal personal representatives of all deceased members would be to paralyse the transaction of business, and would be contrary to the ordinary principles applicable to corporate bodies and, indeed, to other associations as well. The regularity of the proceedings to alter the articles by no means, however, disposes of the matters in controversy. The facts above stated raise the following very important questions, viz.:—(1) Whether a limited company, registered with articles conferring no lien on its fully paid-up shares, can by special resolution alter those articles by imposing a lien on those shares? (2) Whether, if it can, the lien so imposed can be made to apply to debts owing by fully paid-up shareholders to the company at the time of the alteration of the articles? (3) Whether, if it can, fully paid-up shares allotted to vendors of property to the company are in any different position from other fully paid-up shares issued by the company? (4) Whether, assuming the altered articles to be valid and to be binding on the general body of the holders of fully paid-up shares in the company, there are any special circumstances in this particular case to exclude the fully paid-up shares held by Zuccani from the operation of the altered articles? The articles of a company prescribe the regulations binding on its members (Companies Act, 1862, section 14). They have the effect of a contract (see section 16); but the exact nature of this contract is even now very difficult to define. Be its nature what it may, the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (sections 50 and 51); and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute, "*Walker v. London Tramways Company*" (12 Ch.D., 705). The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of section

50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed. But if they are complied with I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those contained in it. How shares shall be transferred, and whether the company shall have any lien on them, are clearly matters of regulation properly prescribed by a company's articles of association. This is shown by table A in the schedule to the Companies Act, 1862 (clauses 8, 9, 10). Speaking, therefore, generally, and without reference to any particular case, the section clearly authorizes a limited company, formed with articles which confer no lien on fully paid-up shares and which allow them to be transferred without any fetter, to alter those articles by special resolution, and to impose a lien and restrictions on the registry of transfers of those shares by members indebted to the company. But then comes the question whether this can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles are altered. Again, speaking generally, I am of opinion that the articles can be so altered, and that, if they are altered *bona fide* for the benefit of the company, they will be valid and binding as altered on the existing holders of paid-up shares, whether those holders are indebted or not indebted to the company when the alteration is made. But, as will be seen presently, it does not by any means follow that the altered article may not be inapplicable to some particular fully paid-up shareholder. He may have special rights against the company, which do not invalidate the resolution to alter the articles, but which may exempt him from the operation of the articles as altered. The conclusion thus arrived at is based on the language of section 50, which, as I have said already, the Court, in my opinion, is not at liberty to restrict. This conclusion, moreover, is in conformity with such authorities as there are on the subject. "*Andrews v. the Gas Meter Company*" ([1897] 1 Ch., 361) is an authority that, under section 50 of the Companies Act, 1862, a company's articles can be altered so as to authorize the issue of preference shares taking priority over existing shares, although no power to issue preference shares was conferred by the memorandum of association or by the original articles. The answer to the argument that the company could not alter existing rights is that, within the limits set by the statute and the memorandum of association, the rights of shareholders in limited companies, so far as they depend only on the regulations of the company, are subject to alteration by section 50 of the Act. The decision of the late Lord Justice Chitty in "*Pepe v. the City and Suburban Building Society*" ([1893] 2 Ch., 311) is in principle also clearly in point. A member of a building society, who had given notice of withdrawal, and who by the rules, as they then stood, became entitled to a certain sum of money, was held to be deprived of his right to that sum by an alteration made in the rules before he had ceased to be a member. This case went very far, but it has been treated as correct in "*Botten v. the City, &c., Building Society*" ([1895] 2 Ch., 441). It was urged that a company's articles could not be altered retrospectively, and reliance was placed on Lord Justice Rigby's observations in "*James v. the Buena Ventura, &c., Syndicate*" ([1896] 1 Ch., 466). The word "retrospective" is, however, somewhat ambiguous, and the concurrence of

Lord Justice Rigby in "Andrews v. the Gas Meter Company" shows that his observations in "James v. the Buena Ventura, &c., Syndicate" are no authority for saying that existing rights, founded and dependent on alterable articles, cannot be affected by their alteration. Such rights are in truth limited as to their duration by the duration of the articles which confer them. But, although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered. It is easy to imagine cases in which even a member of a company may acquire by contract or otherwise special rights against the company which exclude him from the operation of a subsequently altered article. Such a case arose in "Swabey v. Port Darwin Gold Mines Company" (1 Megone, 385), where it was held that directors, who had earned fees payable under a company's articles, could not be deprived of them by a subsequent alteration of the articles which reduced the fees payable to directors. I take it to be clear that an application for an allotment of shares on the terms of the company's articles does not exclude the power to alter them, nor the application of them when altered to the shares so applied for and allotted. To exclude that power or the application of an altered article to particular shares, some clear and distinct agreement for that exclusion must be shown, or some circumstances must be proved conferring a legal or equitable right on the shareholder to be treated by the company differently from the other shareholders. This brings me to the last question which has to be considered—viz., whether there is in this case any contract or other circumstances which excludes the application of the altered article to Zuccani's fully paid-up vendors' shares. First, let us consider the shares. I am unable to discover any difference in principle between one fully paid-up share and another. Whether a share is paid for in cash or is given in payment for property acquired by the company appears to me quite immaterial for the present purpose. In either case the shareholder pays for his share, and in either case he takes it subject to the articles of association and power of altering them, unless this inference is excluded by special circumstances. Next let us consider whether a vendor who makes no special bargain except that he is to be paid in fully paid-up shares is in any different position from other allottees of fully paid-up shares. I fail to see that he is, unless he stipulates that his shares shall be specially favoured. Zuccani bargained for fully paid-up shares and he got them. The imposition of a lien on them did not render them less fully paid-up than they were before. They remained what they were. Zuccani did not bargain that the regulations relating to paid-up shares should never be altered, or that if altered his shares should be treated differently from other fully paid-up shares. I cannot see that the company broke its bargain with him in any way by altering its regulations or by enforcing the altered regulations as it did. I have already drawn attention to clause 5 of the memorandum of association. Having regard to its plain language no allottee of shares, whether a vendor or an ordinary applicant, can justly complain of injustice or even hardship if his rights under the original articles are modified to his

disadvantage. Every allottee was told by the memorandum that his rights as a shareholder were subject to alteration, and no allottee acquired any rights except on these terms unless, of course, some special bargain was made with him. If Zuccani had not been indebted to the company, could he have successfully maintained that the company had no power to alter the articles and so make his shares liable to a lien and consequently less marketable than before? I take it that it is clear that he could not. But I arrive at this conclusion only because the bargain with him has not been broken. Zuccani's indebtedness to the company confers on him, or his executors, no rights against it. But it is his indebtedness which creates the embarrassment from which they seek to escape. The fact that Zuccani's executors were the only persons practically affected at the time by the alterations made in the articles excites suspicion as to the *bona fides* of the company. But, although the executors were the only persons who were actually affected at the time, that was because Zuccani was the only holder of paid-up shares who at the time was in arrear of calls. The altered articles applied to all holders of fully-paid shares, and made no distinction between them. The directors cannot be charged with bad faith. After carefully considering the whole case, and endeavouring in vain to discover grounds for holding that there was some special bargain differentiating Zuccani's shares from others, I have come to the conclusion that the appeal from the decision of the learned Judge, so far as it relates to the lien created by the articles, must be allowed. His decision as to the forfeiture having, however, been affirmed, each party should be left to pay his own costs.

LORD JUSTICE VAUGHAN WILLIAMS differed. In the course of his judgment, he said,—In the present case the company by the articles then in force reserved to themselves a lien upon all shares not being fully paid, and then purchased a property by the issue of fully-paid shares; and the question is whether they could, on the very day after the contract, it might be, materially affect the consideration given by passing a resolution that the fully-paid shares thus given as a price should be subject to a lien for all debts, obligations, and liabilities of the vendor to the company, whether such debts, obligations, and liabilities should have actually arrived or not, and thus render the shares unmarketable. I think not. I think that, notwithstanding the statutory powers of alteration, the basis of the contract of purchase was that the property should be paid for in marketable shares. I think that the very object of the exception in Article 29 of fully-paid shares from lien was to render those shares marketable, and, as they chose to pay for the property in shares thus made marketable, I think that to allow the company to subject the vendors' shares to a lien would be to make the alteration of the articles retrospectively affect existing rights. I think, moreover, that the resolution was not passed in good faith, being really passed merely to defeat the existing rights of an individual shareholder. My observations have no bearing on shares fully paid up in pursuance of calls in the ordinary way, but it is worthy of observation that Zuccani did, in respect of shares other than vendors' shares, prepay such shares with the assent of the company for the purpose of freeing those shares from lien. I doubt if the company could have subjected these shares to lien after receiving prepayment.

LORD JUSTICE ROMER agreed with the Master of the Rolls. He said,—A company such as this may undoubtedly by its articles of association provide for a lien on the shares of its shareholders in respect of any debts for the time being due from them to the company, and, if the original articles do not provide for the lien, the company may subsequently, by duly altering its articles,

give itself such a lien; and the fact that the original articles did not provide for a lien would be in itself no ground for justifying a shareholder who was indebted when the articles were altered in saying that he contracted the debt or that he took his shares in reliance on there being no lien, and that the new articles must not operate so as to make the lien thereby given extend to his existing debt. A shareholder must be taken to have known that the articles might be so altered as to give the lien. And certainly a shareholder could not say as against the company that he was entitled to any special rights because he did not pay his debts. And the same considerations apply to the case where the original articles give only a limited lien, as, for example, a lien limited to debts due for unpaid calls. The company might by subsequent articles extend the lien, and a shareholder would have no right to object to the extended lien because he happened to be indebted to the company. Of course, by the above observations I have not been dealing with exceptional cases. I can imagine a case, for example, where by the memorandum of association certain provisions as to lien are made part of the constitution of the company which could not be affected by any alteration of the articles. And special contracts might be made with particular classes of shareholders or individuals, or special obligations to them might be incurred by the company, and that even by virtue of the original articles alone, which would prevent the articles being altered as against them. But, putting aside such exceptional cases, the observations I have made as to the general law are in my opinion sound. His Lordship then dealt with the facts of the case, and came to the conclusion that there was no sufficient ground for holding that the lien given by the amended article was not good against Zuccani's executors.

[Solicitors—Mayo and Co.; Kerly, Son, and Verden.]

Q.B. Div. } 1900.
(Channell, J.) } Jan. 13.

HOWCROFT AND WATKINS V. PERKINS.*

Sale of Goods—Goods not according to contract—
Conditions of sale—Non-warranty clause in
invoice—Reasonableness.

This was an action, tried before Mr. Justice Channell on January 13, upon a cheque for £25, drawn by the defendant Perkins, and payable to the plaintiffs' order. The defendant did not dispute his liability upon the cheque, but set up a counter-claim under the following circumstances:—The plaintiffs, Messrs. Howcroft and Watkins, are wholesale seedsmen, and the defendant is a nurseryman. The case for the defendant was that, in or about October, 1898, he purchased of the plaintiffs a quantity of celery seed known as "Clayworth Prize," and which they warranted to be Clayworth Prize. This they delivered in or about January, 1899. Most of the seed he sowed, and in due course raised and set out 14,000 plants, but when they were matured he found they were not Clayworth Prize but a very inferior common root known as turnip-rooted. He said that if they had been Clayworth Prize he could have sold them for 1s. 6d. per dozen, but they would only realize about 6d. a dozen. When it was in seed Clayworth Prize could not be distinguished from common seed, and he therefore had to rely entirely upon the plaintiffs' warranty. Upon behalf of the plaintiffs, it was disputed that they in fact supplied anything but Clayworth Prize seed, but it was further contended that even if the seed were turnip-rooted it was sold

to the defendant subject to the following terms of sale which were endorsed upon the invoice for the seed sent by them to the defendant, and that such terms expressly excluded any warranty. The terms were as follows:—"Howcroft and Watkins give no warranty, express or implied, as to description, quality, productiveness, or any other matter of any goods they send out, and will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms they are at once to be returned."

Mr. J. C. Earle appeared for the plaintiffs; Mr. P. T. Blackwell for the defendant.

["Howcroft v. Laycock," 14 *The Times* L.R., 460, and "Reynolds v. Wrench," 23 *L.J.*, N.C., 27, were referred to.]

MR. JUSTICE CHANNELL held that there must be judgment for the plaintiffs. The defendant knew, in fact, that it was common for wholesale seedsmen to have terms of sale of this kind, and as he had had a similar invoice in a previous transaction he must be taken to have known that the usual terms of the plaintiffs were put upon their invoice. One of the terms of the contract expressly said that if the purchaser did not accept the goods on these terms they were to be at once returned. Under those circumstances "Watkins v. Rymill" (10 Q.B.D., 178), showed that the terms of the contract upon the invoice were binding upon him. A condition of this sort with reference to seeds was reasonable, because it was impossible to distinguish between seeds by looking at them. If, instead of celery coming up, something absolutely different, as an oak tree, had grown up, the contract would not have been performed at all. But in the present case the seed was celery seed, although for the purpose of dealing with the present point, viz., the question of warranty, he would assume it was turnip-rooted celery, which would be really of a different description. The words "Clayworth Prize seed" he considered a matter of description within the meaning of the note in the warranty clause, and he must take the thing sold to be celery seed. There must be judgment for the plaintiffs on the claim and counter-claim.

[Solicitors—E. F. and H. Landon, for the plaintiffs; Kingsford, Dornan, and Co., agents for E. J. Holyoak, Leicester, for the defendant.]

Q.B. Div. } 1900.
(Kennedy, J.) } Feb. 19.

BRUNNER V. WEBSTER AND BARRACLOUGH.*

Ship—Bill of lading—Exceptions from liability—
"Restraint of princes, rulers, and people"—
Restraint, what amounts to—Prohibition as to
imports.

In this case the plaintiffs claimed damages for the non-delivery of a cargo of rice at Galatz in accordance with the bills of lading. The facts were as follows:—The rice was shipped at Rangoon on board the defendants' ship *Maling* under bills of lading for Galatz. By the bills of lading "arrest and restraint of princes, rulers, and people" were excepted. The vessel sailed from Rangoon and proceeded to Alexandria where she discharged a portion of her cargo, which did not belong to the plaintiffs. The vessel's next port was Jaffa, but Alexandria being a plague-infected port, the vessel was ordered by the Turkish authorities to go to Beirut for quarantine. At Beirut, by order, she discharged all her cargo intended for Turkish ports. On June 18, the discharge at Beirut having been completed, she was in a position to proceed to Galatz with the plaintiffs' cargo, but, act-

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

ing on the instructions of the defendants, who alleged that the importation of rice into Rumania was at that time prohibited by the sanitary authority of that country, the master proceeded to London, stopping *en route* at Malta to coal. On arrival at London the defendants refused to deliver the cargo to the plaintiffs except on being paid freight from Rangoon to Galatz and from Beirut to London. This was paid by the plaintiffs into Court, this action, in which the plaintiffs originally claimed an injunction to restrain discharge at London, having at that time been commenced; and the plaintiffs took delivery of the cargo, without prejudice to their claim for damages. The damages claimed were the difference between the value of the cargo in London and at Galatz. The defendants counter-claimed for the bill of lading freight and also for freight from Beirut to London, but in the course of the trial they abandoned the former claim. The facts as to the alleged prohibition in Rumania, as found by his Lordship, are stated in the judgment.

Mr. CARVER, Q.C. (with him Mr. F. W. Hollams), for the plaintiffs, said that there were four points involved:—(1) Was there a prohibition by the Rumanian Government of the importation of rice? (2) If so, had the defendants taken the proper steps to enable them, if possible, to fulfil the contract? (3) What damages had the plaintiffs sustained? (4) Were the defendants, on their counter-claim, entitled to any freight. The first question was one of fact, and turned on the meaning and effect of orders made by the Council of Ministers of Rumania and the administration of these orders by a Dr. Obregia, the Director-General of the Rumanian Board of Health, and it was submitted that, in fact, the importation of rice was not prohibited. Even if there was a prohibition, that did not justify the ordering of the cargo to London at the time they did. The question was whether the restraint existed so long as to defeat the commercial object of the voyage. In "*Hadley v. Clarke*" (8 T.R., 359) the delay, under an embargo, was for two years. In "*Jackson v. the Union Marine Insurance Company*" (L.R. 10, C.P., 125) and in "*Esposito v. Bowden*" (7 E. and B., 763) the contracts were still executory; and the latter was a case where illegality affected the performance of the contract. The principle applicable was laid down by Lord Justice Brett in "*Nelson v. Dahl*" (12 Ch. D., at p. 593). [MR. JUSTICE KENNEDY referred to Pollock on Contracts, p. 279.] In "*Geipel v. Smith*" (L.R., 7 Q.B., 404) the contract was executory; this appeared in the judgment of Mr. Justice Blackburn, at p. 414. In "*The Teutonia*" (L.R. 4, P.C., 171) the contract was partly executed. In the present case the defendants, having taken the cargo on board, were bound to fulfil their contract, if it could be done within a reasonable time. Mere apprehension of a prohibition was insufficient; and in any event the ship did not wait a reasonable time, as she sailed from Beirut on June 24 under orders from London of the 21st, and the prohibition, if any, had been withdrawn by the 27th, by which time she could not have reached the Danube had she left Beirut on the 21st. If apprehension of restraint was sufficient, it must be after full inquiry, which had not been made here. On the fourth point the law was clearly laid down in "*Hunter v. Prinsep*" (10 East, 378) by Lord Ellenborough.

Mr. JOSEPH WALTON, Q.C., and Mr. J. A. HAMILTON, for the defendants, contended that the importation of the rice into Rumania was prohibited, and that the ship had acted reasonably. The first question was whether, under the circumstances, the owners were justified in abandoning the voyage. In "*Jackson v. the Union Marine Insurance Company*" the contract was not wholly executory. With a cargo on board the shipowner still had duties where his obligation to deliver at

the destined port was at an end. "*Bensaude v. Thames and Mersey Marine Insurance Company*" (1 Com. Cas., 395). In this case the prohibition was a restraint. It could not be the duty of the ship to wait for a change in the law; and on June 24 the law was a permanent obstacle. As to freight, the shipowner would have been entitled to discharge the cargo at Beirut if it was a proper port; but it was not, and at all events he was entitled to a reasonable payment for bringing it to a reasonable destination—i.e., to London.

MR. JUSTICE KENNEDY, in giving judgment, said that the action was brought to recover damages from the owners of the steamship *Maling* for breach of the contract contained in the bill of lading under which the plaintiffs' goods were shipped. There was a counter-claim for various heads of expenditure, but substantially for freight, and the counter-claim was now confined to freight from Beirut to London. The plaintiffs' goods, consisting of rice, were shipped under bills of lading to be discharged at Galatz, subject to certain exceptions, of which one was, "arrest or restraint of princes, rulers, and people." On June 18, the ship being then at Beirut, a question arose as to whether the discharge of the plaintiffs' cargo at Galatz would be prevented by an ordinance of the Rumanian Government. Messrs. Ewell, who were Lloyd's agents and also the defendants' agents at Galatz, represented to the defendants that the importation of rice from Rangoon was prohibited at Galatz, and that the landing of the cargo at Galatz would not be permitted. On the other hand, the plaintiffs protested that this was incorrect, and they required the defendants to fulfil their contract by proceeding to Galatz. The fact was that there was in force in Rumania at this time a certain official document, which had been referred to as the circular, which was an order emanating from the Council of Ministers intended to protect the country from the danger of the importations of disease. Paragraph 3 of the order was as follows:—"The introduction into the country of the following goods arriving from any part of Egypt or any other suspected stations to be prohibited:—Fruit, vegetables, cheese," and certain other articles. Messrs. Ewell made inquiries of a Dr. Obregia, who was director-general under the Minister of the Interior and who was in charge of the Sanitary Department. Dr. Obregia's view, which he expressed to Messrs. Ewell and also to the English Consul, was that the importation of rice was prohibited, and he stated that he should prevent the cargo from being landed. Dr. Obregia, it was clear, was acting under a misapprehension as to the effect of the order, which did not refer to rice. The question was whether the defendants were justified in treating this intimation as such a restraint, within the meaning of the bill of lading, as excused them from carrying out their contract. His Lordship was of opinion that on the receipt of the opinion of Dr. Obregia the defendants would not have been responsible for a reasonable delay incurred in ascertaining whether the vessel would really be refused admission to the port of Galatz. But the defendants contended that they were at that time entitled to treat the contract as being impossible of performance. His Lordship was satisfied that the interpretation of the law expressed by Dr. Obregia was untenable and would not have prevailed if the vessel had gone to Galatz. The defendants, in taking the course they did, without further delay for inquiry, took the risk of their apprehensions being unfounded. No doubt there might be a state of things, as in "*Nobel's Explosive Company v. Jenkins*" (12 *The Times* L.R., 522, and 1 Com. Cas., 436), in which the restraint was one, in a sense, consisting of fear. In that case, war having been declared between Japan and China,

the master feared that if he proceeded the vessel would be seized by a Chinese man-of-war ; and it was held that in the circumstances he was justified in not proceeding. But, generally speaking, the shipowner must prove more than a reasonable apprehension ; he must prove such a state of facts as justified him in saying that a restraint actually existed. The defendants, without waiting a reasonable time, had sent the ship to London, and there was nothing in the clause in the bill of lading to justify or excuse them in so doing. His Lordship was far from saying that a *de facto* restraint might not be a sufficient justification for the shipowner, if it lasted long enough, but here there had been no delay at all. Even if he were wrong on this point, his Lordship was of opinion that the defendants must fail on the counter-claim, because there was no principle of law under which the defendants could claim to be paid the cost of carrying the cargo to London against the express wish of the plaintiffs. There would, therefore, be judgment for the plaintiffs on the claim and counter-claim with costs.

[Solicitors—Hollams, Sons, Coward, and Hawksley, for the plaintiffs ; Crump and Co., for Turnbull and Tilly, West Hartlepool, for the defendants.]

House of Lords (Lord Halsbury, L.C., } 1900.
Lords Macnaghten, Morris, Shand, } Feb. 20.
James of Hereford, and Brampton.

FIELDEN V. MAYOR, &C., OF MORLEY.*

Practice—Costs—Solicitor and client costs—
Public Authority.

Sec. 1 of the Public Authorities Protection Act, 1893, applies to all actions, including those in the Chancery Division, but not to appeals.

This was an appeal from an order of the Court of Appeal (the Master of the Rolls and Lords Justices Chitty and Collins) dated August 8, 1898, affirming a judgment of Mr. Justice Byrne dated April 28, 1898. The case is reported below in 14 *The Times* L.R., 566 ; and on the question of costs in 14 *The Times* L.R., 576 ; L.R. [1899] 1 Ch., 1 ; 67 *L.J.*, Ch., 611. The object of the action was to restrain the mayor, aldermen, and burgesses of the borough of Morley from causing or permitting water to overflow on the appellant's land from a certain catchwater constructed by the corporation under the Morley Corporation Act, 1890, and for damages. The statement of claim in the action raised a further claim in respect of trespass by the corporation to lands of the appellant, but the substantial question in the action was whether the corporation had, in constructing the said catchwater and certain works connected therewith, exceeded their statutory powers under the Morley Corporation Act, 1890. The Morley Corporation Act, 1890, recites that the corporation had, in accordance with the provisions of the Public Health Act, 1875, established waterworks and were supplying their borough with water, but such supply was inadequate to meet the existing and growing demands of the inhabitants of the borough, and it was expedient that the corporation be empowered to construct the additional works and to acquire the water supply by the Act authorized. By the 6th section of the Act it is enacted that subject to the provisions of the Act the corporation may make and maintain in the manner described the waterworks and other works therein mentioned, including a reservoir situate in the townships of Erringden and Sowerby, in the county of York, to be formed by an embankment placed across the Withens Clough, and

an aqueduct or conduit commencing at a watercourse at the edge of Turley Hole and High House Moor, and terminating at the southern end of the said reservoir embankment, "together with all necessary and proper embankments, culverts, channels, outfalls, weirs, gauges, pipes, roads, approaches, and conveniences connected with the said works, or any of them, or necessary or proper for inspecting, maintaining, repairing, cleansing, or managing the same. Provided that the authority in this Act contained to construct the said reservoir shall not relieve the corporation from any right of action to which, except for such authority, they would be liable in the event of the bursting or failure of the said reservoir." It is provided by the 18th section of the Act, which is a section for the protection of John Fielden and the present appellant, that all lands, rights, easements, interests, and privileges required by the corporation from the owner or owners for the time being of the estates in the townships of Sowerby and Erringden, in the county of York, belonging to John Fielden and the present appellant, or both or either of them, for the purposes of the Act should be acquired and held subject to the provisions therein set forth, including *inter alia* the provision following :—“(b) The corporation shall construct, maintain, and keep the catchwaters, conduits, and lines of pipes for conveying the water through the said estate watertight, and the corporation shall from time to time make good any damage done or which may occur to the said estate, or the owner, or his tenants, during the construction or maintenance of the works by reason or in consequence of the leaking, overflow, or any failure of any of the above-mentioned works in the said estate authorized by this Act.” The other provisions of the 18th section are immaterial for the purposes of this appeal, with the exception of provision (d), which imposes on the corporation the obligation to make passages or roadways over “any uncovered catchwater or conduit,” words which throw some light on the meaning of the word “watertight,” as used in provision (b). The 20th section of the Act is as follows :—“Subject to the provisions of this Act, the corporation may enter upon, take, and use such of the lands shown on the deposited plans and described in the deposited book of reference as they may require for the purposes of this Act, and may from time to time, for the purpose of their waterworks, collect, impound, take, use, get, and appropriate such of the waters of the Withens Clough, Fletcher Dike, Jack Clough, Rudstoops Clough, and their tributaries as can or may be intercepted, collected, or impounded by the Withens Clough reservoir and the aqueducts or conduits described as works No. 2 and No. 3 by this Act authorized, and all waters found in, on, or under any of the lands acquired by the corporation.” Mr. Justice Byrne dismissed the action, and under the Public Authorities Protection Act, 1893, gave the defendant corporation costs as between solicitor and client.

Mr. Fletcher Moulton, Q.C., Mr. Cripps, Q.C., and Mr. Leigh Clare were for the appellant ; Mr. Eve, Q.C., and Mr. R. J. Parker, for the respondents, were not heard.

The LORD CHANCELLOR in moving that the appeal be dismissed, said the point was a very short one. The whole question as argued was this. Section 6, taken by itself, gave the corporation limited powers to execute these works if they obtained the proper authority from the owners of the land from whom they purchased. But it did not give these powers, but provided that the land should be purchased and paid for. That was intelligible. But he declined to follow the argument that section 6 should be construed by itself. Whatever might be the case in other Acts in respect of which such a question might arise, he would not for this

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

purpose go beyond this section of the statute. There might be a section which authorized the doing of certain things. There was no doubt that the corporation must purchase the land in respect of which they were going to erect these works. So far he was in agreement with the appellant. But then the question arose from the use and maintenance of the works. Was there no other provision which extended the liability for the user of the works? It must be assumed that the nature of the work and the situation of the property were present to the mind of the Legislature. Let it be supposed that the Legislature had expressed this knowledge, which it must be assumed to have possessed, by way of recital before the 18th section. Could any one doubt that when the Legislature was authorizing the making of this channel or cut across the plaintiff's land and when the plaintiff, having these facts put before the committee by way of recital, was complaining of the works so authorized and of the consequential injury to him caused by the maintenance of the work, could anybody suggest that this 18th section could have any other operation than to protect the gentlemen named therein from injury to their land by the escape of the water from the channel made by the respondents? In what other way could injury be done? The Legislature was, therefore, not dealing with the transfer of property, which was dealt with by the 20th section, but with the consequential injury from the maintenance and user of the works for which it expressly provided a form of remedy. In the event of overflow or leakage or other causes of such injury, what was to be done? In such an event the corporation were from time to time to pay damages, and to repair and make good any damage done by the injury so resulting. It seemed to him to be inconsistent with that theory, which was manifest in the 18th section, to say that the statute assumed they were to buy the land. If they were to buy the land there would be no necessity for the 18th section, because they would be dealing with their own land. But the section assumed that it was to remain the plaintiff's land; and if in the use and maintenance of that cut or channel injury was done, then by the 18th section compensation was to be paid to the plaintiff. He agreed with Mr. Justice Byrne and the Court of Appeal, and felt obliged to say that he never knew of a more trumpety and frivolous action. The appeal must be dismissed.

The other noble and learned Lords concurred.

A conversation ensued on the effect of the Public Authorities Protection Act, 1893, by which, wherever persons acting in the execution of statutory and other public duties obtain judgment against a person suing them, the costs are to be taxed as between solicitor and client and paid by the unsuccessful plaintiff. Their Lordships agreed with the Court of Appeal that the statute applied to all actions, including what used to be called suits in Chancery, but that the solicitor and client costs were not recoverable in appeals.

[Solicitors—Firth and Co., for the appellant.]

Prob., Divorce, and Adm. Div. } 1900.
(Gorell Barnes, J.) } Feb. 20.

WARD, OTHERWISE DORMER, v. WARD.*

Divorce—Nullity—Variation of Settlements—
Matrimonial Causes Act, 1859 and 1878.

The Court has jurisdiction to vary settlements in the case of a decree of nullity of marriage on the ground of impotence, but *held in* this case that there was by the terms of the settlement no property which the Court could deal with for the benefit of the petitioner.

This was a divorce motion which has occupied the attention of the Court on several occasions. The facts sufficiently appear from his Lordship's judgment, which was delivered yesterday.

Mr. Bargrave Deane, Q.C., and Mr. Danekwerts, Q.C., appeared for the petitioner; Mr. Jelf, Q.C., Mr. R. J. Parker, and Mr. Priestley for the respondent.

MR. JUSTICE GORELL BARNES said as follows:—Two questions are raised in this case, one of general importance—viz., as to the construction of two sections of the Matrimonial Causes Acts of 1859 and 1878—and the other depending upon the terms of an ante-nuptial settlement made on the marriage of the petitioner and respondent and dated May 27, 1885. The parties were married on May 28, 1885, the petitioner being then under age, and afterwards they resided together; but on October 22, 1895, the petitioner commenced a suit in this Court against the respondent, claiming a declaration that her marriage with him was null and void, on the ground of the impotence of the respondent. This suit was heard before the President, and a decree nisi was pronounced by him on December 21, 1896, and this decree was made absolute on June 28, 1897. The petitioner on June 12, 1899, by leave of the Court, presented a petition to the Court under the said Acts to allow a variation of the said settlement for her benefit. The petition having been referred to Mr. Registrar Pritchard, he reported that the respondent raised, amongst other points, the question of the jurisdiction of the Court to vary settlements in the case of a marriage declared void by reason of impotence, and, therefore, the matter was brought before the Court, and the questions which I now have to decide were by arrangement argued before me. The first point taken by the respondent was that the powers of the Court conferred by the said sections could not be exercised in the case of a decree of nullity of marriage on the ground of impotence, and that the sections only applied to cases where there were or might have been children. The said fifth section is as follows:—"The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit." It was decided in the case of "Thomas v. Thomas" (2 Sw. and Tr., 89) that this clause gave no power to the Court to deal with settlements in cases where no child of the marriage had been born, and in the cases of "Bird v. Bird" (L.R., 1 P. and D., 231) and "Corrance v. Corrance" (ib. 495) that the Court had no power to do so unless there was issue of the marriage living at the time of the application. These decisions turned on the use of the word "parents" in the latter part of the section, and the criticisms in the judgments in those cases apparently led to the passing of the third section of the Act of 1878, which is in the following terms:—"The Court may exercise the powers vested in it by the provisions of section 5 of the Act of the 22nd and 23rd years of Victoria, chapter 61, notwithstanding that there are no children of the marriage." The argument for the respondent was that, as under the said fifth section the powers of the Court could only be exercised where there was issue of the marriage living at the time of the application, the marriages referred to in the words in the first part of the section—"final decree of nullity of marriage or dissolution of marriage"—must be marriages capable of being productive of children and that the third section of the Act of 1878, in extending the powers of the Court to cases where there are

*Reported by GWYNNE HALL, Esq., Barrister-at-Law.

no children of the marriage, only did so with reference to the class of marriages contemplated by the said fifth section. This argument is ingenious, but in my opinion endeavours to place a restricted meaning on the first words of the said fifth section which they never were intended to bear. In my opinion the words "final decree of nullity of marriage or dissolution of marriage" are used in their ordinary meaning, just as they are in other sections of the Matrimonial Causes Acts, and apply to any marriages declared null or dissolved. The section then meant that the Court, after any decree of nullity of marriage or dissolution of marriage, might inquire as to the existence of settlements, and then, if there was issue living, might make orders as contemplated by the latter part of the section; and now under the said third section of the Act of 1878 these orders may be made although there is no issue of the marriage. I am of opinion that under the two sections combined the Court has jurisdiction in this case to deal with the settlement in question. The point raised by the respondent upon the terms of the settlement was that, having regard to the terms of the settlement, there is no property settled which in the events which have happened the Court can, or ought, in the circumstances to order to be applied for the benefit of the petitioner. Under an indenture of settlement dated December 8, 1874, made between the respondent's father (who died before the date of the marriage settlement) and the respondent and certain trustees the lands and hereditaments comprised in the schedules to the marriage settlement of May 27, 1883, together with other hereditaments, were limited (subject as to part to a jointure rent-charge of £1,200 payable thereout to the respondent's mother during her life and to a term of 500 years for securing the same) to such uses, upon such trusts, and with and under such powers, agreements, and declarations as the respondent should, by any deed or deeds, with or without power of revocation and new appointment to be executed by him after his father's death, or by his will, or any codicil or codicils thereto, from time to time appoint, but subject and without prejudice to any lease and every contract for a lease or leases subsisting at the date of the said indenture of settlement, and subject thereto, to the use of the respondent and his assigns for his life without impeachment of waste, with divers remainders over. And in the same indenture was contained a power for the respondent after his father's decease by deed or will to charge the settled premises with the payment to himself or any other person of any money not exceeding £8,000 and interest as therein mentioned, and to appoint all or any part of the same premises for any term or terms of years for securing the same, but which power had not at the time of the marriage settlement been exercised. And in the same indenture was also contained a power for the respondent either before or after his marriage with any woman by deed with or without power of revocation and new appointment, or by will or codicil, to appoint to any woman whom he might marry for life or for any less period as from the day of his death if she should survive him, any yearly rent-charge or rent-charges of any amount whatsoever payable after his father's death, whether the respondent should survive him or not, such rent-charge or rent-charges to be in bar or not to be in bar of dower and free bench as to the respondent should seem fit, and to be charged upon and payable out of all or any of the premises by the said indenture of settlement assured without any deduction and to be paid at such times and in such manner as to the respondent should seem meet, and to appoint to such woman usual powers and remedies for recovering and enforcing the same. And to appoint the premises so charged to any person or persons for any term or terms

of years with or without impeachment of waste upon trusts for better securing payment of the rent-charge or rent-charges by mortgage (with a power of sale if thought fit), or otherwise as to the respondent should seem meet. By the marriage settlement made between the respondent, the petitioner, her father, and certain trustees the respondent in consideration of the intended marriage covenanted with the trustees that if the said intended marriage should take place the respondent would, during the joint lives of himself and the petitioner, pay to the trustees a yearly sum of £200 to accrue from day to day, but to be payable by equal quarterly payments, the first of such payments to be made on such of the quarterly days as should happen next after the solemnization of the said intended marriage, and the trustees were to pay the said annual sum of £200 as the same should become due so long as the same should continue payable to the petitioner, but so that she should not have any power of anticipation. And in consideration of the said intended marriage and in exercise of the special power vested in him by the said indenture of settlement, the respondent limited and appointed to the use of the petitioner and her assigns during her life in case the said intended marriage should take effect and she should survive him the rent-charges following—that is to say, if and so long as his mother should be living, the yearly rent-charge of £1,300, and from and after her death the yearly rent-charge of £1,600, the said rent-charges or such of them as should take effect to be in full for her jointure and in bar of all dower and free bench whatsoever, and to be charged upon and issuing out of all the hereditaments and premises comprised in the first schedule thereto (subject as to part of the said hereditaments to the said yearly rent-charge of £1,200 and the said term of 500 years, and subject as to all the said hereditaments to the powers of leasing, and sale, and exchange, and management contained in the said indenture of settlement), such rent-charges to be considered as accruing from day to day, but to be payable quarterly without any deduction except succession duty, if any, the first of such payments as to the said rent-charge of £1,300 to be paid at the end of three calendar months after the death of the respondent if the petitioner and the respondent's mother should then both be living, and as to the said rent-charge of £1,600 to be made at the end of three calendar months after the death of the survivor of the respondent and his mother if the petitioner should then be living. And in consideration of the said intended marriage, and in exercise of the special power vested in him for that purpose by the said indenture of settlement, the respondent as beneficial owner appointed the hereditaments and premises thereinbefore charged with the said jointure rent-charges (subject, nevertheless, as last aforesaid) unto and to the use of the trustees for the term of 1,000 years to commence from the death of the respondent to secure the payment of the said rent-charges. And in consideration of the said intended marriage, and in exercise of the general power of appointment vested in him by the said indenture of settlement and of all or any other power in that behalf him enabling, the respondent as beneficial owner appointed the hereditaments and premises comprised in the second schedule to the marriage settlement to the use of the trustees for the term of 1,200 years, to commence from the solemnization of the said intended marriage, without impeachment of waste (but subject as therein mentioned), upon trust to raise the sum of £20,000 with interest for the same at 4 per cent. per annum, computed from the solemnization of the said intended marriage and to stand possessed thereof upon trust for investment, and to pay the interest and annual produce to the respondent and his assigns during his life, and] after his decease as to the corpus of the

fund and the annual produce thereof in trust for the issue of the marriage as the respondent should appoint and in default as the petitioner should after the respondent's death appoint, and in default for the children equally except as in the deed provided, and in default of issue attaining a vested interest in trust for the respondent. And the deed contained a proviso that no part of the £20,000 or of the interest thereof should be raised during the lifetime of the respondent except with his consent in writing. The respondent's mother is now dead. The petitioner's application is that by some form of order the marriage settlement should be varied so that the petitioner should receive at once a considerable allowance. The principal argument in favour of the petitioner to meet the point raised by the respondent was that the whole of the hereditaments and premises comprised in the schedules to the marriage settlement were property settled by that settlement, and that the Court could, therefore, under the terms of the said fifth section, which gives the Court power to make orders with reference to the application of the whole or a portion of the "property settled" for the benefit (by the effect of the said fifth section and the third section of the Act of 1878) of children or parties, order that the whole or a portion of the said hereditaments and premises be applied for the benefit of the petitioner. The petitioner's counsel, while maintaining that the whole of the hereditaments and premises could be applied by the Court for her benefit, did not contend that the Court in its discretion would apply the whole of this property for her benefit. The respondent, no doubt, had practically a complete power of disposition over the estates in this case when he entered into the marriage settlement subject to the mother's interest, but by that settlement he only affected the estates by creating two charges, one on one part of them and the other on the other part. And it seems an extraordinary proposition that because a charge, it may be a very small one, is created on a large real estate by a marriage settlement the whole estate can be dealt with by the Court under the powers conferred by the sections aforesaid. In my opinion the words "property settled" have not the meaning contended for, but refer to the property the benefit of which is by the marriage settlement conferred on the parties or their children in the ordinary way. Several cases were cited in argument on this point, but they do not appear to me to be of much assistance, except, perhaps, the case of *"Micklethwait v. Micklethwait"* (4 C.B., N.S., 790), the judgments in which are in favour of the respondent (see especially p. 858). It is therefore necessary to refer to the terms of the settlement, the substance of which I have set out above, to see what was really dealt with by the settlement. Now, first there is the covenant to pay £200 a year to trustees for the benefit of the petitioner. The point made by the respondent with regard to this was that the covenant was either still in force or was at an end; and that if it were in force there was no necessity for this application, while if it were not in force, either because the marriage had been declared void, and therefore had not taken place within the meaning of the covenant, and because there was thus no consideration for the covenant, or because the covenant had come to an end and ought to be read as applicable only to the petitioner if she were the respondent's wife, in consequence of the clause as to anticipation, then there was now no property so far as this covenant is concerned upon which the Court could make an order. The only answer made by the petitioner's counsel was that the covenant was in force and that the Court ought to enforce it. Well, if so, it must be enforced by the trustees in the ordinary way, and there is no necessity for this application, and, if it is not in force there is nothing existing as to the application of

which the Court can make an order. The case of *"Worsley v. Worsley"* (L.R., 1 P. and D., 648) was cited for the petitioner, but it does not bear on the present case. In that case there was a separation deed between the husband and the wife, and the husband afterwards obtained a decree of divorce, and then the husband applied to the Court to reduce the amount of his covenant in the deed, and the Court did so, holding the deed to be a post-nuptial settlement. There appears to have been no clause in the deed providing for the event which happened—viz., the unfaithfulness of the wife—and the provisions of the deed could be enforced to the full extent unless the Court reduced the payment. The next subject-matter which can be considered as property settled by the marriage settlement is the jointure rent-charge limited and appointed to the petitioner and the term of 1,000 years to secure it. The point made by the respondent was that no order could be made as to the application of this, because in the circumstances it was not property which could be dealt with. The reasons suggested for this were, first, that the jointure rent-charge and term could only come into force if the marriage should take effect, and that, as the marriage has been declared void, it did not take effect, and the jointure rent-charge and term cannot come into force, and the settlement was without consideration. The cases of *"Chapman v. Bradley"* (4 D.J. and S., 71) and *"Pawson v. Brown"* (13 Ch.D., 202) appear to me to support these reasons. The answer made by the petitioner's counsel was mainly the principal point above mentioned, that the property settled included all the estates mentioned in the schedules to the marriage settlement. I have already dealt with this point. But it was further urged that the marriage was not void, but voidable, and had taken effect. The petitioner had the right to elect whether to treat the marriage as void or not, and at her instigation it has been declared void, and in my opinion has not taken effect within the meaning of the deed. The second reason in support of the respondent's point was that the jointure and term could not commence till after the death of the respondent, and this seems clear upon the terms of the deed. It was, however, strenuously urged by Mr. Deane for the petitioner that it was common practice for the Court to order a settlement to be read as if a party to it were already dead, and that it could do so in this case. This argument was, in my judgment, based on a misconception. It is true that in certain cases—for instance, where property is settled in trust for a respondent for life and after his or her death for a petitioner for life, with remainder to children, and in default of children in trust for the settlor, and in other similar cases—it is found convenient, instead of an order in terms directing the trustees to pay the income at once to the petitioner, to effect the same object by ordering the life interest of the respondent to be extinguished, as if he or she were already dead. But the important question in the present case is whether there is any property settled, and, if property is only to come into settlement upon the death of a person, no order of the Court can bring it into settlement before that time. There is no power to bring into settlement a fund or estate, which is not to come into settlement until a certain event happens, before it happens, in fact. Therefore, no order as to the application of this jointure could have any effect before the death of the respondent. Moreover, before the trustees could act upon an order as to the application of the jointure they would have to recover the money, and in the circumstances which have happened—viz., the marriage not having taken effect, the respondent being alive and the purposes for which the jointure was created, that is to say, to provide for a widow, being impossible of performance—I am unable to see how the trustees could

enforce the security. With regard to the power to raise the £20,000, though the wording as to the commencement of the term of 1,200 years is not quite the same as in the case of the jointure rent-charge, the consideration is the marriage, and the term is to commence from the solemnization thereof, and as the marriage has been declared void for similar reasons to those given with regard to the jointure rent-charge, the fund has not, and will not, become property which the Court can deal with. Moreover, this fund cannot be raised during the lifetime of the respondent except with his consent in writing, which has not been given, and therefore the fund has not yet come into existence, and after his death I do not see how the trustees could be compelled to raise the fund except for the benefit of children, if there had been any. The broad position in the case appears to be this—that no property was transferred to and vested in trustees at the time of the marriage in the way in which this is commonly done under a marriage settlement, and that unless the estates themselves can be treated as having been “property settled” within the meaning of the section there is no property as to the application of which the Court can or ought to make an order. As I have already said, the estates cannot, in my opinion, be so treated. They were not property settled by the marriage settlement, which only purported to carve out of them (so to speak) certain interests which, in the events that have happened, have not come into existence. I suggested in the course of the case that a settlement between the parties was desirable, as the petitioner is without means and the respondent is wealthy, and the case stood over more than once with the view to an arrangement, but the respondent finally expressed himself as unwilling to make any proposal while legal proceedings are taken against him, and therefore the matter was fully argued, and I have now to deal with the case according to the legal principles applicable to it. For the reasons which I have given, the petition for variation of the settlement must be dismissed.

Judicial Committee of the Privy Council } 1900.
(Lords Hobhouse, Davey, Robert- } Feb. 17.
son, and Sir R. Cochrane)

WENTWORTH V. MATHIEU.*

Privy Council Appeals—Canada—Temperance Act, 1864—Construction—Penalties for offences.

This was an appeal by special leave from a judgment of the Superior Court for Lower Canada of May 5, 1899.

The Hon. Edward Blake, Q.C., and Mr. R. C. Smith, Q.C. (both of the Canadian Bar), appeared for the appellant; Mr. L. E. Panneton, Q.C. (of the Canadian Bar), and Mr. Mayne for the respondent.

SIR RICHARD COUCH, in delivering their Lordships' judgment, said,—The question in this appeal arose upon an Act of the Legislature of Canada (27 and 28 Vict., c. 18), commonly called the Temperance Act of 1864. Section 12 of this Act prohibits the sale of any spirituous or other intoxicating liquor, unless it be for exclusively medicinal or sacramental purposes, or *bona fide* use in some art, trade, or manufacture. Section 13 is as follows:—“Whoever, by himself, his clerk, servant, or agent, exposes or keeps for sale, or directly or indirectly, or on any pretence or by any device, sells, or barter, or in consideration of the purchase of any other property gives to any other person any spirituous or other intoxicating liquor or any mixed liquor capable of being used as a beverage, and a

part of which is spirituous or otherwise intoxicating, in violation of the 12th section of this Act, shall incur a penalty of not less than \$20 nor more than \$50 for each such offence, and whoever in the employment or on the premises of another so exposes or keeps for sale, or sells, or barter, or gives in violation of the said section shall be held equally guilty with the principal, and shall incur the same penalty.” Section 17 provides that two or more offences by the same party may be included in one complaint, provided the time and place of each offence is stated; but, whatever may be the number of the offences included in one complaint, the *maximum* of penalty imposable for them all shall in no case exceed \$100. On June 9, 1898, the appellant made a complaint to the district magistrate for the district of St. Francis, in the Province of Quebec, that the respondent on or about April 23 then last past had sold and delivered intoxicating liquors, and received payment for the same, contrary to this Act, whereby he had become liable to pay \$50, with costs. On June 30, 1898, the respondent was convicted by the district magistrate of having on April 23 then last sold and delivered to one George Mount intoxicating liquors contrary to the Act, and adjudged to forfeit and pay to the appellant \$50, to be applied according to law, and also to pay \$29 76 cents for costs. On July 13, 1898, the appellant made a similar complaint to the same magistrate of an offence committed by the respondent on April 19 then last past, and the respondent was on July 20, 1898, convicted of selling intoxicating liquors to one J. H. P. Armitage on April 19 contrary to the Act, and adjudged to forfeit and pay to the appellant \$50, to be applied according to law, and 90 cents for costs. In addition to these convictions there were at different times between June 8 and July 21, 1898, 27 other convictions of the respondent on the complaints of the appellant by the same magistrate of similar offences committed on different days between March 26 and May 19, the penalty in each case being \$50. On September 15, 1898, the Superior Court for Lower Canada, on the petition of the respondent, ordered a writ of *certiorari* to issue, and on April 5, 1897, the writ was issued in the case of the second of the convictions before mentioned—viz., for the sale on April 19 to Armitage, being No. 526 in the records of the magistrate's Court. A return having been made to the *certiorari* the Superior Court, on May 5, 1899, pronounced its judgment annulling the conviction, and on July 14, 1899, her Majesty, by an Order in Council, gave the appellant special leave to appeal against this judgment upon the appellant submitting to pay the costs of this appeal incurred by the parties on both sides in any event, if it should appear advisable to the Judicial Committee so to direct when the appeal came on for determination, and also to abide by any recommendation which their Lordships might see fit to make as to the enforcement of penalties by the appellant against the respondent. The judgment of the Superior Court, delivered by Mr. Justice Lemieux, appears to be founded on the opinion that, according to section 17, the Legislature thought that the penalty of \$100 was sufficient punishment for all the breaches of the law up to the time of the prosecution and during the three months previous to it, that being the limitation of time from the committing the offence for the prosecution for it, and that the complaint of June 9 covered and included all offences previous to that date; that as one or more offences of the same nature against the Act could be included in the same prosecution a complaint made at a particular date for a single offence is presumed to be made and to comprehend all the offences against the Act up to the date of the complaint (Rec., pp. 39, 40). Their Lordships are quite unable to agree with the Superior Court in this opinion. It is an addition to

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

section 17 for which there is no authority either in the words of it or by implication. The purpose of section 17 appears to be to prevent a prosecution under the Act where only one offence is charged failing by reason of the evidence not being sufficient to prove it or in consequence of a variance in the complaint from the evidence of the time when or the person to whom the intoxicating liquor was sold if more than one offence has been committed and the limit of the penalty to \$100 indirectly restrains the use of that power. There is no reason for thinking that "may" is to be imperative and the same as "shall." There is nothing which shows it is intended to have other than its natural meaning. If, as the Superior Court was of opinion, the Legislature thought a penalty of \$100 was sufficient punishment for all offences committed within three months previous to the complaint their Lordships do not doubt but that it would have said so and provided for it. The learned Judge supported his opinion by references to Russell on "Crimes" and the "American and English Encyclopedia of Laws," in which the principle is laid down that, "where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea of *autrefois acquit* is generally good." The meaning of this is that where the same facts would justify a conviction for two different offences (say, burglary and petty larceny) a man who has been convicted for one offence cannot be tried over again on the same facts for the second offence. This principle has no application to the present case. Evidence that the defendant supplied liquor to B at a given hour and place would not support a complaint that he supplied liquor to A at another hour or place, notwithstanding that both complaints might have been included in one proceeding. Their Lordships are not aware of any general principle in criminal law which would support the view of the Superior Court. The magistrate has a discretion as to the amount of the penalty between \$20 and \$50, and where, as in the present case, there are many complaints by the same person of separate offences, it would be right to exercise it. They are, therefore, of opinion that the conviction of the respondent should not have been quashed, and will humbly advise her Majesty to reverse the judgment of the Superior Court. Their Lordships note with satisfaction the statement of the learned counsel for the appellant that the penalties on the conviction of the respondent will not be enforced, but they do not think it necessary to include an undertaking to that effect in the report which they will make to her Majesty. In pursuance of the undertaking of the appellant on the leave to appeal, their Lordships direct the appellant to pay the respondent's costs of this appeal, to be taxed as between solicitor and client.

[Solicitors—Charles Russell and Co., for the appellant; Stibbard, Gibson, and Co., for the respondent.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.JJ.) } Feb. 21.
RICHARDSON V. STORMONT, TORD, AND CO. (LIMITED).*

Stock Exchange—Rules—Defaulting member—
Assets—Rule 176, construction of.

This was an appeal from a judgment of Mr. Justice Mathew, reported in *The Times* of April 13, 1899. The plaintiff was the official assignee of the Stock Exchange. The action was brought to recover £187 10s., being the balance of the price of 2,105 preference shares in the Western Australian Market Trust (Limited), alleged to have been sold by the plaintiff to the defendants. The defence was that the shares had been purchased by the

defendants, not from the plaintiff, but from a Mr. Reaveley, who owed the defendants a sum equal to that sued for, which the defendants claimed to be entitled to set off against the price of the shares. It appeared that Reaveley had been a member of the Stock Exchange, and that in April, 1898, he became a defaulter. At that time a debt of £5,339 was due to him from the Western Australian Market Trust (Limited). By the rules of the Stock Exchange it was the duty of the official assignee to take possession of the assets of a defaulting member and distribute them among his creditors in the Stock Exchange. The plaintiff accordingly took steps to recover the debt of £5,339 from the Market Trust. The company could not pay, and a scheme of reconstruction was proposed. The plaintiff attended the meetings and was fully cognisant of all that was done. A scheme was agreed to and sanctioned by the Stock Exchange Committee, by which a new company was formed to take over the liabilities of the old company and discharge them by paying 12s. in cash and 8s. in shares. The plaintiff empowered Reaveley to execute a deed giving effect to the scheme. By virtue of the deed Reaveley became entitled to the shares standing in his name. At the time of Reaveley's default the defendants were clients of his, and a sum of £187 10s. was due from him to the defendants, being part of a larger sum which had been deposited with him by the defendants as cover. Before the shares were handed over to Reaveley, he wrote to the plaintiff saying that friends of his, meaning the defendants, were willing to buy the shares at 3s. The plaintiff answered Reaveley's letter accepting the offer. In his next letter Reaveley mentioned the defendants' as the buyers. The sale was carried through at 3s. a share, but the defendants in paying the purchase money deducted therefrom the sum of £187 10s., the amount of the debt due from Reaveley to them. The cheque for the money was left with the plaintiff's assistant, but the plaintiff, on being made aware of what had been done, at once claimed the full amount from the defendants, and began this action. Mr. Justice Mathew thought that the result of the evidence was that the defendants dealt with Reaveley in the purchase of the shares, not as a principal, but as agent for a disclosed principal—namely, the plaintiff; and he therefore gave judgment for the plaintiff. The defendants appealed.

Mr. Rufus Isaacs, Q.C., and Mr. MacIntyre appeared for the defendants; Mr. Herbert Reed, Q.C., and Mr. F. M. Abrahams for the plaintiff.

The COURT, without calling upon counsel for the plaintiff, dismissed the appeal.

LORD JUSTICE A. L. SMITH said that he agreed with the judgment of Mr. Justice Mathew. The first question was as to the construction of rule 176 of the Rules of the Stock Exchange, which provided that the official assignee should collect the assets of a defaulting member and distribute them amongst his creditors in the Stock Exchange. What was the meaning of "the assets"? Did it mean the defaulter's Stock Exchange assets or all his assets? *Prima facie* it meant all the assets which he had, and there was a strong indication of opinion on the part of the House of Lords in the case of "*Tomkins v. Saffery*" (3 App. Cas., 213) that it meant all his assets without limitation. He therefore held that rule 176 meant that the official assignee should collect the whole of the assets of the defaulting member and distribute them among his Stock Exchange creditors. The second question was whether the official assignee could sue. On this question he adopted the reasons given in the judgment of Mr. Justice Mathew, and he thought the official assignee could sue. Further, he thought there was in this case good evidence of a direct bargain between the defendants and the official assignee that the price of 3s.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

a share should be paid without any set-off. The appeal must therefore be dismissed.

LORD JUSTICE COLLINS said he was of the same opinion. The effect of rule 176 was to constitute a *cessio bonorum* on the part of Reaveley of all his assets. It seemed to him that the case in the House of Lords was practically a decision to that effect. The plaintiff, therefore, clearly became owner of the shares, and the defendants could not refuse to pay the price to the true owner.

LORD JUSTICE ROMER delivered judgment to the same effect.

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } Feb. 22.

SYKES AND ANOTHER V. SOWERBY URBAN DISTRICT COUNCIL.*

Local Government—Sewers—Vesting in local authority—Exceptions—"Sewers made by a person for his own profit"—Public Health Act, 1875, sec. 13 (1).

Decision of Divisional Court ([1899] 1 Q.B., 979) reversed.

This was an appeal by the plaintiffs from the decision of the Divisional Court (Mr. Justice Darling and Mr. Justice Channell) reversing the judgment of the Halifax County Court Judge; reported in [1899] 1 Q.B., 979. The plaintiffs were quarry owners, and they brought an action for an injunction to restrain the defendants, who were the local sanitary authority, from sending polluted water into a stone drain within the defendants' district which had been made by the plaintiffs' predecessors in title to carry away the rain and surface water from their quarry, and for damages. Some 20 years ago the plaintiffs' predecessors in title constructed a drain within the defendants' district to collect and carry into a public sewer in the district of another local sanitary authority the rain and surface water which came on to their land down a lane known as Carr-lane, within the defendants' district, and which would otherwise have flowed into the quarry. As the quarry workings advanced the course of the drain was from time to time altered. In 1896 the defendants turned polluted water into this drain for the purpose of enabling it to pass through it into the public sewer. The plaintiffs alleged that in consequence their drain was insufficient to carry off the water, and the water percolated into the quarry, and flooded it and rendered the working more expensive. The defendants contended that the drain was a "sewer" vested in them, and was not the private drain of the plaintiffs. The County Court Judge held that the drain was a "sewer" within the definition of that term in section 4 of the Public Health Act, 1875: that by section 13 it would vest in the defendants unless it came within exception (1) as a sewer made by the plaintiffs for their own profit. He found that the drain was constructed for the more economical and convenient working of the quarry and in order that the land might be worked more profitably. He held therefore that the drain not having been made for sanitary or ordinary drainage but for the more beneficial use and occupation of the land was a sewer made by the plaintiffs for their own profit, within exception (1) in section 13, and consequently did not vest in the defendants. The defendants, therefore, had no right to discharge water into the drain. He accordingly granted the injunction, and assessed the damages at £20. The Divisional Court held that the exception did not apply, and entered judgment for the defendants. The plaintiffs

appealed. By section 13 of the Public Health Act, 1875, "all existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, except (1) sewers made by any person for his own profit . . . shall vest in and be under the control of such local authority."

Mr. Butcher, Q.C., and Mr. T. F. Byrne appeared for the plaintiffs; Mr. J. Lawson Walton, Q.C., and Mr. W. J. Waugh appeared for the defendants.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that he agreed that this drain was a "sewer" within the Public Health Act, 1875. The County Court Judge found that the drain was constructed for the more economical and convenient working of the quarry and in order that the land might be worked more profitably, and that as the drain was not made for sanitary drainage purposes, but for the more beneficial use and occupation of the land it was a sewer made by the plaintiffs for their own profit within exception (1) in section 13. The Divisional Court reversed that decision. Section 4 of the Public Health Act, 1875, defined "drain" as "any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." The drain in the present case was not a "drain" within that definition. A "sewer" was defined in section 4 as including "sewers and drains of every description, except drains to which the word 'drain,' interpreted as aforesaid, applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." In his Lordship's opinion this drain was a "sewer" within that definition. That being so, did it vest in the defendants as the local authority? That depended upon section 13, which was in Part 3 of the Act, headed "Sanitary Provisions." That section provided that all existing and future sewers should vest in the local authority, except, first, "sewers made by any person for his own profit." Those words had been the subject of decision on many occasions. The decisions showed that house drains did not come within the exception. The drain in the present case was not a house drain. Considering the findings of the County Court Judge, why was it not a drain made for the plaintiff's profit? It was made in order that he might work the quarry more economically and conveniently. In "Minehead Local Board v. Luttrell" ([1894] 2 Ch., 178) Mr. Justice Romer went through the prior authorities and pointed out that all of them related to house drains. It was there held that sewers made by a landowner for the purpose of draining a town, the greater part of which stood on his own lands, and for the use of which sewers he levied and was paid a sewer rate by all persons whose houses were connected with his sewers, were sewers made by him for his own profit, and did not vest in the local authority. Then in "Croystale v. Sunbury-on-Thames Urban Council" ([1898] 2 Ch., 515) Mr. Justice Stirling held that a sewer, which was not made for ordinary drainage purposes, but to enable the land on which it was made to be occupied more profitably, or to avoid expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, was made for the profit of the owner within the meaning of the section, and did not vest in the local authority. Upon the facts and findings of the County Court Judge in the present case he (the Lord Justice) was of opinion that this sewer was made for the profit of the plaintiff within exception (1) in section 13, and there-

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

fore did not vest in the defendants. The appeal must therefore be allowed.

LORD JUSTICE COLLINS concurred. It would seem as if the definitions in section 4 swept everything which could be described as a drain into the ambit of the Public Health Act, 1875, and though the provisions of Part 3 of the Act were described as "Sanitary Provisions," a drain made for a non-sanitary purpose, *prima facie*, would come within the Act. How were such drains excluded from the Act? That was done by introducing exceptions in section 13. An ordinary agricultural drain would, apart from the exceptions, be swept into the ambit of the Act, and it was only got out of the Act by means of exception (1) in section 13. In his opinion this drain was made for the profit of the plaintiffs within the meaning of the exception, and therefore did not vest in the defendants.

LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—Williamson, Hill, and Co., for Longbottom and Sons, Halifax, for the plaintiffs; Helliwell, Harby, and Co., for Jubb, Booth, and Helliwell, Halifax, for the defendants.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } Feb. 22.

THE BRENDA STEAMSHIP COMPANY (LIMITED) V. GREEN.*

Ship—Charter-party—Discharge of cargo—Stipulation to exclude custom of the port—Liability of charterers.

Decision of Mathew, J. (15 *The Times* L.R., 330, affirmed.)

This was an appeal from the judgment of Mr. Justice Mathew's in favour of the plaintiffs, reported in 15 *The Times* L.R., 330; 4 Com. Cas., 209. The plaintiffs were the owners of the steamship *Brenda*, and they claimed from the defendants, the charterers of the vessel, a proportional part of the cost of the discharge of a cargo of timber at the Surrey Commercial Docks. The charter-party, which was the Chamber of Shipping Wood Charter (Scandinavia and Finland), 1898, contained the following clause:—"The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense, any custom of the port notwithstanding." It was admitted by the plaintiffs that, in the absence of any provision in the charter-party negating it, there was a custom in the Port of London with regard to timber ships which enlarged the ordinary meaning of "alongside" and "delivery" by requiring the shipowner to do work outside his ship, in placing the timber in the barge or on the quay, but that such custom did not require him to stow the timber in the barge, or to stack it on the quay. The sum claimed in this action represented the cost of discharging from the ship's rail into barges and on to quay. The defendants denied that the above clause in the charter-party imposed upon them any liability for the cost of discharge into barges or on to quay. Mr. Justice Mathew held that the custom was by the terms of the charter-party excluded, and gave judgment for the plaintiffs. The defendants appealed.

Mr. ENGLISH HARRISON, Q.C., and Mr. D. C. LECK, for the defendants, contended that the words in the charter-party, "any custom of the port notwithstanding," referred to the previous words, "at charterers' risk and expense," and not to the words, "to be brought to and taken from alongside." The custom was therefore applicable. They referred to "Aktiesel-

kab Helios v. Eokman" (2 Com. Cas., 70, 163; [1897] 2 Q.B., 83); "Stephens v. Winttingham" (3 Com. Cas., 169); "The Nifa" ([1892] P., 411).

Mr. T. E. Scrutton, for the plaintiffs, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the judgment of the learned Judge was right. The parties had taken good care to cut out the custom of the port. Apart from any custom the shipowner had only to offer the cargo over the ship's rail, and it was the duty of the consignee to take it from there. The operation was a joint operation, the shipowner bringing the cargo to the ship's rail and the consignee taking it from there. In the present case the charter-party excluded any custom of the port. That exclusion was not limited to the words "at charterers' risk and expense," but covered the whole sentence. That being so, it was the duty of the charterers to take the cargo when it was offered to them over the ship's rail. They did not do so, and they must refund to the shipowners the expense incurred by them in taking it from the ship's rail into barges and on to the quay.

LORD JUSTICE COLLINS agreed. Apart from the custom of the port the words "brought to and taken from alongside" meant brought to and taken from the ship's rail, and that meaning could only be extended by the custom of the port. If, therefore, the custom of the port was excluded, as in his opinion it was in the present case, the extended meaning sought to be given to the words was not applicable.

LORD JUSTICE ROMER agreed. He thought the argument of the defendants was too fine. The meaning of the clause in question in the charter-party was that, in considering the relative obligations of the shipowners and charterers as to loading and discharging the cargo, the custom of the port was to be disregarded, and the case was to be governed by the general law apart from any custom.

[Solicitors—Botterell and Roche, for the plaintiffs; Lowless and Co., for the defendants.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } Feb. 23.

BOWEN V. DUC D'ORLÉANS.*

Contract—Offer and acceptance—Negotiations for sale—Statute of Frauds.

Held, no concluded contract.

This was an appeal by the defendant from the judgment of Mr. Justice Wills, reported in *The Times* of May 8, 1899. The action was brought by the plaintiff, an electric launch builder, who was the owner of a portion of Eel-pie Island, on the Thames at Twickenham, to recover damages for an alleged breach of contract by the defendant to purchase his interest in the island. In 1897 the defendant, who occupied York-house, Twickenham, was anxious to secure the island. The matter was placed by him in the hands of Messrs. Rogers, Chapman, and Thomas, estate agents, and the plaintiff put himself in communication with them and offered to sell his interest to the duke for £4,500 on the condition that he would grant him back a lease of certain works on the island. A long correspondence passed between Messrs. Rogers, Chapman, and Thomas, who were admitted to be the duke's agents in the matter, and the plaintiff's solicitors and the duke's solicitors, Messrs. Farrer and Co., and the plaintiff executed the contract for sale. The Duc d'Orléans declined to sign the contract

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

on the ground that he had made it a condition that he would buy the whole island or no part of it at all. The defendant contended that he did not enter into an agreement to purchase the plaintiff's portion of the island, the matter not having gone beyond negotiation; and if there was such an agreement, it was one which did not comply with the Statute of Frauds. The question as to this turned wholly on the correspondence between the representatives of the parties. The plaintiff, on the other hand, maintained that the correspondence showed that there was a concluded agreement, and that there was a sufficient memorandum signed by the defendant's agents to satisfy the Statute of Frauds. The plaintiff also submitted that the defendant was bound by the signature of his solicitors to the finally agreed draft contract. The learned Judge came to the conclusion that a concluded contract was made on or about February 25, 1898, and that two letters of February 25 and March 23, signed by Messrs. Rogers, Chapman, and Thomas, the latter containing the draft contract, amounted to a sufficient memorandum in writing to satisfy the Statute of Frauds. It appeared that this draft contract, when received by the defendant's solicitors, was sent by them to Messrs. Rogers, Chapman, and Thomas in order to get the defendant's approval, and Messrs. Rogers, Chapman, and Thomas, on March 23, returned the draft to the defendant's solicitors approved by them with certain observations on it, and the defendant's solicitors sent it on to the plaintiff's solicitors. The latter made certain alterations in it, and returned it to the defendant's solicitors, who, on April 1, wrote to the plaintiff's solicitors that they approved of the draft as altered and signed by them. Mr. Justice Wills said that the defendant's solicitors were only employed as solicitors to put the contract into shape, and that the draft signed by them on April 1 did not satisfy the Statute of Frauds, but that, as above stated, the letters of February 25 and March 23, and the draft contract enclosed in the last letter, contained a sufficient memorandum in writing of the contract to satisfy the statute, and that the subsequent discussion upon the contract was merely as to putting it into form. He accordingly gave judgment for the plaintiff and assessed the damages at £1,540.

Mr. Dickens, Q.C., and Mr. Muir Mackenzie appeared for the defendant; Mr. Robert Wallace, Q.C., Mr. E. M. Pollock, and Mr. Harold S. Simmons appeared for the plaintiff.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the point which was taken here was not taken before Mr. Justice Wills. In order to succeed, the plaintiff must make out two things; first, that there was a contract *de facto*; and secondly, that there was a sufficient memorandum in writing of the contract signed by the party to be charged or by his agent thereunto lawfully authorized. In his opinion the plaintiff could not succeed unless he made out that Messrs. Farrer and Co., the defendant's solicitors, were agents for the defendant to enter into a contract for him. There was not a particle of evidence that Messrs. Farrer and Co. were acting otherwise than as solicitors for the defendant. The agents to effect the contract were Messrs. Rogers, Chapman, and Thomas. Messrs. Farrer and Co. were employed to draw up the contract in point of form and to get it stamped, and it was no part of their duty as solicitors to enter into a contract for the defendant. In his opinion the plaintiff could not succeed unless he made out that on April 1, 1898, Messrs. Farrer and Co. were authorized as agents to enter into the contract. He was unable to agree with Mr. Justice Wills that there was a concluded contract on or before March 23. But he pre-

ferred to rest his judgment on this, that the plaintiff had to rely on the signature of Messrs. Farrer and Co., and that signature was not sufficient within the Statute of Frauds. The appeal would therefore be allowed, but there would be no costs of the appeal.

LORD JUSTICE COLLINS agreed. It was clear law that a solicitor employed to put a contract into shape was not an agent whose signature was sufficient within the Statute of Frauds. The question was whether upon the documents they could get a memorandum in writing to satisfy the Statute of Frauds. Mr. Justice Wills spelt the memorandum principally out of the letters of February 25 and March 23 and the draft contract. That learned Judge thought that the former letter contained every term of the contract, except the duration of the lease. That letter, however, would not bind the purchaser to take the property subject to a right of way across it. There was nothing in the letter about a right of way. That letter admittedly was not sufficient in itself. The learned Judge, thinking that the only other term of the contract necessary to get was the duration of the lease, got that from the letter of March 23 enclosing the draft contract. If that letter and the draft amounted to an unqualified acceptance of the terms by the defendant through his agent, he should agree with Mr. Justice Wills; but upon the face of the documents an exception was taken which went to the root of the contract and was not a mere matter of form—namely, that the draft contract was made subject to a right of way, which was not accepted. Therefore that was not a sufficient memorandum within the statute, and in the exchange of documents which followed no such memorandum could be found.

LORD JUSTICE ROMER was of the same opinion. In his view there was no concluded contract at all. But assuming that there was a concluded contract, in order to get a memorandum in writing of it to satisfy the Statute of Frauds the plaintiff must rely upon Messrs. Farrer and Co.'s signature on April 1. But Messrs. Farrer and Co. were only employed as solicitors, and it was no part of their duty to sign a contract for the purchaser. There was therefore no memorandum in writing to satisfy the statute. His Lordship added that it was a hard case upon the plaintiff.

Court of Appeal (A. L. Smith, }
Collins, and Romer, L.J.J.) }

1900.
Feb. 24.

CASS V. BUTLER.*

Master and Servant—Master's liability to servant
—Workmen's Compensation Act, 1897—
“Undertakers,” who are.

A sub-contractor is not an “undertaker” within the Act.

This was an appeal from the decision of Judge Greenhow, the Leeds County Court Judge, in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, Ann Cass, was the widow of Henry Cass, who, at the time of the accident, was a painter in the employment of the appellant, and she claimed compensation under the Act on behalf of herself and her children, and also on behalf of Cass's mother. It appeared that a builder and contractor named Isaac Gould had entered into a contract to build and complete an electrical station. Gould then entered into a sub-contract with the appellant, who was a painter, that the latter should do the whole of the painting work of the building. The building was being constructed by means of a scaffolding, and was over 30ft. in height. On June 17, 1899, Cass was engaged in

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

painting the iron girders of the roof, and was standing on the scaffolding belonging to Gould, which was used in the erection of the building. While Cass and another man named Crowther, also in the employment of the appellant, were so engaged a plank broke and they fell and were killed. It was admitted that this new building was being painted for the first time. The County Court Judge held that the appellant was an "undertaker" within the meaning of the Act, and that the painting of the new building was "construction," and he made an award of £235 6s. in favour of the respondent. By section 4 of the Workmen's Compensation Act, 1897, "Where, in any employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman . . . by such contractor, or would be so payable if such contractor were an employer to whom this Act applies. Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section." By section 7, subsection 2, the term "undertakers" is defined to mean, in the case of a building, "the persons undertaking the construction, repair, or demolition."

Mr. RUEGG, Q.C., and Mr. A. POWELL, for the appellant, contended that the appellant was not an "undertaker" within the meaning of the Act. The contractor, Gould, was the undertaker, as he was "undertaking the construction" of the building within the definition of "undertakers" in section 7, subsection 2. A sub-contractor was not an undertaker. Section 4 clearly showed that the contractor was liable as the undertaker, though he might be entitled to be indemnified by the sub-contractor. This was not like the case of "*Mason v. A. R. Dean (Limited)*" (*ante*, p. 212), where different contractors agreed with the building owner to do separate parts of the construction, and in that case the Court held that each contractor was an undertaker. In the present case one contractor agreed with the building owner to do the whole of the work, and he sub-contracted with the appellant for the painting work. The appellant was therefore not liable. Secondly, painting was not "construction." In "*Wood v. Walsh and Sons*" ([1899] 1 Q.B., 1,009) it was held that painting the outside of an old house was not "repair." There was no distinction between that case and the present. The decision of the County Court Judge was therefore wrong.

Mr. TEMPLE FRANKS, for the respondent, contended that there was nothing in the Act to show that a sub-contractor could not be an "undertaker." In "*Mason v. A. R. Dean (Limited)*" it was decided that there could be several undertakers in respect of the construction of one building. If that were so, a sub-contractor could be an undertaker, and whether he was so or not was a question of fact in each case. The County Court Judge found that in this case the appellant was an undertaker, and no appeal lay from his finding. Section 4 was not against the respondent. That section merely provided a remedy against the contractor in addition to that against the sub-contractor. If the sub-contractor was a man of straw, then the applicant could proceed against the contractor. That was the object of section 4.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the County Court Judge was wrong. Though the Judge's notes were very meagre he understood the facts to be

these:—Gould was a builder and contractor, and he contracted with the building owner to construct the building. Gould then entered into a sub-contract with the appellant, who was a painter, whereby the appellant contracted with Gould to do the whole of the painting of the building. The appellant employed a man named Cass as a painter upon the painting work of the building. The building was a new one and had never been painted before, and one point taken was that the painting was "construction" within the meaning of section 7. That point it was not necessary to determine, because the other point taken was sufficient to decide the case. It was said that the appellant was not an "undertaker" within the Act; that Gould was the undertaker, and that if any one was liable Gould was liable. The question in other words was whether a sub-contractor was an "undertaker" within the Act. It was said on the other hand that the respondent had the option of suing either the contractor or the sub-contractor, as they were both "undertakers." To his Lordship's mind, this latter contention was not correct. That was not the meaning of the Act. "Undertakers" were defined in section 7, subsection 2, so far as material, as meaning persons undertaking the construction, repair, or demolition of a building. In the present case, who had undertaken the construction of this building? The answer must be, Gould. In "*Mason v. A. R. Dean (Limited)*" a firm named Messrs. Moore and Sons had contracted with the building owner for the construction of a theatre, but under powers reserved in Messrs. Moore and Sons' contract the building owner entered into a contract with A. R. Dean (Limited) for the latter to do the decorative work. The deceased man was in the employment of the latter firm, and he was killed while at work on the theatre. This Court held that, as A. R. Dean (Limited) had entered into a contract direct with the building owner to construct part of the building, they were "undertakers" within the Act, and liable as such. That was an entirely different case from the present where a contractor had agreed with the building owner to construct the whole building, and had let out part by a sub-contract to a sub-contractor. Section 4 was strong to show that a sub-contractor was not an "undertaker" within the Act.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER agreed.

[Solicitors—W. Hurd and Son, for H. A. Child, Leeds, for the appellant; Hamlin, Grammer, and Hamlin, for C. Dunn, Leeds.]

Chan. Div. } 1900.
(Cozens-Hardy, J.) } Feb. 24.

IN RE MAUDSLAY, SONS, AND FIELD (LIMITED).*

Conflict of Laws—Company—Receiver for debenture-holders—Creditor attaching foreign debt due to company—French law.

MR. JUSTICE COZENS-HARDY gave judgment in a motion, which raised an important point on private international law, as follows:—By an order made by the Vacation Judge on October 11, 1899, in three actions by debenture-holders receivers were appointed of the undertaking and of the property whatsoever and wheresoever, both present and future of the defendant company, comprised in certain securities therein mentioned. The company has not been wound up. Thomas Piggott and Co. (Limited), whom I will call the claimants, are the holders of a dishonoured acceptance of the company. Among the assets of the company is a debt due from a French firm, Delaunay

* Reported by D. FITZGERALD, Esq., Barrister-at Law.

et Cie. The claimants registered in Paris the dishonoured bill of exchange, and served on Delaunay et Cie. on November 25, 1899, a certain document, the effect of which, and of a subsequent document served on November 24 in Paris, is fully explained by the affidavit of the French advocates, which all parties agreed to accept, in the following terms:—"According to the French law a debt can be assigned or charged, but in order to be operative as against third parties (which denomination includes the creditor's own creditors) it is imperative—(1) that the assignment or charge should be by instrument in writing; (2) that the *ad valorem* registration duty should have been paid thereon; and (3) that formal notice in writing of the assignment or charge should, after such registration, be served upon the debtor by an officer of the French Court called or named a *huissier*. This formal notice can be replaced by the debtor's formal acknowledgment of the assignment or charge in a notarial French deed. When these requirements have been complied with and not before the transferee acquires a legal title to the debt as against third parties as from the date of the formal notice. An assignment or charge of a debt not perfected by registration and subsequent notice to the debtor passes no title whatever to the debt as against third parties, including the assignor's own creditors. We are informed that the above-named plaintiffs claim to hold debentures or debenture stock issued by the defendant company in a form purporting to charge all the property of the defendant company whatsoever and wheresoever, present and future, which by English law comprises the moneys as payable or to become payable to the defendant company by Messrs. Delaunay, Belleville, et Cie. under the conventions mentioned in paragraph 3 of this our affidavit. We say that in the absence of such registration and notice as aforesaid any such debentures or debenture stock has not, according to French law, passed to the holders thereof the moneys payable or to become payable to the defendant company from Messrs. Delaunay, Belleville, et Cie. under the said conventions or given to them any charge upon or interest in the same as against third parties as aforesaid. We are further informed that receivers or sequestrators of all the property comprised in the said debentures or debenture stock have been appointed by this Court on behalf of the said debenture or debenture stock holders. We say that according to French law the said receivers or sequestrators, as such, have no right whatever to receive the above-mentioned moneys, and could not recover the same and would receive no recognition whatever in the French Courts as against attaching creditors. According to French law any creditor, whether French or foreign, who seeks to enforce his claim on a debt owing in France can only do so in accordance with French law, irrespective of the cause of action and of the place where it arose. According to French law any creditor, whether French or foreign, can, if he holds an acknowledgment of debt signed by his debtor, such as a bill or acceptance, attach in the hands of a third party the sums or bills which may belong to his debtor, and thus prevent same being handed over to him. No Judge's authority is required, nor is it necessary that the creditor, if foreign, should be entitled to follow the same course in his own country, French law disregarding entirely foreign laws in matters of procedure which are exclusively governed by the *lex fori*. We have perused the document now produced to us and marked 'B,' which is a copy certified by the process server of the proceedings taken at the request of Thomas Piggott and Co. (Limited). The proceedings comprise the attachment ('opposition') notice of attachment ('dénouciation d'opposition'), the counter notice of attachment ('contre dénouciation d'opposition'),

and have been taken in accordance with French law and constitute an attachment in due form upon which Messrs. Thomas Piggott and Co. (Limited) are entitled to rely to force their claim against the moneys payable, or to become payable to the defendant company, by Messrs. Delaunay, Belleville, et Cie. The notice of attachment contains a citation for the defendant company to appear before the Tribunal Civil of the Seine, who has alone jurisdiction to declare the attachment valid and order the funds attached to be paid over to the attaching creditors. According to French law, when the judgment declaring an attachment valid has become final it operates as an assignment of the funds attached to the attaching creditor, who is entitled to recover same from the party owing same, notwithstanding any subsequent attachments. As long as the judgment declaring the attachment valid has not become final any other creditor could follow the same course as the one followed by Messrs. Thomas Piggott and Co. (Limited) if they have an acknowledgment of debt as aforesaid, and in such case all attachments would rank *pari passu*, the date of the respective attachments giving no cause of preference. When several attachments are notified it is often the practice of the person receiving the attachments to pay the funds he holds into the Caisse des Dépôts et Consignations subject to the attachments so as to assure a legal distribution of same." After stating that the motion now before him was to restrain the respondents from continuing proceedings in France and interfering with the receiver, it had been ordered to stand over on terms of the receivers paying £530 into Court and the claimants withdrawing proceedings in France and having reserved to them the same right to recover their debt and costs out of the £530 they would have had against the debt of Delaunay et Cie., his Lordship continued:—"The motion now comes on before me to determine whether the claimants are or are not entitled to payment out of the fund in Court, it being arranged that (if necessary) the claimants should be treated as applying for liberty to proceed notwithstanding the appointment of receivers. I must decide this case on the footing that the parties now occupy the same position as they did on December 21. At that date the claimants had acquired an inchoate and imperfect title, which would have been in due course made absolute by the Court in Paris unless this Court had thought fit to intervene. It will be convenient to consider the case first without reference to the appointment of the receivers and on the assumption that the debenture-holders have a security, which is no longer a floating security but has become enforceable. It is plain that, according to English law, the debenture-holders have by contract with the company a charge upon all the assets of the company, including this French debt, and the first question which arises for consideration is this, Does the existence of the charge, which is undoubtedly valid according to English law, entitle the debenture-holders to prevent the claimants, who are unsecured creditors and not debenture-holders, from asserting and enforcing such rights as are given to them by French law against this French debt? In other words, is there any equity in favour of the debenture-holders as against the claimants? I think this question must be answered in the negative. The very point seems to have been decided by Vice-Chancellor Wood and Lord Chelmsford in the "*Liverpool Marine Credit Co. v. Hunter*" (L.R., 4 Eq., 62; 3 Ch., 479) in the case of a ship. The mortgagees of a ship were then held not entitled to prevent an English unsecured creditor of the shipowner from taking proceedings at New Orleans which would result in judgment against the ship in disregard of the mortgage, the Court of Louisiana declining to recognize the mortgage as valid. See also "*Norton v. Florence Land Co.*" (7 Ch.D.,

332). It was urged before me that this doctrine applies only to immovable property, or to movable property having actual locality, and that a chose in action has no locality. "*Lee v. Abdy*" (17 Q.B.D., 309). But for many purposes a debt is deemed to have a locality. See "*Commissioners of Stamps v. Hope*" ([1891] A.C., 476); or, as it is sometimes stated, a quasi-locality. It seems to me that I must treat the debt due from Delaunay et Cie. as being situate in France and subject to the French law, and I cannot therefore prevent the claimants at the suit of the debenture-holders from taking such proceedings as the law of France allows for recovering their debt out of this French asset. The next question, or rather the same question in a different aspect, is this. The debenture-holders having, according to English law, a good assignment of the French debt, but having according to French law no such assignment, and the claimants having according to French law a good inchoate charge or assignment, which ought to prevail? It seems to me that I am bound to hold that that assignment which alone is recognized by the law of France ought to prevail, and that the claimants have a better title than the debenture-holders. This is the view taken by Mr. Dicey in his work on the Conflict of Laws (Rule 141):—"An assignment of a movable which cannot be touched—i.e., of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt) is valid." I am not satisfied that the authorities cited by him necessarily involve this principle, but I think it is correct, and, indeed, is a necessary consequence from the admission that a debt has a locality or quasi-locality. Apart, therefore, from the appointment of receivers, I think the claimants ought to succeed. It remains to consider whether the appointment of receivers makes any difference. It was argued with great force that the receivers were appointed over all the property comprised in the debentures, and that it was a contempt of Court to intercept the property which ought to come into the hands of the receivers. On the other hand, it was argued that the order appointing receivers in this general form did not extend to property abroad, and that in any view there had been no interference with the possession of the receivers such as would constitute a contempt. It is not altogether easy to ascertain the origin, nature, and extent of the powers of a receiver. A receiver is an officer of the Court, and the Court does not allow the possession of its officer to be interfered with without its leave. When the Court appoints a receiver it requires the parties to the action to give up possession to the receiver of the property comprised in the order, and treats them as guilty of contempt if they refuse to do so. The Court will grant a receiver a writ of possession (Order XLVII., Rule 2) or a writ of assistance "*Wyman v. Knight*" (39 Ch.D., 165) to enable him to recover possession. And it will order tenants to attorn to the receiver. So long as the property is within the territorial jurisdiction of the Court there is no difficulty, at least in theory, in putting the receiver in actual possession, and when the receiver is in possession the Court does not allow his possession to be interfered with without leave. For example, no judgment creditor of the company would be allowed to levy execution upon the property of the company in England now in the possession of the receivers. It is well settled that the Court can appoint receivers over property out of the jurisdiction. This power, I apprehend, is based upon the doctrine that the Court acts in *personam*. The Court does not and cannot attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents such steps being taken as are necessary to enable its

officer to take possession according to the laws of the foreign country. [His Lordship here referred to the cases "*Keys v. Keys*" (1 Bea., 425), "*Smith v. Smith*" (1 Hare, Appen. lxxi.), and "*Houlditch v. Marquis of Donegall*" (8 Bli., N.S., 301).] In other words, the receiver is not put in possession of foreign property by the mere order of the Court. Something else has to be done, and until that has been done in accordance with the foreign law, any person not a party to the suit who takes proceedings in the foreign country is not guilty of a contempt either on the ground of interfering with the receiver's possession or otherwise. For this purpose no distinction can be drawn between a foreigner and a British subject. I have not been able to find any authority on which this precise point has been discussed, but on general principles I think I should not be justified in holding that the claimants by taking proceedings in Paris were guilty of a contempt of Court. If, however, I am wrong in this view, and there has been a contempt, it seems to me that I ought to allow the claimants to proceed notwithstanding the appointment of receivers. It cannot be reasonable that I should deprive English creditors of a right against French assets, which French creditors undoubtedly enjoy. Upon the whole I think the application fails, and I must order payment of the dishonoured bill and the costs of the French proceedings and the costs of this application out of the funds in Court, and the plaintiff will pay the amount, if any, by which the fund in Court is insufficient to answer the costs.

Mr. Vernon Smith, Q.C., and Mr. Mark Romer were for the receivers; Mr. Theobald, Q.C., and Mr. Dunham for the claimants.

[Solicitors—Nicholson, Graham, and Graham, for the receivers; Tarry, Sherlock, and King, for the claimants.]

Q.B. Div. } 1900.
(Kennedy, J.) } Feb. 26.

PABSONS V. THE NEW ZEALAND SHIPPING COMPANY (LIMITED).*

Ship—Bill of lading—Short delivery—Incorrect description of goods in bill of lading—Onus of proof on shipowner—Bill of Lading Act, 1855, sec. 3.

The plaintiff claimed damages for the non-delivery of certain carcasses of lambs shipped from New Zealand on board the steamship *Fifeshire*. The defendants were the agents of the owners of the *Fifeshire* and had signed the bills of lading. The facts and arguments are fully stated in the judgment. Section 3 of the Bills of Lading Act, 1855, upon which the plaintiff relied, is as follows:—"Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board of a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board, provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder claims."

Mr. Danekwerts, Q.C., and Mr. Loehnis appeared for the plaintiff; Mr. Carver, Q.C., and Mr. Leck for the defendants.

MR. JUSTICE KENNEDY read the following judg-

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

ment :—This is an action brought by the plaintiff, the consignee in London of a quantity of lambs' carcasses from Timaru, New Zealand, against the defendants, who were the agents in New Zealand for the owners of the steamship *Fifeshire*, in which the goods were carried, and who signed the bills of lading. The claim is for damages for short delivery of 154 carcasses. Each of the bills of lading, two in number, relating to the claim in this action describes the goods included in it as "marked and numbered as in the margin," the body of the bill of lading in the one case giving a total of 1,166 carcasses, and the marginal description containing (*inter alia*) "Sun Brand, 488 X., 226 carcasses." The body of the bill of lading in the other case, gives a total of 1,076 carcasses, and the marginal description contains (*inter alia*) "Sun Brand, 622 X., 608 carcasses." On the ship's arrival in London 53 carcasses of the former description, so far as regards the figure 488, and 100 carcasses of the latter, so far as regards the figure 622, were found to be wanting. But there were on board 21 carcasses marked "Sun Brand, 388 X.," and 102 carcasses marked "Sun Brand, 522 X.," which were not required by any other importer, and to which no bills of lading, given in respect of the cargo laden on the *Fifeshire*, related, except, as the defendants contend, the two bills of lading already mentioned of which the plaintiff was the holder. If these carcasses were treated as carcasses included in these two bills of lading, although incorrectly described in the marginal description, as being marked "488" instead of "388" in the one case, and "622" instead of "522" in the other, there was still a deficiency in the number ready for delivery of 31 carcasses. The plaintiff in this action claims damages for the non-delivery of 154 carcasses. The defendants admit the claim in regard to the deficiency of 31 carcasses, and in respect of that they paid into Court, after service of the writ of summons, a sum of £29, which exceeds the net invoice cost at the rate of 8s. 8d. per stone of 8lb. By the terms of the bill of lading the shipowners' liability in case of loss, or detention, or injury to goods for which they may be responsible is to be calculated on, and in no case to exceed, the net invoice cost. I hold that the defendants are entitled to the benefit of this clause, and therefore in regard to the plaintiff's claim as regards 31 carcasses, the plaintiff's claim is satisfied by the payment into Court. In regard to the larger subject of the claim—123 carcasses—the main issue is this. The defendants say :—"The 21 'Sun Brand, 388 X.,' and the 102 'Sun Brand, 522 X.,' really formed part of the plaintiff's consignment, and were erroneously described in the margins of the two bills of lading, in the one as '488' instead of '388,' and in the other as '622' instead of '522.' We carried these carcasses as part of the goods included in the two bills of lading; we tendered the plaintiff these as part of his consignment; we therefore performed our contract, and his refusal to accept them as part of his goods was unjustifiable." The plaintiff, on the other hand, does not admit the fact that these carcasses did form part of his consignment in the sense of being shipped, and intended to be included in the totals set forth in the bills of lading; and further he says, as a matter of law, that the defendants, having by their manager, W. Bennett, signed the bills of lading, are concluded by section 3 of the Bills of Lading Act, 1855, and cannot be allowed to prove an error in the marginal statement of the bills of lading as to the numerical marking of 123 of the carcasses (21 in the one case and 102 in the other). He contends that these bills of lading, so signed, are not only conclusive evidence against the defendants of the total number of carcasses therein respectively stated to be shipped and of the carcasses being of the quality

"Sun Brand, X.," and of the grade of weight designated in the margin in the case of one bill of lading by the final letter "8" and in the other by the final letter "2," but also conclusive evidence of the shipment of quantities designated in the margins of these bills of lading with the marginal markings "622" and "488." Upon the evidence and statements before me, I find the facts, so far as they appear to me to be material, to be these :—The Sun Brand is a registered brand of the shippers, the Christchurch Meat Company (Limited), under whose form of bill of lading signed by the defendants' manager the meat in question was shipped. That brand and the "X." denote quality; of the three-figure numbering, whether 488, 388, 622, or 522, the final figure is important because it denotes what may be called the classification of weight, as—e.g., 35-40lb., or as the case may be. The duplication of this figure, 88, 22, and so on is a peculiarity of these shippers to indicate both that the meat comes from their factories, as the killing and freezing places appear to be called, and that the meat is their own property, and has not been frozen and shipped by them as agents for other persons. The first figure, as e.g., the 6 in 622, or the 4 in 488, simply records the date of killing and freezing, and so for the purposes of his own accounts it has its use or importance for the shipper, just as the duplication of the 2 or the 8 has; but neither the first figure, nor the duplication of the following figure has, as I understand the evidence, any distinctive value as regards the market for the meat. In other words, and to sum up, given the "Sun Brand" and "X." and the final figure, the meat is as a commercial article absolutely unaffected in character or value whether it is marked "522" or "622," "488" or "388." Secondly, I find as a fact that in practice, and according to the course of business in shipment, the only tally at Timaru made on behalf of the ship is a tally of the number of carcasses. The work proceeds rapidly day and night, and no attempt is made to check the shipper's marks or numbers upon the individual carcasses. The carcasses are brought in insulated vans from the freezing store, some distance away, to the mole or breakwater where the ship lies, and thence are shot at once down a shoot through the ship's side into the refrigerating chamber of the ship. Thirdly, I find as a fact in regard to the carriage and discharge that there were no other shipments on board the *Fifeshire* of "Sun Brand, X.," with duplicated 2 or duplicated 8 under any bills of lading other than those of which Parsons became the holder; nor were there any claims by any other consignees for the 21 "388" or the 102 "522," which the defendants sought to deliver to the plaintiff as part of his consignment. So far as I can discover in the documents, though I do not, on my note, find any oral statement in evidence to that effect, no "Sun Brand" at all were shipped under any bills of lading except these to any consignees. In the result I have come to the conclusion upon the question of fact that the defendants have discharged the burden of proof which undoubtedly lay upon them, and that the true inference from the evidence is that the 21 "Sun Brand, 388 X.," and the 102 "Sun Brand, 522 X.," which the defendants asked the plaintiff to take as part of his consignment, did respectively form part of the quantities set forth in the two bills of lading, and were by the shipper's error incorrectly included in the respective marginal specifications under "488" and "622." Upon the point of law I have come to the conclusion that the defendants are not prevented by section 3 of the Bills of Lading Act, 1855, from showing and relying upon these facts in order to establish that 21 fewer carcasses "Sun Brand, 488 X." and 102 fewer carcasses "Sun Brand, 622 X.," were shipped than are stated in the margins of the bills of lading, and that these were shipped as part

of the total quantities stated in these bills of lading respectively, 21 "Sun Brand, 388 X.," and 102 "Sun Brand, 522 X." I so hold upon the ground that in my view the section referred to does not operate to make the bill of lading conclusive as to the statement of marks upon the goods shipped where those marks do not affect or denote substance, quality, or commercial value. To interpret this statutory enactment, as Mr. Danckwerts for the plaintiff has invited me to interpret it, so as to prevent the party treated as the party responsible for the carriage of goods under a bill of lading and I will assume signing the bill of lading, from showing, not that he has carried fewer goods than the bill of lading specifies, or goods different in substance or quality or value from those which are specified in the bill of lading, but that the bill of lading has been incorrectly filled up in regard to the statement of the mark put upon parcels of goods by the shipper for the purposes of identification or record would be, as it appears to me, to strain the meaning of the section. It was not unfairly urged, I think, by Mr. Carver, for the defendants, that if the statute operates in such a case as this the shipper who signed a bill of lading would be conclusively bound by a clerical error in description of an immaterial mark in a bill of lading. No authority, as it appears to me, has been cited which really supports such an interpretation. "*Bradley v. Duniface*" (31 *L.J.*, Ex., 210; 32 *L.J.*, Ex., 22) is, I think, distinguishable. The weight there, as the judgment of the Exchequer Court delivered by Mr. Justice Wightman points out, was of some importance in the contract. The plaintiff's counsel suggested in this case an importance of the mark in regard to insurance; but it appears to me that a difficulty in matters outside the contract of the shipment or the nature and value of the goods themselves is not a matter which ought to affect the question of the applicability of the statute to such a case as the present. Taking this view of the case, it is unnecessary for me to consider the three other points which Mr. Carver also relied on. First, that the defendants, on the face of the bills of lading, signed as agents only for the shipowners, as, in fact, they were, and therefore could not be successfully sued; secondly, that in regard to the Bills of Lading Act, 1855, section 3, by the operation of the clause of these bills of lading, "The ship will not be responsible for correct delivery unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark or number and address," the effect of that section, if otherwise such as the plaintiff contended for, would be destroyed (see "*Jessel v. Bath*," *L.R.* 2, Ex., 267); and, thirdly, that, as the value and nature of the carcasses offered to the plaintiff by the defendants were the same as those of such carcasses as should have been delivered to him under the marks stated in the bills of lading, the plaintiff, as he was tendered an equivalent, could claim no damages. I will only say, so far as regards the last point, that it seems to me now, as I said during the argument, untenable. A carrier who fails to deliver cannot avoid the consignee's claim for damages by offering something which is not the thing to which the consignee is entitled, because it would be an equivalent in value. The first point is not, I think, open to the defendants, because they have accepted in this action the position of the shipowners as carriers of the goods. There is more, I think, to be said for the second point, but I prefer to rest my judgment upon the ground which I have stated.

Judgment for the defendants.

Mr. DANCKWERTS stated that there were some other carcasses marked "Sun Brand X. 62" and "48" but

not with the duplicated final figure, shipped to consignees other than the plaintiff.

The learned JUDGE said that that fact did not in any way affect his judgment.

[Solicitors—Charles Butcher; W. A. Crump and Son.]

House of Lords (Lord Halsbury, L.C., } 1900.
Lords Macnaghten, Morris, Shand, } Feb. 27.
Davey, Brampton, and Robertson)

SEATON V. BURNAND.*

Insurance—Guarantee of solvency—Disclosure of material facts.

Decision of the Court of Appeal (15 *The Times* L.R., 297), ordering a new trial, reversed.

This was an appeal from an order of the Court of Appeal, dated March 25, 1899, that the verdict of a special jury and the judgment of Mr. Justice Bigham, on the trial of the action on January 11 and 12, 1899, in favour of the plaintiff—appellant in the House of Lords—should be set aside and a new trial heard. The case is reported below (15 *The Times* L.R., 297; *L.R.* [1899], 1 Q.B., 782; 68 *L.J.*, Q.B., 631). The questions in this appeal arose out of a curious policy at Lloyd's—viz., one guaranteeing the solvency of a person who was surety for a debt of large amount. Mrs. Seaton, the appellant, plaintiff in the action, claimed £240 under a contract in writing dated December 2, 1897, underwritten by the respondent Burnand for £240, whereby the respondent guaranteed the solvency of Sir Frederick Seager Hunt, in respect of a promissory note for £15,000 given by Major-General Barwell, payment whereof was guaranteed by the said Sir Frederick Seager Hunt. The respondent in his defence pleaded:—(i.) That the appellant by the said contract represented and warranted and it was a condition precedent to liability under the contract:—(a) That the appellant had advanced to Major-General Barwell the sum of £15,000; (b) that the said loan of £15,000 had been made by the appellant to the said Major-General Barwell in the ordinary course of business, and either without interest or at a reasonable rate of interest. That the said representations were untrue and the said warranty was broken, and the said condition precedent was not performed. (ii.) That the appellant represented to the respondent thereby inducing him to enter into the contract:—(a) That the said Sir Frederick Seager Hunt was a man of great wealth, and that his only other liability was a bill for £25,000 or thereabouts; (b) that the transaction was a loan made in the ordinary way of business but that as the lender was a lady her husband desired to obtain the contract of guarantee sued upon for better security. That the said representations were untrue in fact and that they were made fraudulently or recklessly. (iii.) That the appellant fraudulently concealed from the respondent, thereby inducing him to enter into the contract, the following facts:—(a) That part of the alleged advance was only a renewal of an old loan; (b) that 30 per cent. interest and a bonus was being charged; (c) that the appellant's name was only used in the transaction to conceal the fact that the transaction was in fact being carried out by another. That these facts were well known to the appellant but were unknown to the respondent and were material to be known to him. Mrs. Seaton, the appellant, who was a lady of considerable private means, on October 21, 1897, advanced to Major-General Barwell £4,500 on the security of his promissory note for that amount

*Reported by J. EYNE THOMPSON, Esq., Barrister-at-Law.

becoming due on January 24, 1898. Such advance was effected by payment of a sum of £4,125 to Major-General Barwell, being £4,500 less interest for the period of three months. This loan was guaranteed by Sir Frederick Seager Hunt. In November, 1897, Major-General Barwell was desirous of procuring a further advance out of part of which the loan of October, 1897, should be repaid, and on December 3, 1897, Mrs. Seaton advanced to him a sum of £15,000 on the security of his promissory note for that amount becoming due on June 6, 1898. Such advance was effected by handing back to Major-General Barwell the promissory note for £4,500 which was not due till January 24, 1898, and by giving him a cheque for £8,250, the balance of the £15,000 being retained to satisfy the interest on the advance. This loan also was guaranteed by Sir Frederick Seager Hunt. Major-General Barwell agreed in writing on December 3, 1897, to pay interest on £15,000 at the rate of 30 per cent. if the note was not paid on maturity. Mrs. Seaton desired a further security for repayment, and accordingly through Mr. Lion, a broker at Lloyd's, proposals were made to the respondent, Mr. Burnand, a broker and underwriter at Lloyd's, who with others had for some years made a business of guaranteeing loans, to guarantee the solvency of Sir Frederick Seager Hunt. Mr. Lion and Mr. Burnand were both called as witnesses at the trial, and there was a conflict of evidence as to what passed between them, but it was common ground that after receiving from Mr. Lion the original request to guarantee the loan, Mr. Burnand (who stated that he said, "It is a funny thing—we will see whether Sir Frederick Seager Hunt is as rich as all this. We will go and ask") went with Mr. Lion and Mr. Fleming, another broker and underwriter, to Mr. Shand, the manager of Parr's Bank, where Mr. Burnand banked, on two occasions to make inquiries as to the pecuniary position of Sir Frederick Seager Hunt, and was informed by Mr. Shand that Sir Frederick Seager Hunt had a certain amount of paper out, but he (Mr. Shand) thought he was good for this loan. Mr. Burnand said in his evidence that on hearing this he thought he had the best authority on the subject, and a slip containing a proposal for guarantee was prepared and initialled by those underwriters, who were ready to guarantee Sir Frederick Seager Hunt's solvency. The original premium asked on this slip was 40s. per cent. for six months, which was altered by the first underwriter, Mr. Heath, to 50s. per cent., representing a payment at the rate of 5 per cent. per annum on the original loan by Mrs. Seaton. Neither Mr. Burnand nor any other underwriter asked any question at the time as to the rate of interest which Mrs. Seaton was receiving on the original loan, but Mr. Burnand said at the trial that he presumed between 8 and 9 per cent. was being paid. Thereupon the contract sued on was on December 2, 1897, drawn up and signed by each of the guarantors, being stamped with a 6d. stamp for each person guaranteeing. At the conclusion of the evidence Mr. Justice Bigham submitted to the counsel for the parties the questions he proposed to ask the jury. Sir Robert Reid, Q.C., who was the leading counsel for the respondent, after consultation with Mr. Carson, Q.C., who was with him, and Mr. Lawson Walton, Q.C., who appeared for Mr. Heath, another guarantor, stated that there were no additional questions or any variations in the questions asked, which he could suggest. Counsel for the applicant also agreed to the questions proposed, which were as follows:—(1) Was the transaction one of exceptional risk? (2) Did the plaintiff know it to be so? (3) Did the conduct of the plaintiff amount to a representation that it was not a transaction of exceptional risk? (4) Did the defendants in taking the risk act upon the representation?

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(5) Was the representation made fraudulently, that is to say, with a view to induce the underwriters to take the risk? Mr. Justice Bigham asked the jury, in the first place, to answer the first question agreed upon. He suggested to the jury that from the admitted fact that the appellant was paying the respondent at the rate of 5 per cent. per annum for the guarantee, and that the respondent knew or must have known that she was getting more than that for herself, the respondent must have known that a high rate of interest was being paid for a loan guaranteed by a man supposed to be very wealthy. The Judge pointed out that the respondent must have known that at least 10 per cent. was being paid for the loan, but that he might not have known that as much as 30 per cent. interest was to be paid, and that it was for the jury to say whether this was not, by reason of the high rate of interest in fact charged, such an exceptional risk as Mr. Burnand would not in the ordinary course of business and from the facts disclosed contemplate. The jury, after a very short deliberation, answered this question in the negative. Mr. Justice Bigham after the answer of the jury to the first question, asked Sir Robert Reid as counsel for the respondent, Mr. Burnand, whether he wanted the other questions put, and after discussion it was agreed that the other questions need not be put except the fourth, which, at the request of plaintiff's counsel, was put to the jury. This question was as follows, as finally explained:—"Did Mr. Burnand solely rely upon the information which he got from Shand, or did he rely upon the information which he got from Shand *plus* the information he got from Lion?" The jury, after some deliberation, answered that he relied on the information of both. On these findings Mr. Justice Bigham entered judgment for the appellant, with costs. On January 19, 1899, the respondent, by his solicitor, gave notice of an application to the Court of Appeal that the judgment of Mr. Justice Bigham should be set aside and that judgment should be entered for the respondent, Mr. Burnand, or that a new trial should be had on the grounds, *inter alia*, that the verdict was against the weight of the evidence, and that the Judge had misdirected the jury by omitting to give them certain directions. The respondent's motion for a new trial came on for hearing before Lords Justices Smith, Collins, and Romer on March 6, 10, and 13, and on March 25, 1899, the Court gave judgment declining to enter judgment for the respondent, but granting a new trial. Lord Justice Smith was of opinion that the following question should have been left to the jury:—"Whether, taking into account the statement made to the underwriters, it was a concealment of a material fact not to disclose to them the circumstances under which the loan to the major-general had been made and the rate of interest which was demanded and obtained?" The learned Judge also thought that the question left by Mr. Justice Bigham, "Was the transaction one of exceptional risk?" required more explanation to the jury, and that if it meant, "Was it a risk which, in the circumstances under which it was tendered to the underwriters, was exceptional in the sense that it in fact differed materially from what the underwriters on the facts disclosed might naturally suppose it to be?" the answer of the jury required reconsideration. At the close of his judgment the Lord Justice was of opinion that the questions which should be left to the jury should embrace the following:—"Taking what was stated with what was left unstated, was there a concealment, designed or undesigned, varying materially the risk undertaken to be run? Whether there was any mis-statement of a material fact, and, if so, were the defendants influenced by such mis-statement in underwriting the policy? Lords Justices Collins and Romer

agreed with this judgment. The appellant, in her reasons, submitted that the question put to the jury with the assent of the respondent was correct. That the summing up of the Judge contained the proper directions to the jury, and that he was not asked by the respondents to give any of the directions or to enter the judgment suggested by the respondents in their notice of appeal. That there was evidence upon which the jury could reasonably answer the question as they did answer it, and that the answer given by the jury was correct. That the respondents agreed at the trial that it was not necessary to put any further questions to the jury. That the verdict and judgment were correct. For the respondent the main reasons were that the contract made between the appellant and the respondent was one of insurance. That the law as to concealment, non-disclosure, and misrepresentation, and *uberrima fides* applicable to contracts of marine, fire, and life insurance were equally applicable to the contract in question, whether the same was a contract of insurance or one of guarantee. That in the present case there was concealment or non-disclosure of material facts, and want of *uberrima fides*, such as vitiated the contract and entitled the respondent to judgment, or at all events that there was evidence of such concealment and non-disclosure and want of *uberrima fides*, and the question as to whether the facts were material ought to have been left to the jury. That the verdict was against the weight of the evidence, and that the learned Judge misdirected the jury as to the effect of concealment and non-disclosure, and by not giving them any direction as to such effect, and not leaving to them the question as to the materiality of the facts concealed.

Sir E. Clarke, Q.C., Mr. Joseph Walton, Q.C., and Mr. Scrutton were counsel for the appellant; Sir R. T. Reid, Q.C., Mr. Lawson Walton, Q.C., Mr. Carson, Q.C., Mr. Willes Chitty, and Mr. F. Newbolt for the respondent.

THE LORD CHANCELLOR, in moving that the decision of the Court of Appeal should be reversed, said that, but for the respect due to the learned Judges below, the case might be very summarily disposed of. Many topics had been urged which were irrelevant to the question to be determined. This was a transaction in which a person borrowing money at a high rate of interest—30 per cent. or more—was guaranteed by a gentleman of good commercial credit at that time. The lender insisted upon the additional guarantee of a policy at Lloyd's for the purpose not of establishing his right to have the money paid, but to guarantee the solvency of a gentleman of whose solvency there was not the smallest reason for doubt. He did not know that there had been any suggestion that there was any fact known to the lender, and not disclosed, which would have diminished by a feather's weight belief in Sir F. Seager Hunt's solvency. In these circumstances, Lloyd's undertook, or underwrote, this policy for the guarantee of Sir F. Hunt's solvency. That was the contract into which they entered and upon which they were now sued. The case set up by the respondents was not that there was anything affecting the solvency of Sir F. Seager Hunt, but that the whole transaction should have been explained to those who were going to enter into the policy. His Lordship entirely differed—and could not agree that any such circumstance could or ought to have affected the mind of any one entering into this contract. He did not think any such idea occurred to any of these gentlemen. As business men, what did they do? Did they inquire into the original loan or how it came to be made? No; they did the natural thing to do. They inquired at the bank into the commercial reputation of Sir F. Seager Hunt, and then they entered into this contract. It appeared to him that this was the beginning and end of

the whole case. There was no protest that anything had been kept back, nothing known to the appellant which could have affected Hunt's credit, except what was afterwards said about the nature of the loan itself. To his mind that was the whole question and the parties could not go back further. It was easy to use the phrase "the whole transaction must be explained." If by that was meant the only thing guaranteed—viz., Hunt's solvency, the respondent knew all there was to be known. There was not a fragment of evidence bearing upon this question. But it was said that this was not an ordinary transaction. He did not know what that meant. The transaction itself, one of guarantee of somebody's solvency who was liable for somebody else's debt, was itself of a somewhat extraordinary character. But all this was known, it was the very nature of the transaction. He was not aware before this case that arrangements of this kind were made the subjects of policies at Lloyd's. Then after the event it was said that the underwriters ought to have known the circumstances of the loan and ought to have had their minds directed to them. People often persuaded themselves as to what they would have done if the circumstances had been different. So then it was said that the underwriters would not have taken this risk if they had known the loan was to be at 30 per cent. He declined to discuss whether or not the loan was actually made at that time. That question was never essentially contested. What was put before the Judge and stated by him much more favourably to the defendants than he would himself have stated it was that £15,000 was the gross sum to be paid, not so much interest and so much principal, but a lump amount. Business men would know that interest was included; and if they had thought it material would have inquired into the items. The first was distinctly put before Mr. Burnand in cross-examination, who said that no question was asked about interest. Mr. Burnand said it would have been material to know if it had been as much as 30 per cent. But they thought it might be 8 or 9 per cent., as it was a friendly transaction. His Lordship had during the argument observed that 8 or 9 per cent. was a strange rate to charge in a friendly transaction. But the whole case showed that it was idle to base the matter on the information given or withheld of the character of the loan. This admission of Mr. Burnand's was decisive. It had also been suggested that the verdict was against the evidence; and Mr. Lawson Walton had contended that no reasonable jury could have found such a verdict. His Lordship was sorry to differ from the learned counsel, as he should himself have so found if he had been a jurymen. It was not only a reasonable verdict but the only possible one. The Court of Appeal, whose judgment was relied upon, did not enter into the question which had been so vehemently argued before the House, but formulated other questions. But at the trial the Judge gave counsel at the Bar the opportunity of asking whether any other question should be put, and the defendant's counsel suggested no additional question and no variation of those which were put. In these circumstances it would indeed be a loose mode of administering justice to permit the issues to be submitted to another jury. He therefore moved that the decision of the Court of Appeal should be reversed.

LORD MACNAGHTEN concurred.

LORD MORRIS agreed with the Lord Chancellor that the Judge had laid the case before the jury in a manner which was too favourable to the defendant. The only risk was the solvency of Sir F. Seager Hunt. No doubt his failure to meet his liabilities would lead to the obligation of the defendant to pay the money, and there was no suggestion that Mrs. Seaton had kept back anything which would have affected

belief in Hunt's solvency, which was thought to be unimpeachable. Counsel on both sides acquiesced in the questions submitted to the jury, and yet the Court of Appeal suggested other questions. If there had been any extraordinary miscarriage of justice—and there certainly was none—the question might be different. But in an ordinary case the parties must be bound by the course of the trial when counsel on both sides have agreed as to the issues to be submitted to the jury. Then it was said the Judge had failed to dwell upon some points in the transactions. Well, a Judge was not a literary critic, engaged in an exhaustive survey, and if counsel did not call attention to such points they must suffer the consequences.

LORD SHAND was of the same opinion. The Court of Appeal had made out a case for the respondent which he had not made for himself at the trial. It was said that the rate of interest was so extraordinary that it ought to have been disclosed. Mr. Burnand was a witness, but admitted he did not inquire. In his Lordship's opinion it was not material to know the interest. The only question was one of Hunt's solvency, and the underwriters made the only inquiry which concerned them and were satisfied, and the Judge had placed the case before the jury as favourably to the respondent as possible.

LORD DAVEY concurred.

LORD BRAMPTON held that there had been no fraud and no concealment, and no information about the nature of the transaction could have had any possible bearing on the solvency of Sir F. Seager Hunt.

LORD ROBERTSON said that in the Court of Appeal the question was fully discussed whether the respondent's liability was one of insurance or purely of guarantee. That question had been entirely superseded by the appellant's counsel. Mr. Joseph Walton formulated his case thus. Assuming that disclosure was incumbent, as in the case of insurance—and the Court of Appeal relied upon the duty of disclosure—the disclosure necessary must be of facts material to the formation of a judgment as to the risk incurred. But, according to Lord Justice A. L. Smith, the question whether anything was material was one for the jury. His Lordship's concurrence in the motion of the Lord Chancellor was based on the ground that this question had been determined by the jury. The question submitted by the Judge must be regarded in connexion with the explanations with which he furnished the jury, and the latter were in full possession of the whole case.

The appeal was accordingly allowed.

[Solicitors—Thomas Cooper and Co., for the appellant; Morten, Cutler, and Co., for the respondent.]

Court of Appeal (A. L. Smith,) 1900.
Collins, and Romer, L.J.J.) } Feb. 27.

GREENWELL AND ANOTHER V. HOWELL AND ANOTHER.*

Practice—Costs—Public Authorities Protection Act, 1893—Public right of way—Act of trespass by county surveyor and deputy clerk of the county council by instruction of county council—Action against county surveyor and deputy clerk of the council—"Public duty"—Solicitor and client costs.

Decision of Bruce, J. (*ante*, p. 130), affirmed.

This was an appeal from the decision of Mr. Justice Bruce as to costs after the trial of an action with regard to an alleged right of way (reported *ante*, p. 130). The question raised was an important one under the Public Authorities Protection Act, 1893. The action was one for trespass, and was brought by the owners of Marden Park, in Surrey. The

defendants alleged that a certain way in the parish of Godstone was a public highway. A dispute having arisen as to whether the way was a public highway, the Surrey County Council, upon the petition of the parish council under section 28, subsection 4, of the Local Government Act, 1894, resolved to exercise the powers and duties of the district council under that section in regard to the protection of the alleged public right of way, the district council having failed to take proceedings in respect thereof. Thereupon some letters passed between the plaintiffs or their solicitors and the clerk of the county council, and in the result a letter was written on behalf of the plaintiffs to the clerk of the county council stating that they had removed the obstructions complained of on the way, without admitting that the way was a public way, and that they would prosecute any one trespassing thereon. They stated that, in order that the question of right might be tried before a competent tribunal, they were prepared to bring an action of trespass against any person so trespassing, thus giving an opportunity of raising the question whether a public right of way existed or not. They suggested that the question of right might be conveniently raised by the county council authorizing their surveyor or some other person, on their behalf, to commit a nominal trespass, as was usually done in such cases. Thereupon the defendants, who were the county surveyor and the deputy-clerk of the county council, acting under the instructions of the county council, drove along the road in question, thus committing the alleged act of trespass. The plaintiffs then brought the present action. The learned Judge held that the public right of way had been established, and gave judgment for the defendants. The defendants thereupon applied for costs as between solicitor and client under section 1 of the Public Authorities Protection Act, 1893 (56 and 57 Vict., c. 61). The learned Judge, in giving judgment upon this point, said that the defendants had brought themselves within the provisions of the Act. It was the duty of the county council in the circumstances to appoint persons to drive along the road for the purpose of testing the public right of way, and the defendants were the persons who were directed or ordered by the county council to test the right. They drove along the road as the servants of the county council, and their act was the act of the county council; and therefore, in his opinion, it was an act done by the defendants in pursuance of a public duty, because, in doing what they did, they were acting in pursuance of the authority of the county council. He accordingly ordered the plaintiffs to pay costs as between solicitor and client. By section 1 of the Public Authorities Protection Act, 1893, "where, after the commencement of this Act, any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of . . . ; (b) wherever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client." The plaintiffs appealed from the order as to costs on the ground that the above provision only applied where the action was brought against the local authority.

Mr. Neville, Q.C., and Mr. McSwinnery appeared for the plaintiffs; Mr. Jelf, Q.C., and Mr. George Humphreys for the defendants.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the plaintiffs

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

were the owners of certain land over which there was a suggested public right of way. There was a dispute whether a public right of way existed. The plaintiffs threatened to prosecute any one trespassing upon the way. It was then arranged between the plaintiffs and the county council that the proper way of testing the question was by some one on behalf of the county council committing a nominal act of trespass. Accordingly, by the direction of the county council, to the knowledge of the plaintiffs—if that had anything to do with the matter—the two defendants, who were officials of the county council, drove along the way in question. An action of trespass was then brought. What was done was done, not under any agreement, but under an arrangement between the plaintiffs and the county council. At the trial the learned Judge gave judgment for the defendants. Thereupon the defendants said that they were entitled to costs as between solicitor and client under section 1 of the Public Authorities Protection Act, 1893. Section 1 of that Act provided, so far as material, that where any action was commenced against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, certain results, which he would mention subsequently, were to follow. Pausing there, the section did not say that the action must be against a public body, but against “any person.” The section went on to provide in Clause (a) that in such a case the action must be commenced within six months next after the act complained of. Could the plaintiffs have brought this action after six months had elapsed since the act of trespass? In his opinion they could not; but if such a defence were to be set up it must be pleaded. The section then went on to provide, in Clause (b), that wherever in any such action a judgment was obtained by the defendant it was to carry costs to be taxed as between solicitor and client. It was clear that, in committing the act of trespass, the defendants were acting under the direction of the county council for the purpose of enabling an action of trespass to be brought to raise the question in dispute. Was that act of the defendants done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority? That brought him to section 26 of the Local Government Act, 1894. By subsection 1 of that section it was the duty of the district council to protect all public rights of way, and to prevent as far as possible the stopping or obstruction of any such right of way, where the stoppage or obstruction thereof would in their opinion be prejudicial to the interests of their district. By subsection 3 the district council might, for the purpose of carrying into effect the section, institute or defend any legal proceedings, and generally take such steps as they deemed expedient. By subsection 4, if the district council failed in their duty under the section, the county council might resolve that the powers and duties of the district council should be transferred to the county council. It seemed plain to him that when any one set up an obstruction on a public way—his Lordship did not care whether the obstruction was of a physical character or took the form of a threat of legal proceedings—it was the duty of the district council, or, if the county council had taken over the duties of the district council, it was the duty of the county council, to take proceedings to preserve the rights of the public, or to defend proceedings taken against them by the landowner, or to take such steps as they might deem expedient for that purpose. Having regard to the provisions of the Act of 1894, it seemed to him clear that the act of the defendants was done in pursuance of the public duty imposed by that Act, and therefore came within the protection of section 1 of the Public Authorities Protection Act, 1893. He agreed with Mr. Justice Bruce.

It was said that it had not been pleaded in the defence that the defendants were acting under the direction of the county council. In his opinion it was not necessary, nor, indeed, would it be proper, to plead that fact, as it was no defence to the cause of action, but would be like a plea to damages. The appeal would therefore be dismissed.

LORD JUSTICE COLLINS agreed. The Act of 1893 extended its protection not only to the principals, the public body, but also to the individuals who carried out the mandate of the public body. The only question remaining was whether the defendants acted in pursuance of a public duty under the Local Government Act, 1894. It seemed to him clear that upon the facts they did so act. The point could not be better put than it was in the judgment of Mr. Justice Bruce.

LORD JUSTICE ROMER agreed.

[Solicitors—Norton, Rose, Norton, and Co., for the plaintiffs; Wyatt and Co., for the defendants.]

Q.B. Div. } 1900.
(Kennedy, J.) } Feb. 27.

HANNAN'S LAKE VIEW CENTRAL (LIMITED) v.
ARMSTRONG AND CO.*

Bill of Exchange—Banker—Cheque crossed generally—Negligence—Bills of Exchange Act, 1882, sec. 82.

Held, on the facts, that there was negligence on the part of the bankers disentitling them to the protection of sec. 82 of the Bills of Exchange Act, 1882.

Judgment was delivered in this case, which was tried before his Lordship on the 21st and 22nd inst. The facts appear sufficiently from the judgment.

Mr. C. A. Russell, Q.C., and Mr. J. Mansfield appeared for the plaintiffs; Mr. Rufus Isaacs, Q.C., and Mr. F. M. Abrahams for the defendants.

MR. JUSTICE KENNEDY read the following judgment:—The plaintiffs in this case are a company registered with limited liability and the defendants are bankers. On November 16, 1897, the plaintiffs' then secretary, one Henry Montgomery, paid into his private account with the defendants a cheque for £542 drawn in favour of the plaintiffs or order by the British Australian Mines Agency (Limited) under the hand of two of that company's directors and the said Henry Montgomery, who at that time was secretary of the British Australian Mines Agency (Limited) as well as of the plaintiff company. It was crossed generally, and when paid in at the defendants' bank to the private account of the said Henry Montgomery it bore the endorsement “Hannan's Lake View Central (Limited), H. Montgomery, secretary.” The name was in Montgomery's handwriting. The other words of the endorsement were stamped or typewritten by him. The defendants placed the amount to the credit of Montgomery's account, crossed the cheque specially to Brown, Janson, and Co. in order to pass it through the Clearing-house, and collected the proceeds in this way from the London and County Banking Company (Limited) upon whom the cheque had been drawn. The amount credited to his account by the defendants in respect of the cheque was drawn out by Montgomery for his own purposes in the usual way as he required it. The plaintiffs claim in this action to recover this amount from the defendants. What are the facts? I am of opinion upon the evidence adduced at the trial that Montgomery acted dishonestly and without authority in endorsing the cheque to the defendants, and that

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

he thereby misappropriated and converted to his own use the property of the plaintiffs. It is, in my view, doubtful whether, as special provision is made in article X of the articles of association of the plaintiff company for the authorization by the board of directors of two or more of the directors and secretary to endorse any negotiable securities or instruments belonging to the company which might require endorsement in order to effect or complete the negotiation or transfer thereof or to pass the property therein, it would have been within the power of the board under article XVI., if they had purported to do so, to delegate to the secretary the endorsement of cheques. It does not appear that the board ever did expressly delegate this power. What the board did do, as I understand the effect of the evidence in regard to cheques drawn in favour of the plaintiffs by third parties, was to permit the secretary to endorse such cheques for one purpose, and for one purpose only—viz., that of his paying the same into the plaintiffs' account at the City Bank. It was the secretary's duty to pay into this account all moneys received by him for the plaintiffs, and for this purpose he was tacitly at least authorized by the directors of the plaintiff company to endorse cheques which were received by him as secretary for the plaintiffs. Endorsement in legal language in relation to negotiable instruments means endorsement completed by delivery. Montgomery was permitted to endorse, but to endorse only to the plaintiffs' own bank. It was stated in the course of the evidence before me to be a general practice of limited companies for this particular and limited purpose to permit their secretaries to endorse cheques drawn payable to the order of their employers which come into the secretaries' hands as the servants of those employers. I shall assume that, so far as endorsing cheques for the purpose of paying them in to the company's bankers, the plaintiffs cannot be allowed to deny the secretary's authority. In the present case Montgomery, in endorsing the plaintiffs' cheque to the defendants, was not so dealing with this cheque, but was fraudulently converting it to his own use; and it appears to me that the defendants, in dealing as they did with the cheque and with the proceeds of it, made themselves liable to the plaintiffs for the full amount of the cheque, unless they are protected, as the defendants contend that they are, from the plaintiffs' claim by the operation of the Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), section 82. The protection of that section is given to a banker who in good faith and without negligence receives payment of a cheque crossed generally, as this cheque was, where the customer has no title or a defective title thereto; and it is enacted by the section that in such a case the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment. Now here there is no doubt that Montgomery was a customer of the defendants; he had kept an account with them since about the middle of July, 1896. It is not suggested by the plaintiffs that the defendants in this transaction acted otherwise than in good faith or were in any way privy to Montgomery's misdoings. The only question is, Did they act without negligence? What does "without negligence" mean? It means, I take it, without want of reasonable care in reference to the interests of the true owner, the principal whose authority the customer purports to have. This view was expressed by Mr. Justice Denman in "*Bissell v. Fox*" (51 L.T., N.S., p. 666), and his view was approved by the Court of Appeal on appeal (53 L.T., N.S., p. 193). The true owner, the principal, in the present case, is the plaintiff company. We have to see, therefore, what were the relevant facts proved or admitted in this action with regard to this question of "negligence," as that

term ought to be understood according to the judicial decision which I have just cited. This large cheque was on the face of it the property of the plaintiffs. It was an order drawn in their favour by third parties upon the London and County Bank. The defendants knew not only from the form of the endorsement when Montgomery endorsed the cheque to them, but from earlier information, that he was the plaintiffs' servant in the capacity of secretary. They knew also that the plaintiffs had a banking account of their own at another London bank. It was apparent on the face of the transaction that in endorsing the cheque to them as his bankers and for the credit of his private account Montgomery was using for himself a valuable document, which was upon its face created for the benefit of his employers. Of course it was possible that his employers had authorized Montgomery so to deal with the cheque. But the defendants had not had with Montgomery any like transaction before; it was not a transaction which would be, as I understand the evidence, a customary transaction for the secretary of a company in Montgomery's position, and the question is whether the defendants, as business men, bound to act with reasonable care towards the plaintiffs, were entitled in the circumstances to assume without inquiry (which could have been made promptly and easily) that Montgomery was authorized to endorse to the defendants as he did. Upon the whole, whilst I fully appreciate the importance of not hampering by undue restriction the free flow of banking business, I feel myself bound to hold that the defendants in this case did not act, in the words of the statute, "without negligence." I have stated already the principal considerations which move me to this conclusion, and I do not think that any useful purpose would be served by my dealing minutely or in any detail with the evidence as given at the trial. But I think that I ought not perhaps to leave unnoticed some portions of the evidence given by Mr. Bodley, the defendants' chief accountant, who was a witness called by them at the trial. It appears to me to contain some material admissions against the defendants' case upon the central question of "negligence." Mr. Bodley asserted no doubt in his view that there was no irregularity upon the face of the cheque, and nothing whatever suspicious or calling for inquiry in Montgomery's conduct in the matter, or in any previous matter; that it was quite usual to find a company's cheques endorsed by the secretary alone; that there is nothing very extraordinary in the endorsement by Montgomery of a cheque paid to the plaintiff company by third persons, but, at the same time, he admitted, in the course of his cross-examination, that he did not suggest that it was a usual thing for a company to make a payment to its secretary by endorsing to him a cheque drawn in favour of the company, and he would say that it was not a usual one; that he knew that the plaintiffs in the ordinary way paid Montgomery by drawing a cheque on its own account in his favour, as the defendants had frequently had such cheques, but he had never in his own experience had an example before of the secretary of a company paying into his private account a cheque drawn by third persons in favour of the company; and that he had never known an instance of any secretary of a limited company endorsing by himself a cheque payable to his company except for the purpose of the cheque being paid in to the company's own banking account. This was his evidence, as I understand it. One argument used by Mr. Bodley against any duty of inquiry appeared to me, if the matter should have any weight at all, to make rather the other way. "*Prima facie*," he said, "this cheque was his master's cheque. But in the face of the way in which the account had previously been kept I do not think this

put on us the duty of inquiry. I mean there had been several other large cheques which had been drawn by the company and paid into Mr. Montgomery's account." This is true enough; but then these cheques were cheques drawn by and not in favour of the company. The inference, if any inference can properly be drawn, would rather seem to be that when the directors of the plaintiff company wanted to pay money to Montgomery they paid him by their own cheque. I think that these are the only matters in Mr. Bodley's evidence which have a substantial material bearing upon the question of negligence. A good deal was elicited from him in examination and cross-examination whilst he was in the box about matters which, as there is no suggested impeachment of the defendants' good faith, appear to me to be really immaterial. On the one hand, it was elicited from him that the defendants had no reason to suspect Montgomery's honesty and respectability; that his account since July, 1896, had been kept on the right side; on the other, that he had for some time before November, 1897, maintained the credit balance by loans from the defendants on security of shares which they realized by sale for him, and that at the date of the endorsement of this cheque his account would have been overdrawn but for the amount of this cheque being placed to his credit. I think these matters have little or no bearing upon the real issue in this case, which, as I have already said, on the facts already sufficiently referred to I feel bound to decide in favour of the plaintiffs.

Judgment for the plaintiffs.

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams,
L.JJ.) 1900.
Feb. 28.

IN RE A. B. AND CO.*

Bankruptcy—Jurisdiction—Foreigners.

Foreigners residing out of the jurisdiction are not subject to the provisions of the Bankruptcy Act, 1883.

This appeal against a decision of Mr. Registrar Linklater raised a question of importance as to the operation of the bankruptcy law upon foreigners. In the present case traders, who are citizens of the United States, reside in Baltimore, and have carried on business there. They have also carried on business in London by means of a manager, and in so doing have incurred debts in London, where they have assets of value. In December last they executed in the United States a deed by which they assigned all their property to their manager at Baltimore as a trustee for their creditors. Two English creditors presented in England a bankruptcy petition against the traders, alleging the execution of this deed as an act of bankruptcy. Section 4 of the Bankruptcy Act, 1883, provides that "a debtor commits an act of bankruptcy in each of the following cases (*inter alia*):—(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally." And by section 6:—"A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (*inter alia*) (d) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England." The Registrar held that the debtors, being foreigners not in England, were not subject to the Act. The petitioning creditors appealed.

Mr. Herbert Reed, Q.C., and Mr. Muir Mackenzie,

were for the appellants; Mr. C. A. Russell, Q.C., and Mr. Carrington, for the debtors, were not called upon.

The COURT dismissed the appeal with costs.

The MASTER of the ROLLS would not say what his view might have been but for previous decisions of the Court of Appeal which were binding on the Court. But having regard to the decision in "*Ex parte Blain*" (12 Ch.D., 522) and "*In re Pearson*" ([1892] 2 Q.B., 263) this appeal must fail. Bankruptcy was a serious matter; it had been sometimes called a statutory execution. But at any rate it altered the *status* of the debtor. What right had the Court to alter the *status* of a foreigner in the absence of express words in the Act enabling it to do so? If Parliament had in express words empowered the Court to do this of course it must do it. But the Court must not, in the absence of express words, assume that the Legislature intended it to do that which might startle foreigners and might perhaps give offence to foreign Governments. Unless the Legislature had said so in plain terms the Court ought not to do this. This was the principle of the decision in "*In re Pearson*." In that case the Court said that section 6 was not plain enough to override that principle. His Lordship saw the difficulty about section 6, but this Court could not overrule that decision. The appeal must be dismissed with costs.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS expressed their concurrence.

[Solicitors—Bentwich, Watkin-Williams, and Gray; J. H. Moggridge.]

House of Lords (Lords Macnaghten,
Morris, Shand, Davey, Brampton, and
Robertson) 1900.
March 1.

CARTWRIGHT V. SOULCOATES UNION—WILFORD V.
SAME—WALSH V. SAME—ROBINSON V. SAME.*

Rating—Rateable value—Mode of assessment—
Publichouse—Evidence as to situation and business done.

Decision of the Court of Appeal (15 *The Times* L.R., 208) affirmed.

These were appeals, all involving the same question, from a decision of the Court of Appeal (the Lord Chancellor and Lords Justices A. L. Smith and Collins) dated February 16, 1899, affirming a judgment of the Divisional Court dated May 14, 1898. The case below is reported 15 *The Times* L.R., 208; L.R. [1899], 1 Q.B., 667; 68 L.J., Q.B., 455. In Cartwright's case the appellant for 19 years had been and still was the tenant and occupier of the premises known as The Star and Garter publichouse, of which the Hull Brewery Company (Limited) are the owners. The appellant held the same premises under an agreement with the Hull Brewery Company (Limited) dated February 16, 1888, determinable by either party on giving three months' notice, expiring at any time, at a yearly rent of £250. By the terms of such agreement the appellant was bound to purchase all liquors sold by him from the landlords or their nominees. The Star and Garter publichouse was a fully-licensed publichouse, situate at the corner of two streets called West Dock-avenue and Hessel-road in the city and county of Kingston-upon-Hull. In both of such streets there was a good deal of traffic passing to and fro, and the situation was a good one for the publichouse trade. Though it was built as an hotel no hotel business was carried on on the said premises. By the rate for the relief of the poor, now appealed against, which was levied on or about April 10, 1897, the appellant was rated on an assessment in respect of the said premises

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

of £850 gross estimated rental and £680 net rateable value. The assessment immediately prior thereto was £257 net rateable value. On June 17, 1897, the appellant gave notice of appeal to the general quarter sessions of the peace for the city and county of Kingston-upon-Hull against the said rate and assessment, on the ground that he was over-rated. By an agreement dated December 18, 1897, and made (*inter alia*) between the appellant and the respondents, and by an order of Mr. Justice Day, the matters of the said appeal were by consent ordered to be referred to the arbitration of Walter Cranby Ryde, Esq., barrister-at-law, as arbitrator. The arbitrator, after hearing the parties and the evidence adduced by them, made his award in the form of a special case for the opinion of the Queen's Bench Division of the High Court of Justice. On the hearing before the arbitrator the respondents endeavoured to justify the assessment of £850 gross annual value and £680 net rateable value by:—(1) cross-examination of the appellant as to and evidence of his weekly takings and payments; (2) evidence of the actual number of persons observed to enter the appellant's said premises during a certain period of 14 days (during which they were under observation by the respondents) and a deduction therefrom of the amount of the annual trade done upon the said premises by the appellant; (3) valuations of the said premises on the basis that such an annual trade is done upon them and including therein the value of such trade. The arbitrator rejected the evidence of and disallowed the cross-examination of the appellant as to his weekly takings and payments, and found as a fact that:—(1) the goodwill attached to the premises so far as it consists of the personal connexion between the appellant and his customers was non-existent, or, if existent, of inappreciable value; (2) the personal qualities and capacity for business or management possessed by the appellant had no effect on the trade done or the profits made in the said premises. The arbitrator further held that in fixing the amount of the assessment of the appellant's said premises it was lawful and proper to take into account:—(a) the value of the trade already done there; (b) the value of the goodwill attached to the said premises so far as it consists of the probability that the customers now resorting to the said premises will continue to do so whether the appellant continues to occupy the said premises or not. This decision was affirmed by the Court of Appeal. The appellant contended that the order of the Court of Appeal ought to be reversed or varied for the following among other reasons:—Because the said publichouse should be valued without reference to the goodwill and the trade already done there; because the arbitrator had in arriving at his valuation wrongly taken into account the goodwill of, and the trade done at, the said publichouse, and wrongly admitted evidence thereof; because the arbitrator had in fact in arriving at his valuation wrongly taken into account the personal capacity and skill of the appellant, and had not considered solely the value of the hereditaments; because on the facts found by the arbitrator the said publichouse was not exceptional, or in exceptional circumstances, so as to make the ordinary principles of assessment inapplicable.

Mr. Balfour Browne, Q.C., and Mr. H. S. Cautley were for the appellants; Mr. Bray, Q.C., and Mr. R. Cunningham Glen for the respondents.

LORD MACNAGHTEN, in moving that the appeal be dismissed, said that, speaking generally, he might say the question was one of common sense and not of law. Having regard to the plain language of the Act of Parliament their Lordships had to consider whether the arbitrator proceeded on the lines laid down in the statute. He had to inquire into what was to be done

in the particular case. He was to exclude any inquiry into profits; and he was right in so doing—not that the profits would not be an element in arriving at the amount of assessment, but because inquiry into profits was, if possible, to be avoided. There was nothing a tradesman so much disliked as such an investigation. What the arbitrator had done was to take into consideration the amount of business of the publichouse. Was he wrong in that? Surely not. He was bound to do so—accurately, if he could, roughly if he could not do so with precision. The first thing the man in the street would do—if such an expression were allowable—would be to do that which the arbitrator had done. The judgment of the Court of Appeal was perfectly right.

LORD MORRIS concurred, and observed that the Act of Parliament lent no countenance to the distinction which had been set up between exceptional and ordinary cases. It only required the ascertainment of what would be a reasonable rent. A great deal of artificial language had been employed about the hypothetical tenant; but the question itself was a simple one, although no doubt the process might be different in the case of a great undertaking like a railway and of premises belonging to individuals.

LORD SHAND briefly expressed concurrence.

LORD DAVEY, being of the same opinion, demurred to the distinction drawn between exceptional and ordinary cases being elevated into a principle of law, and denied that the authorities relied upon were intended to establish any new principle of evidence.

LORD BRAMPTON and LORD ROBERTSON concurred in the judgment proposed, and the appeal was dismissed.

The other appeals were also dismissed.

[Solicitors—Rollit and Sons, for the appellants; J. W. Sykes, for the respondents.]

Court of Appeal (A. L. Smith, }
Collins, and Romer, L.JJ.) }

1900.
March 1.

MARLBOROUGH V. BALL.*

Animal—Animal *feræ naturæ*—Duty to keep secure—Accident caused by action of person injured.

This was an application by the defendant for judgment or a new trial in an action tried before Mr. Justice Phillimore and a special jury at Manchester. The action was brought to recover damages for personal injuries sustained by the plaintiff through being bitten by a zebra belonging to the defendant. The plaintiff was a working man. The defendant was the proprietor of the Chadderton-hall pleasure-grounds, at Oldham, where he kept an exhibition of wild animals. The plaintiff went with his wife and his brother-in-law to see the exhibition, and, having paid for admission, entered the gardens. While they were walking along they found the door of a stable standing open, and went in. There were four zebras inside the stable, each in a separate stall and properly tied up by a halter to the manger. The plaintiff went up to one of the zebras and stroked it. The animal kicked out, and the plaintiff being then standing against the partition, the animal pressed him through the partition, and he fell into the next stall, where another zebra bit his hand, which had to be amputated. At the trial the jury returned a verdict for the plaintiff for £175.

Mr. MONTAGUE LUSH, for the defendant, in support of the application for judgment or a new trial, contended that there was no evidence on which the defendant could be held liable. The common law obligation of a person who kept animals *feræ naturæ* was to keep

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

them secure, or, in other words, to prevent them from getting loose. He was liable to an action, if, in consequence of a failure on his part to comply with that obligation, any other person was injured. In such a case it was not necessary for the plaintiff to allege negligence. But in this case there had been no failure to comply with that common law obligation. Here the animals were kept secure, they were not loose. The plaintiff, therefore, had to allege negligence, and the alleged negligence appeared to be this—that the defendant did not provide a keeper, or some physical barrier to prevent people from meddling with the animals. But this allegation did not show a cause of action at all. There was no authority for saying that an action lay for not preventing the plaintiff from bringing an injury on himself. It was not sufficient for the plaintiff here to show that the door was open. The door being open might be an invitation to go in, but it was not an invitation to meddle by stroking the zebras. The plaintiff failed to show any negligence on the part of the defendant, and he had no remedy. Counsel referred to "*Filburn v. the People's Palace and Aquarium Company (Limited)*" (25 Q.B.D., 258); and "*Memberz v. the Great Western Railway Company*" (14 App. Cas., 179).

Mr. S. T. EVANS, for the plaintiff, said the foundation of the action was that zebras were dangerous animals, and it was the duty of persons who kept dangerous animals to prevent them from doing injury. The leaving the door of the stable unlocked was a default on the part of the defendant. The plaintiff was not in any way warned that these zebras were wild animals. The evidence taken altogether showed that these zebras were kept in much the same way as horses would ordinarily be kept. He referred to "*May v. Burdett*" (9 Q.B., 101).

The COURT allowed the application and ordered judgment to be entered for the defendant.

LORD JUSTICE A. L. SMITH said it was conceded that a zebra was a dangerous animal, and that by law a man who kept a dangerous animal must do so at his peril, and that if any damage resulted, then, apart from any question of negligence, he was liable for the damage. But that was subject to this—that the person who complained of damage must not have brought the injury on himself. Where the plaintiff did something which he had no business to do—*e.g.*, by meddling, as the plaintiff in this case had done—then the defendant was not liable. That was common law, and it was also common sense. In "*Filburn v. the People's Palace (Limited)*" Lord Esher expressly dealt with this point. He there said:—"It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shown by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself." The action, therefore, could not be maintained on the common law liability. The plaintiff then set up a claim for negligence—*viz.*, that the door was not kept locked, and that there was no keeper at hand. The evidence showed that the door had been shut, but had got opened. If the plaintiff had been kicked while walking along the stable an action might have lain, but the plaintiff went into the stall and meddled with the animal. Even if the fact of the door being open was an invitation to go into the stable, it was not an invitation to stroke the animals. In his opinion there was no evidence to go to the jury, and judgment must be entered for the defendant.

LORD JUSTICE COLLINS said the plaintiff's case was put on the footing of these zebras being wild animals. The duty of a person who owned a wild animal, as laid

down in "*May v. Burdett*," was to keep it secure at his peril. The evidence in this case all went to show that these animals were kept secure within the meaning of that case. In his opinion there was no evidence of any invitation to go and tamper with the animals.

LORD JUSTICE ROMER concurred.

Mr. MONTAGUE LUSH said the defendant would not ask for the costs either of the action or the appeal.

Q.B. Div. }
(Phillimore, J.) }

1900.
March 1.

BEAL AND MYRTLE V. CARTER.*

Contract—Agreement—Construction—Land Agents—Finding a purchaser—Commission.

This was an action brought by Messrs. Beal and Myrtle, the plaintiffs, against Mr. Edward James Carter, the defendant, both of whom are auctioneers and land agents, to recover one-half of a commission of £144 received by the defendant in respect of the sale of a freehold property called Fairlight, in Kent.

Mr. Corrie Grant appeared for the plaintiffs; and Mr. Dickens, Q.C., and Mr. G. F. Hohler for the defendant.

On February 25, 1898, the plaintiffs wrote to the defendant as follows:—"We are seeking an unfurnished house in Sussex for Mr. Goddard, to contain three reception-rooms, eight bed-rooms, bath-room, stabling, and from ten to 15 acres of land. Can you send us particulars of anything suitable? We presume you will divide commission with us as usual." In reply the defendant wrote:—"I am obliged to you for your letter of yesterday, and in reply beg to send you herewith particulars of a property I have just been instructed to let at Forest Row, known as Stone-house Park. The accommodation, &c., seems to be just what your client requires, and I need hardly say I hope he will take an opportunity of seeing the place, and in the event of business ensuing I shall be only too pleased to share with you my commission." The negotiations which ensued with regard to Stone-house Park fell through. Negotiations were afterwards entered into between Mr. Goddard and the defendant on behalf of Mr. Trumble, the owner of Fairlight, which resulted in a contract for the sale of that property to Mr. Goddard. The contract was signed by the defendant, purporting to act for Mr. Trumble, but, upon an action for specific performance of the contract being brought by Mr. Goddard, Mr. Trumble pleaded that the defendant, Mr. Carter, had no authority to make the contract on his behalf, and the action was therefore abandoned. Mr. Carter, nevertheless, brought an action against Mr. Trumble for his commission, which was settled before it came on for hearing, Mr. Trumble paying the full amount claimed (£144) and costs.

Mr. DICKENS, Q.C., on behalf of the defendant, contended that the agreement to pay half commission was limited to commission paid in respect of Stone-house Park, and that negotiations with regard to that property having fallen through, and no commission having become payable in respect of it, the plaintiffs' action failed. He contended further that, even if the agreement extended to other properties, the half commission was only payable in the event of business being transacted between one of the defendant's clients and Mr. Goddard.

MR. JUSTICE PHILLIMORE, in giving judgment, was of opinion that, under the agreement between the parties, half of any commission was payable to the plaintiffs which was earned by the defendant in consequence of the intro-

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

duction of Mr. Goddard to the defendant. His Lordship did not understand why Mr. Trumble paid the commission under the circumstances, but, as he had paid it, it did not lie in the defendant's mouth to say that the commission was not paid in consequence of the introduction of Mr. Goddard. There would therefore be judgment for the plaintiffs for the amount claimed, less £13 12s. 8d., being half the excess costs paid by the defendant to his solicitor in the action brought against Mr. Trumble.

Prob., Divorce, and Adm. Div. } 1900.
(Gorell Barnes, J.) } March 1.

H.M.S. SANSPAREIL.*

Ship—Collision—Regulations for preventing collisions—Her Majesty's battleships—Merchant Shipping Act, 1894, sec. 419 (4).

The fact that the regulations with respect to the navigation of her Majesty's ships are not made under the Merchant Shipping Act, 1894, may, in cases of collision between such a ship and a vessel to which the regulations made thereunder apply, affect in some respects the statutory liability imposed on the latter vessel by sec. 419 (4) of the Act.

Judgment was given in this case, which was heard on February 8 (reported in *The Times* for February 9), and further argued on February 21 (reported in *The Times* for February 22). The facts of the case and the nature of the arguments appear fully in the judgment.

Mr. Joseph Walton, Q.C., and Mr. Scrutton appeared for the plaintiffs; and the Attorney-General and Mr. R. B. D. Acland for the defendant.

MR. JUSTICE GORELL BARNES, in delivering a written judgment, said:—This action arises out of a collision which took place on August 7, 1899, between the plaintiffs' vessel, the *East Lothian*, and her Majesty's battleship *Sanspareil* some miles to the southward of the Wolf rock, whereby the *East Lothian* was sunk. The *East Lothian* was proceeding in tow of the tug *Sir W. T. Lewis* on a voyage from Nantes to Cardiff in ballast. The tug and tow were on a course of N. 9° E., and were proceeding at a speed of about six knots. The wind was about south-east and the vessel had some sail set. The tug was exhibiting the usual lights for a tug having a vessel in tow, that is to say, two bright lights in a vertical line one over the other at a distance of six feet apart, the regulation side lights, and a white light abaft the mainmast for the sailing vessel to steer by. This last light, according to the regulations, ought not to have been visible forward of the beam, but in fact it showed to some extent forward of the beam. The *East Lothian* had the regulation side lights and stern light. The *Sanspareil* was one of a large fleet of 30 ships of war proceeding up Channel. She and the other vessels were proceeding on the same course, S. 72° E., at a speed of about ten knots, and were in the following formation:—The ships were in four lines. The distance between each line was about eight cables and the distance from the bow of one vessel to the bow of the vessel behind her was about two cables. The outer lines were formed by cruisers and the inner by battleships. The *Sanspareil* was the leading ship of the more southerly line of battleships. She had all the lights prescribed by the Queen's Regulations burning. Those on board the *East Lothian* and the *Sir W. T. Lewis* made out the lights of the fleet at a distance of about six miles and broad on the port bow. At first the lights were taken to be those of

a cluster of fishermen, but as the tug and tow drew nearer the lights were observed to be the electric lights of the fleet. The tug and tow kept their course and speed and crossed ahead of the southernmost line of cruisers. As they drew near to the *Sanspareil* the helm of that vessel was ported to pass under the stern of the tug, but the defendant, who was navigating the *Sanspareil*, being under the impression that the tug was a steamer proceeding alone, ordered the helm of the *Sanspareil* to be starboarded as soon as the *Sanspareil* was in a position to pass clear of the tug, and this was done. Shortly afterwards the defendant observed the red light of the *East Lothian*, and the engines of the *Sanspareil* were put full speed astern, but she ran into the *East Lothian* and sank her. This action was afterwards brought by the owners of the *East Lothian* against the defendant, Lieutenant Potter, to recover for the damage sustained by them. At the hearing of the case the Attorney-General, who appeared for the defendant, raised no technical defences, but treated the case as one tried in the ordinary way between the owners of two vessels. He conceded that the helm of the *Sanspareil* had been improperly starboarded in the circumstances. This, in effect, means that the *Sanspareil* could have passed under the stern of the *East Lothian*. The Attorney-General, however, contended that the plaintiffs' vessel must also be held to blame on two grounds. The first was that the tug infringed the regulations by exhibiting a light to guide the vessel astern, which showed forward of the beam instead of only abaft the beam. The second was that the tug and tow infringed the regulations by standing on across the track of the fleet. With regard to the first point, the rule as to the exhibition of a light to a vessel in tow is contained in the second clause of Article 3 of the regulations for preventing collisions at sea, made in the year 1897 by virtue of the Merchant Shipping Act, 1894. This clause is as follows:—"Such steam vessel [that is, a tug] may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam." There is no doubt that there was an infringement of this rule by the tug, and that this would affect the tow as much as the tug. The Merchant Shipping Act, 1894 (57 and 58 Victoria, cap. 60), section 419 (4), provides that "where in a case of collision it is proved to the Court before which the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulations necessary." But it has been held that if the infringement of a rule could by no possibility have contributed to a collision the infringement will not be a ground for holding the vessel infringing the rule to blame. See "*The Fanny M. Carvill*" (13 App.Cas., 455) and "*The Duke of Buccleuch*" (A.C. [1891], 310). It was urged by the plaintiffs' counsel that the infringement in this case could not by any possibility have contributed to the collision in question. This was disputed by the Attorney-General. The facts bearing upon this point disclosed by the evidence appear to be these. The two towing lights forward, the white light aft, and the red light on the tug and the red side light on the *East Lothian* could be seen from the *Sanspareil* from her position forward of the beam of the tug. The defendant stated that he only noticed one white light forward, one white light aft, and the red light on the tug, and that he took the white light aft to be the second light, which a steamer of a certain size may carry under Article 2 (c), and that, therefore, the tug was considered to be a steamer proceeding alone. I cannot understand this statement, because if one light forward was noticed the

*Reported by HUGH C. S. DUMAS, Esq., Barrister-at-Law.

other one forward ought to have been noticed too, and the small white light aft was an inferior light to the light which is referred to in Article 2 (c). The latter should show at least five miles. I understand that he did not see the red light of the *East Lothian* nor hear any report of the lights before the order to starboard was given. There was no evidence as to what reports, if any, were made, and, owing to the course which the case has taken, it is not necessary for the Court to determine on what person on board the *Sanspareil* the blame rests. Upon these facts the question for consideration is peculiarly one for the Elder Brethren of the Trinity House, who have heard this case as assessors with me, to form an opinion upon. They advise me that in their opinion the fact that the white light aft on the tug was visible before the beam of the tug could by no possibility have contributed to the collision. Whether the white light aft on the tug was visible from before her beam or not, the other lights on the tug and tow should have shown unmistakably that they were a tug and her tow. Even if the red light of the tow were not noticed at first, the two towing lights forward on the tug were plainly visible, and would indicate that she had a vessel in tow, whether the white light aft could or could not be seen. Moreover, there is nothing unusual in a tug showing to another vessel in certain positions her two white lights forward, her side light, and her white light aft, for the first three are to show as far as two points abaft the beam and the last may show from aft to abeam, and thus over two points of the circle on each side the lights overlap. Further, the small white light aft is, as I have already noticed, a different light from the light mentioned in Article 2 (c). The defendant says that he concluded it was a steamer proceeding alone by only noticing one white light forward and one aft besides the red light. I have already commented on this, and it is to be observed, further, that if he only noticed one light forward and no light had been visible aft the reason which he gave for concluding that the tug was a steamer proceeding alone shows that in this case also he would have concluded that the tug was a steamer proceeding alone, so that the fact that the white light aft was to some extent visible before the beam of the tug really made no difference whatever in the case. The second point raises a question of very considerable importance. It was contended by the Attorney-General that the tug and tow ought not to have continued their course and speed across the course of the fleet, but should either have waited till the fleet had passed across their bows or starboarded their helms and gone under the stern of the fleet, and that in continuing their course and speed they were guilty in the circumstances of an infringement of the said regulations. The particular rules referred to were Articles 19, 21, 27, and 29. These are as follows:—"Article 19.—When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." "Article 21.—Where by any of these rules one of two vessels is to keep out of the way the other shall keep her course and speed. Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision (see Articles 27 and 29)." "Article 27.—In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." "Article 29.—Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or

signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." The substance of the argument was that, although if the *Sanspareil* had been navigating alone, having the tug and tow crossing her course from starboard to port, she should keep out of the way of the tug and tow, and they should keep their course and speed, unless and until they might be compelled to take action as contemplated by the note to Article 21, yet that, where the *Sanspareil* was one of a fleet crossing the course of the tug and tow in the formation described above, Article 27 applied, and Article 21 ought to have been departed from by the tug and tow, because, owing to the difficulties which the vessels composing the fleet would have in the circumstances in navigating for a tug and tow coming in amongst them and crossing their course, and in avoiding collision with one another in doing so, due regard was not had by those in charge of the tug and tow to the dangers of navigation and collision and the special circumstances which, it was contended, rendered a departure from the rules necessary in order to avoid immediate danger. It was also contended that Article 29 applied for practically the same reason, but, as this rule does not impose any obligation and merely provides that nothing in the rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to observe certain proper precautions, this contention was not really pressed. The objections to the argument were that the articles in question do not apply so as to render the plaintiffs' vessel subject to the statutory consequences imposed by section 419 (4) of the Merchant Shipping Act, 1894, and that the tug and tow were not guilty of contributory negligence, and that there was no infringement of Article 27 by the tug and tow in the circumstances—that is to say, that they were right in keeping their course and speed and that there was nothing in the circumstances which rendered it improper or negligent for them to do so, or to render it necessary for them to act as suggested by the Attorney-General. First, with regard to the law applicable to the case. The regulations for preventing collisions at sea, of which the articles above referred to form part, were made by Order in Council in 1897 by virtue of section 418 of the Merchant Shipping Act of 1894, which provides that regulations so made shall have effect as if enacted in that Act, and also applies them, together with the provisions of the Act relating thereto, or otherwise relating to collisions, to all foreign ships within British jurisdiction, and they and the said provisions of the Act may by section 424 be applied by Order in Council to the ships of any country when beyond the limits of British jurisdiction if the Government of such country is willing that they should be so applied; but section 741 of the Act enacts that the Act shall not, except where specially provided, apply to ships belonging to her Majesty, and there is no special provision in the Act providing that the regulations for preventing collisions at sea are to apply to such ships. There are, however, precisely similar regulations, made in June, 1899, for her Majesty's ships by Order in Council, and these are set out in the Queen's Regulations and Admiralty instructions. These are not made by virtue of the said Act of 1894, but they are word for word the same as those made under that Act, and there are, as I understand, in addition certain special regulations for her Majesty's ships with regard to certain special lights and signals, to be used by them only. Article 13 of the regulations of 1897 contemplates such special regulations being made. The result is that, as the regulations for preventing collisions at sea (except the special regulations just referred to) are similar for her Majesty's ships and for other

vessels, for all practical purposes the navigation of all vessels upon the high seas and in all waters connected therewith by navigable by seagoing vessels must be conducted as if the same regulations applied to them. This is the only reasonable way to treat the matter. In my opinion, however, the fact that the regulations made with respect to her Majesty's ships are not made under and by virtue of the Merchant Shipping Act, 1894, may, in cases of collision between such a ship and a vessel to which the regulations of 1897 apply, affect in some respects the statutory liability imposed on the latter vessel by section 419 (4) of the said Act. This observation does not apply to most of the regulations which have to be obeyed. For instance, an infringement by the tug in this case of the rule with regard to lights, would, as I have already pointed out, be visited by the statutory penalty unless it could by no possibility have contributed to the collision. Such a breach is not affected by the observance or non-observance by the other vessel of the regulations applicable to her. But I find a difficulty in applying the statutory penalty in cases of collision between a merchant vessel and one of her Majesty's ships, where the infringement by the former, which is complained of, is an infringement of the 27th combined with the 21st Article. This arises from the language of these rules, and may be pointed out by dealing with the present case. In navigating for each other in the circumstances of this case and acting on similar regulations, the *Sanspareil* would have to keep out of the way (Article 19) and the *East Lothian* and her tug to keep their course and speed (Article 21), subject to the effect to be given to the note to Article 21 and to Article 27, and it follows from what I have remarked above that it would be neglect of good seamanship and navigation to do otherwise, and if such neglect caused or contributed to the collision, the vessel infringing the regulations would clearly be held to blame. If, however, a breach of Article 27, combined with Article 21, by the *East Lothian* and her tug did not, in fact, contribute to the collision, though by possibility it might have done so, then to fix the *East Lothian* with blame it is necessary to rely on the statutory penalty imposed by the said section 419 (4) of the Act of 1894, and to consider strictly whether any of the collision regulations referred to in that section have been infringed by her or her tug. Now, in my opinion, the collision regulations referred to in that section are only those made by virtue of the Act, which, according to section 418, are to have effect as if enacted in the Act, and, as already noticed, the Act does not apply to her Majesty's ships. The *Sanspareil*, in fulfilling a duty to keep out of the way, would, strictly speaking, be acting under Article 19 of the Queen's Regulations, and not under the corresponding article of the regulations made under the Act of 1894, and, strictly speaking, the duty of the *East Lothian* and her tug to keep their course and speed according to Article 21 of the latter regulations was only "where, by one of these rules," the other vessel is to keep out of her way. "One of these rules" must as a matter of construction mean one of the regulations made under the said Act of 1894, and Article 27 thereof only strictly applies to the obeying and construing of the same rules. It appears to me necessarily to follow that the statutory provisions of the said section 419 (4) could not apply in the present case, even if the *East Lothian* and her tug did not act in accordance with Article 27. There was a further point taken by the plaintiffs with regard to the meaning of Article 27 of the regulations of 1897. It is this—that that article does not impose an obligation which can be infringed, but is to be considered solely as in exoneration of the strict duties imposed by the other articles. I am not able to agree with this view entirely. It

seems to me that there is an express obligation in obeying and construing the rules to use due regard to the circumstances mentioned in the article. At the same time it is difficult to conceive a case in which there could be a finding of want of such due regard, unless it in fact contributed to the collision. So that I fail to see how there can be an infringement of Article 27 unless there has been default under it which contributes to a collision. For these reasons I am of opinion that in order to establish liability on the part of the plaintiffs for the collision in this case, it is necessary to show that there has been default on the part of the *East Lothian* or her tug under Articles 21 and 27 which, in fact, contributed to the collision. Even if the tug and tow were wrong in the circumstances in proceeding at full speed on the course they were on at first, it is clear that the *Sanspareil* could, by the exercise of reasonable care, have avoided the collision without any difficulty, and, according to well-known principles, which are stated in a convenient form in Mr. Marsden's book on the "Law of Collisions at Sea," page 25, the plaintiffs can recover in this case. I might leave the case there, but I think it desirable to express the view which the Court has arrived at with regard to the important question as to whether the tug and tow were right or wrong, as a matter of navigation, having regard to the terms of Article 27, in proceeding as they did in the circumstances. The argument of the Attorney-General upon this point was supported by a reference to the following notice to shipowners and masters, which has been issued by the Board of Trade for some time, though the masters of the tug and tow stated that they were not aware of it. His Lordship then read the notice, which warns masters of single ships to take timely measures to keep out of the way of, and avoid passing through, a squadron of warships, and continued,—The Attorney-General did not rely upon this notice as having any binding effect such as the regulations have, but as supporting his contention that for a single ship to stand on in amongst a squadron was for her to run into such danger that she should be held guilty of an infringement of Article 27 by so doing. There may possibly be cases in which, if a vessel were to keep her course and speed through a squadron of war-vessels, which ought *prima facie* to keep out of her way, it would be impossible or impracticable for them to manœuvre so as to keep out of her way without some or one of them either colliding with her or with some other vessel or vessels of the squadron, and in such a case the single vessel may be required to take action to avoid the danger, either by acting according to the note to Article 21 or in accordance with the provisions of Article 27. But there is at present no regulation dealing in express terms with the case of a single ship approaching a squadron of war-vessels. The general regulations for all crossing steam vessels is that the vessel which has the other on her starboard hand must keep out of the way of the other, and that the other vessel must keep her course and speed unless the circumstances referred to in the note to Article 21 or in Article 27 require her to act differently. It is necessary to consider the particular circumstances of each case. I have therefore taken the opinion of the Elder Brethren upon this point, having regard to the facts of the case, which I have set forth at the commencement of this judgment. Their opinion is that the position and movements of the fleet did not constitute such a danger of navigation or collision, or such circumstances as to render it necessary for the tug and tow to wait till the fleet had passed or to starboard and go under the stern of the fleet; in other words, they do not consider that the tug and tow acted improperly in this case in proceeding as they did, and that the *Sanspareil* and the other vessels of the fleet could without difficulty or danger,

though possibly not without some inconvenience, have avoided them. All the vessels, except the *Sanspareil*, in fact did so, and the *Sanspareil* would have done so without any difficulty if her helm had not been star-boarded until she was in a position to pass under the stern of the *East Lothian*. For these reasons I am of opinion that the plaintiffs are entitled to judgment.

His LORDSHIP subsequently, at the request of the Attorney-General, stayed the reference to the registrar, assisted by merchants, to assess the damages, pending an appeal, provided that notice of appeal were given within three weeks.

[Solicitors—T. Cooper and Co., for the plaintiffs; the Solicitor for the Treasury, for the defendant.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.JJ.) } March 2.

DURANT V. ROBERTS AND KEIGHLEY, MAXSTED, AND CO.*

Principal and Agent—Undisclosed principal—Liability.

A contract made by a person in his own name, not purporting to make it on behalf of a principal, but intending to act for another in making it, though without authority from him, can be ratified by that other person even though the intending agent did not disclose to the other party at the time of making the contract that he was acting for some one else.

This was an application by the plaintiffs for a new trial of an action tried before Mr. Justice Day and a jury. The action was brought by the sellers of wheat to recover damages from the purchasers for breach of contract in failing to take delivery. The contract with the plaintiffs had been made by the defendant Roberts, and the plaintiffs alleged that the defendant Roberts, in making the contract, had acted as agent for the defendants Keighley, Maxsted, and Co. The case raised a question of law as to the ratification by a principal of a contract made by an agent. So far as regards this question of law, it must be taken that Roberts had authority from Keighley, Maxsted, and Co. to make a contract for them, but that in making this contract he exceeded their authority as to price; that he, nevertheless, made the contract in the hope that they would ratify what he had done; that he did not communicate to the plaintiffs the fact that he was acting for any principal; and that Keighley, Maxsted, and Co. afterwards expressed their willingness to affirm the contract which he had made. The question was whether a contract made under such circumstances, that is to say, made in his own name by one who in fact has no authority from any principal to make it, but who intends at the time to apply afterwards to a particular person to ratify it, can in law be afterwards ratified by that person. At the trial the learned Judge answered this question in the negative, and directed that judgment should be entered for the defendants.

Mr. Robson, Q.C., and Mr. Scrutton appeared for the plaintiffs in support of the application for a new trial; Mr. Carver, Q.C., and Mr. Danckwerts, Q.C., appeared for the defendants Keighley, Maxsted, and Co.

The COURT, having taken time to consider, gave judgment allowing the application and granting a new trial, Lord Justice A. L. Smith dissenting.

LORD JUSTICE A. L. SMITH delivered a written judgment, in the course of which he said:—The question in this case is whether a contract made by a principal with what I will call an unauthorized agent in the latter's name, which contract does not purport or profess to be made by the unauthorized agent on behalf

of any one excepting himself, and as regards which contract he has not when he made it assumed to be acting on behalf of any one excepting himself, is capable of being ratified by a stranger if it be shown that the unauthorized agent had at the time he made the contract the undeclared intention in his own mind of making the contract for a person who had never authorized him to make it. It was said by the learned counsel for the appellants that this question had never been decided, and that the law was that, if an unauthorized agent—i.e., any one—had in his own mind, when he entered into a contract with another, the undeclared intention of making it on behalf of himself and of some other person, or of some other person alone, that other person could ratify the act of the unauthorized agent and become as if he had been a party to the contract *ab initio*. It struck me, when I heard this proposition put forward by the appellants' counsel, that it was not in accord with my recollection of the law; for I thought it had been long ago well engrained into the law that a stranger in such circumstances could not ratify, and, having had my memory refreshed at great length by the cases upon the subject, I find that my recollection has not played me false. It will be seen hereafter that very learned Judges over and over again have stated the law as regards ratification to be that, unless the contract made by the unauthorized agent purports or professes (which in my judgment is the same thing) to have been entered into on behalf of another, or the unauthorized agent, when he made the contract, assumed to be making it on behalf of another, then the contract made by the unauthorized agent is not capable of being ratified by a stranger to it; for to be capable of being ratified the contract must purport or profess to have been entered into by the unauthorized agent on behalf of another, or the agent must have assumed by what he did when he entered into the contract to have been acting on behalf of some person who afterwards proposes to ratify. I find that every learned Judge who has dealt with the question during the last three-quarters of a century has affirmed the doctrine of ratification to be as above stated, with a most remarkable unanimity of opinion, and there is only one solitary instance to the contrary to be found in the books—viz., the judgment of Lord Chief Justice Cockburn in the case of "*Matheson v. Kilburn*," mentioned in the notes to "*Armory v. Delamirie*," in "*Smith's Leading Cases*," Vol. I. There Lord Cairns and Lord Justice Brett differed from the Lord Chief Justice, and, in my opinion, decided the point now raised in this case adversely to the appellants. I find that my brothers Collins and Romer are of opinion that this doctrine of ratification has never yet been decided, and they think that it is therefore necessary to begin *ab ovo*, and go back to the Roman law and other ancient works to try and ascertain what is or ought to be the law upon the subject and to see whether what all the learned Judges (with the one exception) have been saying throughout the last century is correct or not. His Lordship then dealt with the English authorities and the text-books, and continued,—It will be seen that every one of the learned Judges whose judgments I have cited from, when dealing with the question of ratification, have always used the following expressions as to when a contract made by an unauthorized agent is capable of being ratified by a stranger. The contract must (a) have "professed" to have been made on behalf of another; (b) have "purported" to have been made on behalf of another; (c) have been made on behalf of another; (d) have been made in the name of another; or (e) the agent must have "assumed to act on behalf of another"; every one of which expressions, in my judgment, is wholly inconsistent with an unauthorized agent

* Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

keeping locked up in his own mind a mere undeclared intention that another shall afterwards participate in the contract. In my judgment upon this doctrine of ratification the law has been settled for years. If I were to accede to the appellants' contention, I should have to differ and disagree with Lord Wensleydale in the House of Lords, with the Exchequer Chamber—which I could not do, if I desired to do so, which I do not—with the Court of Appeal, consisting of Lord Cairns, Lord Chief Justice Cockburn, and Lord Justice Brett—to which the same remark applies—with the full Court of Common Pleas presided over by Lord Chief Justice Tindal, with the full Court of the Exchequer presided over by Baron Rolfe, and then with Baron Park, before he went to the House of Lords, Mr. Justice Holroyd, Chief Justice Erle, Mr. Justice Willes, Mr. Justice Blackburn, Baron Wilde, Baron Martin, Baron Amphlett, and last, but not least, Lord Justice Bowen. With all submission to my learned brothers who disagree with me, I think even if I had the courage to try to differ with all these very learned Judges, which I have not, it would not only be useless, but it would be most mischievous at this date to try to overturn what for years has been laid down as law by these most eminent Judges without a single discordant voice, with the exception of Lord Chief Justice Cockburn's, and in my judgment, for the reasons above, this appeal should be dismissed. As my brothers, however, disagree with me, the action must go down for a new trial.

LORD JUSTICE COLLINS read the following judgment:—The question raised by this appeal is whether a contract made by a person in his own name, but intending to act for another in making it, though without authority from him, can be ratified by that other person, unless the intending agent disclosed to the other party at the time of making the contract that he was acting for some one else. Roberts, the intending agent in this case, did not disclose to Durant, the seller, that he was acting otherwise than for himself, and Mr. Justice Day appears to have held that such non-disclosure rendered the contract incapable of ratification by the other defendants. In other words, that there can be no ratification by an undisclosed principal—I mean undisclosed in the sense that the existence of a principal has not been disclosed at the time of making the contract. This being the ground of decision, it is immaterial to consider whether there would be any difference as to the possibility of ratification where the intending agent who contracts as principal knows that he has no authority or that he is [exceeding a given authority, and the case where he is under a mistaken belief that he has authority, since the right of ratification is negatived in either case. For reasons which I will give more in detail later on, I think the point has never been actually decided, though there are numerous dicta upon it, which have become the foundation of statements in text-books more or less adverse to the appellants' contention; but it is raised now for actual decision, and I think it cannot be satisfactorily determined without examining how far these dicta are consonant with principle, and if not, whether they have been acted upon for so long as to render it undesirable for this Court, at all events, to interfere with them. It is clear law that an act done or a contract made by a person stating that he is acting for another, but without authority, can be ratified by that other. What, then, is the essence of this right to ratify? Does it depend on the intention with which the act was done by the would-be agent, of which what he says at the time is merely evidence, or is the open avowal of the fact by him, not merely evidence, but itself an essential condition of the right to ratify? Ratification is equivalent to a prior command, and, as between the would-be agent and the person ratifying, it can make no possible

difference whether the former has avowed his intention or not. His command, had it been given beforehand, would have been equally effectually carried out whether the agent had contracted in his own name or in terms on behalf of the principal. The intention to contract for the principal must certainly exist in the mind of the agent, since in our law the act of a mere stranger cannot be ratified. That would be, not ratification, but adoption, which our law does not admit. But, given intention existing in the mind of the would-be agent, it seems impossible to suggest any reason why from the standpoint of the agent and the ratifier avowal of it to the other contracting party should be essential, unless the rights of the principal against the other contracting party are affected by it. It would seem, then, that the reason, if any, must be sought in some difference caused to the other contracting party by reason of the non-disclosure. But where the law admits, as our law does admit, a person who has authorized another to make a contract on his behalf to sue and be sued upon it, although he is not named in the contract and his agent contracts as principal without disclosing that he has a principal, every person who makes a contract with another (excluding, of course, certain special personal contracts) must be taken to know that he may have to deal with some other person on whose behalf the contract is made. He cannot complain, therefore, of non-disclosure. He loses nothing, and gains an option of suing either the party named in his contract or the principal behind him. Indeed, any ground of supposed alteration of the position of the other contracting party that might be urged in support of the view that disclosure as well as intention on the part of the agent is necessary is succinctly disposed of by Baron Rolfe in a well-known passage in delivering the judgment of the Court in "*Bird v. Brown*" (4 Exch., at p. 798), a passage other parts of which are usually relied on in support of the necessity of disclosure by the agent. He says:—"If A. B. unauthorized by me makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case J. S. is precisely in the condition in which he meant to be, or, if he did not believe A. B. to be acting for me, his condition is not altered by the adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue which he would have had against A. B." It would seem, then, that neither from the point of view of the ratifier or of the other party to the contract is there any solid reason why disclosure by the would-be agent should be essential. But it has been suggested that the nature of ratification itself presupposes a contract purporting to bind the ratifier. I can find no such limitation in the word. I think it does involve the idea of something which was intended to be done on behalf of the ratifier, and which needs nothing but confirmation, not to create it *ab initio*, but merely to give it validity. It does not involve the existence of a contract stating anything more on its face than would have been necessary if there had been actual prior authority. Is there anything in the word "ratification" itself to make it inapplicable to a case where an agent, believing he has authority, has made a contract intending to do it for a principal but in his own name and without disclosing that he is agent? It is clear law that a contract may be ratified by a person unknown to the would-be agent himself, who contracting in his own name discloses the fact that he is acting for another. It cannot be contended, therefore, that it is essential to ratification that all the terms of the contract (in cases of con-

tract) should have been already expressed either by words or in writing. This shows that what is essential is what is intended, and not what is expressed, and, so long as the form is capable of covering what was really intended, there is nothing in the nature of ratification itself to make it inapplicable to such a case. The doctrine of ratification would seem, as its name imports, to have come into our law from a Roman source; but, so far as I am aware, no argument can be drawn from the Digest that the person acting without authority in the affairs of another must avow that he is acting for him in order to let in ratification. On the contrary, it would seem that the *contemplatio* was in that as in many analogous cases the essential point. In Dig. 3, 5, 11, we find the phrase—*Ratihabitio constituit tuum negotium quod tuum non erat sed tua contemplatione factum*. The instance to which this observation is appended, the collection of a debt, may have involved avowal, though I am not clear that it did, but the point is that *contemplatio* is made the test. His Lordship then cited further passages in the Civil Law, and continued:—In the Anon. case, Godbolt, 109, following the case 7, Hen. IV., Hil. 346, emphasis is laid on the intent with which the act sought to be ratified was done. "Can he," says Chief Justice Anderson, "so father his misdemeanours upon another? He cannot, for once he was a trespasser, and his intent was manifest." This seems to point to the intention being the essential and the manifestation being only the evidence of it, and I think this view is confirmed by later authorities. In "Fuller v. Trimwell" (2 Leon, 215), an action of replevin, decided on the authority of the case in "7, Hen. IV.," it was objected that the averment that the defendant took as bailiff to another could not be traversed. The Court say, "and as to that which hath been objected, that if this traverse be allowed the meaning of the party shall be drawn in question—i.e., the meaning of him who took the cattle, the same is not any mischief, for so it is in other cases as in the case of recaption." "Buller's Case" (1 Leon, 50) is to the same effect. These cases seem conclusive that the issue to be tried is the intention. If so, what was said or done at the time would only be material as evidence of the intention of which there might be other conclusive evidence. And this quite accords with the attitude of our older lawyers in analogous cases. For instance, in the case of a person who, entering under a licence given by law afterwards abused it; "for," says Coke in the "Six Carpenters Case" (8 Rep., 106a), "the law adjudges by the subsequent act *quo animo*, or to what intent, he entered, for *acta exteriora indicant interior asecreti*," citing 11, Hen. IV., 756. The passage in the Institutes where Lord Coke quotes the maxim in the form in which it is current in English is quite consistent with those early authorities, and gives no support to the notion that actual statement by the agent is necessary. "He that receiveth a trespass and agreeth to a trespass after it be done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case *omnis ratihabitio retrotrahitur et mandato equiparatur*." Of the more modern cases the earlier ones follow on the same lines. His Lordship then referred to "Hull v. Pickersgill" (1 Brod. and B., 282), "Soames v. Spencer" (1 D. and R., 32), "Foster v. Bates" (12 M. and W., 226), "Wilson v. Tunman" (6 M. and G., 236), "Saunderson v. Griffiths" (8 D. and R., 643), "Vere v. Ashby" (10 B. and C., 288), "Bird v. Brown" (4 Exch., 786), "Woollen v. Wright" (1 H. and C., 54), "Watson v. Swann" (11 C.B., N.S., 756), "Ridgway v. Wharton" (6 H.L., 296), and "Falcke v. the Scottish Imperial Company" (34 Ch.D., 250). It seems to me, therefore, that the sup-

posed rule is not based on any sound reason; that, though supposed to be drawn from Roman law, it finds no support in Roman law; that it is opposed to the early English authorities; that there is no actual decision where it was raised and decided against the appellants; that the *dicta* which are supposed to establish it were pronounced *alio intuitu*, and in many instances when carefully examined with their context either do not support it or involve the contrary; and that if it is to be supported at all it must be rested on grounds of convenience only, and not of principle. As to convenience, it is, no doubt, a rule of English law that a contract really made for one person cannot be adopted by another, and there may be room for violations of this rule, if it is to depend on what is passing in the mind of the person who makes the contract, who is to be bound by it. But if this be an inconvenience, it is one which the law already tolerates, in that it allows a contract for an undisclosed principal by a person who contracts as principal himself; furthermore, the case would be rare where no other evidence would be available but the statement of the agent himself. But, even if there were inconvenience, it would not equal that which would be caused by an arbitrary limitation in the case of contracts for undisclosed principals. That it is arbitrary seems to me obvious, when it is realized how far the law has admittedly gone, and where it is that, according to the contention of the respondents, it stops short. A person may contract in his own name, and yet give rights to and against a third person from whom he had prior authority, though he gave no indication whatever to the other party to the contract that such person existed. He may by a similar contract, but without prior authority, if he avows that he intends to act for some one else, give a right to ratify to a person whom he could not name if asked, provided such person is capable of being ascertained and that he answers the description of person for whom he intended to contract. What substance is there then in avowal as a vital fact when the party of whom avowal is required is not obliged to know the name of the person for whom he intends to act, and the standard by which the right to ratify is to be tried is what description of person the unauthorized agent contemplated at the time of the contract? The doctrine of undisclosed principal is a substantive part of the law of agency, and, as far as I can trace it, it is as old in our law as the doctrine of ratification itself. There is no reason therefore why it should be subject to an anomalous exception. On the whole, therefore, though I am sensible of the great weight due to the opinion of the two Judges who formed the majority in "Matheson v. Kilburn," as well as that of my brother A. L. Smith in this case, I cannot regard that as a decision binding on this Court, though it is the only case in which the point was ever actually raised for determination. I am bound therefore to decide the case in accordance with what I regard to be principle and common sense.

LORD JUSTICE ROMER read a judgment, in which he agreed with Lord Justice Collins.

[Solicitors—Thorowgood and Co., for the plaintiffs; Chester and Co., for the defendant.]

Chan. Div. }
(Cozens-Hardy, J.) }

1900.
March 2.

IN RE THE WELSH WHISKY DISTILLERY COMPANY (LIMITED).*

Company—Winding up—Surplus assets—Distribution by direction of the Court—Principle of distribution—Shares not fully paid up.

* Reported by D. FITCAIRN, Esq., Barrister-at Law.

His LORDSHIP gave the following judgment in a summons reserved from the 21st ult. :—This is a summons in a voluntary liquidation to ascertain the principles upon which "the surplus assets of the company available for distribution among the shareholders" ought to be distributed. The capital of the company is £100,000, divided into 19,960 shares of £5 each and 200 founders' shares of £1 each. The founders' shares are fully paid up and some of the ordinary shares are fully paid up, but a large number of the ordinary shares have only £1 15s. paid up. Assets realized by the liquidator are more than sufficient to pay all debts of the company and costs of the liquidation, but they are not sufficient to return in full the capital which has been paid up. Clause 6 of the memorandum of association is as follows :—The rights of the members shall be regulated as follows :—"(a) The net profits of the company in each financial year shall be applied as follows, that is to say, there shall first be paid thereout to the holders of the ordinary shares a dividend at the rate of 10 per cent. per annum for each year upon the amounts paid up thereon and one moiety of the surplus net profits shall belong to the holders of the ordinary shares and may be applied in payment of a further dividend upon such shares and the other moiety thereof shall belong to the holders of the founders' shares and shall be applied in payment of a dividend upon such shares ; (b) all moneys divisible amongst the holders of any class of shares shall be divided amongst the holders of such class of shares *pro rata* according to the amount paid up thereon for the time being ; (c) any shares forming part of the original capital of the company and any shares that may be created by the company may (but subject always and without prejudice to the rights of the holders of the founders' shares) be divided into different classes and may have such respective rights, preference, rank, guarantee, or privilege or postponement over or to one another either as to capital or dividend as shall be determined in accordance with the regulation for the time being of the company." On the part of the fully-paid shareholders it is contended that the principle established by "*Ex parte Maude*" (6 Ch., 51) and "*Birch v. Cropper*" (14 App. Cas., 525) applies to the present case. On the part of the shareholders who are not fully paid it is contended that clause 6, subsection (b), of the memorandum negatives this. I am not satisfied that subsection (b) relates to anything more than the net profits of the company referred to in subsection (a). For the present purpose, however, I assume that it extends to surplus assets distributable on the winding up of the company and also to moneys which may be returned by virtue of an order of the Court reducing the capital of the company, but in my view this assumption does not suffice to establish the contention of the unpaid shareholders. What is the meaning of the words "all moneys divisible" ? I think it wrong to confine this simply to the assets actually in the hands of the liquidator. I think it extends to not merely those assets but also to the calls which can be made and which for the purpose of winding up must be considered as having been made and paid upon the holders of all shares not fully paid up. I further think that the words "according to the amount paid up thereon for the time being" mean according to the amount actually paid up or which, having regard to what the liquidator ought to do, must be considered as paid up. In other words, the assets in hand *plus* the amount of unpaid calls must be divided between all the shareholders in the proportion of £5 to an ordinary shareholder and £1 to the holder of a founders' share, the holders of unpaid shares being debited with the amount of the calls which they have not in fact paid. The conclusion at which I have arrived seems to me to follow from the judgment of the Court of Appeal in

Lowenfeld's case (70 L.T., 3), and from the observations of Lord Davey in "*Welton v. Saffery*" ([1897] A.C., 299), and from the judgments of Mr. Justice Wright in "*Re Anglo-Continental Corporation of Western Australia*" ([1898] 1 Ch., 327) and in "*Re Mutoscope and Biograph Syndicate*" ([1899] 1 Ch., 896). I may observe that the liquidator's summons asks, and properly asks, for directions as to the principles upon which, not the moneys now in his hands, but "the surplus assets of the company available for distribution among the shareholders," ought to be distributed. In my opinion those surplus assets must be taken to include the sums payable by shareholders who have not paid up in full. I must therefore make a declaration in accordance with the above opinion. The costs of all parties as between solicitor and client will be paid out of the assets.

Mr. Maughan was for the liquidator ; Mr. Muir Mackenzie for holders of shares fully paid up ; Mr. Younger, Q.C., for holders of shares partly paid up.

[Solicitors—Rowcliffes, Rawle, and Co. ; Woodrooffe and Burgess.]

Q.B. Div. (Grantham)
and Ridley, J.J.) } 1900.
March 2.

THE QUEEN V. THE GOVERNOR OF HER MAJESTY'S
PRISON AT HOLLOWAY.*

Criminal Law—Extradition—Germany—Obtaining goods by false pretences—Variation between German and English law.

Extradition should be ordered if the depositions show facts which would support any offence in our law which is extraditable.

In this case cause was shown on behalf of the Crown why a writ of *habeas corpus* should not issue directed to the Governor of Holloway Prison to bring up Samuel James Kohn, a prisoner, before the Court to be dealt with by the Court as it thought fit. The rule *nisi* was made last Friday, and a report of the case appeared in *The Times* of the following Saturday. The prisoner was arrested on January 26 last upon an extradition warrant charging him with obtaining a thing by false pretences within the jurisdiction of the German Empire. On February 15, at Bow-street, he was committed to Holloway Prison, in order that he might be delivered over to the German police. The offence for which he was committed was described in the committal order as "fraud by an agent and larceny by a bailee (*Erlangung einer Sache durch falsche Vorspiegelungen*)."¹ It appeared from the depositions before the magistrate that the prisoner was either a Prussian or an American subject ; that on January 18 last in Berlin he obtained from a jeweller named Adolph Königsberger, the prosecutor, a brooch set with brilliants valued at 3,900 marks, in order to show it to an American lady, who, as the prisoner represented to the prosecutor, was likely to purchase it ; and that on the same day he left Berlin for Grimsby without having returned the brooch. The prisoner's answer to the charge was that he bought the brooch from the prosecutor on credit with the view of selling it to the American lady at a profit. Finding that the lady had left for England he followed her. By virtue of Article 2 of the Extradition Treaty of 1872, between the British and German Governments, the following, among other, crimes are crimes for which extradition is granted :—"(6) Obtaining money or goods by false pretences (*Erlangungen von Geld oder anderen Sachen durch falsche Vorspiegelungen*)" ; and "(8) fraud by a bailee. . . . agent. . . . &c."

*Reported by O. G. WILBRAHAM, Esq., Barrister-at-Law.

The SOLICITOR-GENERAL (with whom was Mr. H. Sutton) said that an extradition crime must be a crime both in the demanding and in the surrendering country. The offence of obtaining money or goods by false pretences in German law was wider than the offence called by that name in English law, and it included cases where there was no intention to pass the property in the money or goods. The evidence before the magistrate supported the charge of obtaining goods by false pretences in the sense in which the term was used in German law, but it did not support a charge of the offence of the same designation in English law. The magistrate accordingly, in the committal order, described the offence as fraud by an agent and larceny by a bailee, crimes which were within section 8 of article 2 of the Extradition Treaty, and which according to English law were supported by the evidence before him. He was justified in so doing by the decision in "*In re Arton*" ([1896] 1 Q.B., 509). Referring to the evidence he contended that there was evidence before the magistrate on which he could make a committal order, and that, that being so, there was no power to review his decision, see "*The Queen v. Maurer*" (10 Q.B.D., 513).

Mr. GUY STEPHENSON (with whom was Mr. J. P. Grain), in support of the rule, contended that the prisoner, having been arrested on a warrant charging him with obtaining goods by false pretences, could not be committed on a charge of fraud by an agent or larceny by a bailee. He also contended that there was no evidence before the magistrate to support either of the charges.

The COURT discharged the rule.

MR. JUSTICE GRANTHAM said that if the case of "*In re Arton*" had not been decided it would have been necessary to go more fully into the arguments raised in this case. According to German law what the prisoner was said to have done was obtaining goods by false pretences, but it was not so according to English law, but was an offence of another kind. The Act was the same, but it was called by a different name in each country. The prisoner was charged in Germany with obtaining goods by false pretences. The magistrate simply changed the description of the offence charged into the description under which the act alleged was known in English law. If that could not be done Extradition Treaties would be of no value. He was satisfied that there was evidence on which the magistrate could commit the prisoner.

MR. JUSTICE RIDLEY said that he agreed, and that he formed no opinion as to whether the prisoner was guilty or not of the offence with which he was charged.

[Solicitors—The Solicitor for the Treasury, for the Crown; Wilson, Wallis, and Co., for the prisoner.]

Q.B. Div. } 1900.
(Mathew, J.) } March 2.
PONSFORD V. THE "FINANCIAL TIMES" (LIMITED)
AND HART.*

Defamation—Libel—Newspaper report of a meeting of shareholders—Law of Libel Amendment Act, 1888 (51 and 52 Vict., c. 64), sec. 4—Matters "not of public concern."

This was an action by Mr. Alexander Ponsford for an alleged libel which appeared in the *Financial Times*. The defendants pleaded that it was a fair and accurate report of a matter of public concern, and was published for the public benefit without malice.

Mr. F. Dodd was for the plaintiff; Mr. Isaacs, Q.C., and Mr. S. C. Macaskie were for the defendants.

*Reported by J. F. WALKER, Esq., Barrister-at-Law.

MR. JUSTICE MATHEW read the following written judgment:—This action was brought for libellous statements contained in a report of proceedings at a meeting of shareholders of the National Cycle and Motor Car Insurance Company (Limited). The defendants, as proprietors and publishers of the *Financial Times* newspaper, claimed privilege under 51 and 52 Vict., c. 64, on the grounds that the words complained of were a fair and accurate report of the proceedings of a public meeting, and were published by the defendants in good faith and without malice, and that the matter published was of public concern and its publication was for the public benefit. It appeared that the object of the meeting was to obtain the co-operation of the shareholders to a project for providing further capital. The chairman, a Mr. Tindal, delivered a speech in support of the proposal and explained that losses, which had been incurred in the conduct of the business of the company, made it necessary to raise further capital. He offered the explanation, as it would seem, in exoneration of the directors, that the company's difficulties were due to the misconduct of the plaintiff and others of its officers. The substance of the charge against the plaintiff was that as chief cashier and book-keeper he had conspired with his brother-in-law, the secretary, to defraud the company. It was admitted that this charge was wholly unfounded, and it appeared that the plaintiff had recovered a verdict with substantial damages against Tindal for having procured the publication of his speech in the defendants' newspaper. The report was put in and was admitted to have been inserted in good faith and to be a fair report of the proceedings. It was contended by the defendants that the publication was privileged on the ground that the company was a public company and that the meeting of shareholders was a public meeting for the discussion of a subject of public concern within the meaning of the Act. For this position reliance was placed on "*Rickett v. Sharp*" (45 Ch.D., 286) and on the last clause of section 4 of the Act. It seems to me that the report of any statement made at the meeting in question, which was strictly confined to a discussion of the company's financial position, would have been privileged. But it does not follow that a report of all that was said in the course of a speech on the affairs of the company would be protected. This seems to be clearly the result of the proviso in section 4, which is in the following terms:—"Provided, further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit." It was argued for the defendants that full effect would be given to the proviso by holding that it applied only to publications, no part of which could be shown to have been of public concern or to have been of benefit to the public. But the proviso in terms applies to any matter contained in a report, and, therefore, to any part of a report which was of a defamatory character. In this case the chairman, in his reference to the plaintiff, was not discussing the matters in which the public were interested. He was stating his opinion or impression that the plaintiff, who had been dismissed, had been guilty of criminal conduct as a servant of the company. But such a charge ought not to influence any reasonable man, who contemplated either the buying or selling of shares or any other business transaction with the company. It had no other authority than the assertion of the speaker, whose knowledge must have been derived from what he had been told, and who was not unlikely to have been misled by information supplied to him for the purpose of his speech. It was, therefore, not a matter the publication of which was for the public benefit. The

charges against the plaintiff were of grave importance to him and to his accuser, but were no more of public concern than any other defamatory statements which might or might not be true. The defendants have failed to show that they are protected by the statute, and I give judgment for the plaintiff for 40s. I understand that an arrangement has been come to as to costs.

A stay of execution was granted with a view to an appeal.

[Solicitors—Haslam and Hier Evans, for the plaintiff; J. E. Lickfold, for the defendants.]

Q.B. Div. } 1900.
(Phillimore, J.) } March 2.

BLUM V. ANSLEY.*

Landlord and Tenant—Lease—Reversionary lease
—Publichouse.

A took a reversionary lease of B's premises which were then occupied as a fully licensed publichouse. Some years before A's tenancy began the licence had been forfeited and no fresh licence was obtained: *held*, that A could not repudiate the contract.

In this case the plaintiff sued to recover £20 from the defendant, for one quarter's rent, due on June 24, 1899, under an indenture of lease, dated August 10, 1885, whereby a house and premises, No. 142, Cable-street, in the parish of St. George's-in-the-East, were demised by the plaintiff's predecessor in title to E. Hartshorn, of whose estate the defendant is the surviving executor, for a period of 50 years from March 27, 1899, at a yearly rental of £80, paid quarterly.

The defence was that there was an implied condition in the lease that the premises should be maintained as a fully-licensed publichouse, and that the licence having been lost without the default of E. Hartshorn or the defendant, the contract was at an end.

Mr. A. T. Lawrence, Q.C., and Mr. A. J. Ashton appeared for the plaintiff; and Mr. Birrell, Q.C., and Mr. T. E. Scrutton for the defendant.

The facts of the case were as follows:—At the time of the making of the lease of August 10, 1885, the premises in question were occupied by a tenant as a fully-licensed publichouse called The Shovel. The lease which was granted by the plaintiff's predecessor on that date was a reversionary lease for 50 years to take effect on the determination of the tenancy of the then tenant, which event would occur on March 27, 1899. One of the terms of the lease was that the lessee should, during the continuance of the term thereby granted, use the demised premises as and for a fully-licensed publichouse only, so long as the necessary licence could be obtained for that purpose. The licence was forfeited some six years before the date of the commencement of the defendant's lease by the tenant in possession, and no fresh licence had been obtained. In these circumstances the defendant declined to pay rent for the premises, whose value since the loss of the licence was greatly depreciated. On behalf of the plaintiff it was contended that the defendant was liable for the rent, on the ground that there was no implied condition that in the event of the licence of the premises having ceased to exist before March 27, 1899, the contract should be at an end, and also on the ground that there was no implied warranty in the lease that the premises should be suitable for the purpose for which they were taken. In support of this contention the cases of "*Tadcaster Tower Brewery Company v. Wilson*" ([1897] 1 Ch., 705), and "*Gillard*

v. Cheshire Lines Committee," (32 W.R., 943) were referred to. For the defendant it was argued that the lease showed that what the parties had in their mind was a lease for a publichouse. The lease reeked of beer, and showed that they intended that when the *interesse termini* came to an end, and the lease became a lease in possession, the publichouse was to be still a publichouse. No human being, in view of the fact of what the value of the house would be otherwise than as a publichouse, would have agreed to take it for 50 years at £80 a year. The Court had power on the authority of "*Taylor v. Caldwell*" (3 B. and S., 826) to consider not only the condition of things in 1885, but also in 1899. There must be read into the lease an implied condition that on March 27, 1899, there should be in existence subject-matter for the covenants contained in it—that is, a publichouse; and if the corpus concerning which the contract was made had gone, the defendant was entitled to succeed. The following cases were also cited:—"*Appleby v. Myers*" (L.R., 2 C.P., 651); "*Howell v. Coupland*" (1 Q.B.D., 258); "*Paradine v. Jane*" (Ayleyn, 26).

MR. JUSTICE PHILLIMORE, in giving judgment, said, as he read the lease, if there was a warranty at all, it was a warranty that there was a publichouse at the date of the making of the lease, and he could find nothing in the document like a warranty that there should be a publichouse when the lease came into possession. The rights of the parties were settled when the lease was made. It was quite true that it was a reversionary lease, and it was quite true that until entry it was only an *interesse termini*, but it granted a proprietary interest which the defendant's predecessor was willing to take on the terms of the lease. Having taken that proprietary interest, he bound himself from the date of the lease, and if a portion of the consideration had been a premium paid at the time of the lease, he (his Lordship) had no doubt that it could not have been recovered. Although appreciating and recognising the decision in "*Taylor v. Caldwell*," he could not say that this case came within it. No doubt a great deal of what was contracted for had gone, but the land remained and the building remained, and, in his opinion, there must be judgment for the plaintiff, with costs on the High Court scale.

[Solicitors—Young, Jackson, Beard, and King, for the plaintiff; Clapham, Fitch, and Co., for the defendant.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.JJ.) } March 3.

MILNER V. GREAT NORTHERN RAILWAY COMPANY.*

Master and Servant—Master's liability to servant
—Workmen's Compensation Act, 1897.

Employment in a refreshment-room at a railway station is not employment "on, in, or about a railway" within the Act.

This was an appeal by the employers from an award of the Judge of the County Court of Northamptonshire, holden at Peterborough, in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was Eliza Milner, who was in the employment of the Great Northern Railway Company as an assistant barmaid in the refreshment-room at Peterborough Station. On April 5, 1899, while she was dusting a counter in this room in the course of her duty, a framed advertisement fell from the wall, and struck her on the head, and caused her injury. The County Court Judge made an award in her favour for £8

*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

with leave to her to apply for further relief. The question raised in the appeal was whether the employment in which the applicant was engaged was an employment to which the Act applied. By section 7, subsection 1, of the Act, the Act is to apply to employment on or in or about a railway. And, by subsection 2, "railway" means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and "railway" and "railway company" have the same meaning as in the Act of 1873. By section 3 of the Act of 1873 "railway" includes every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic. The refreshment-room in question was a larger room in the railway company's station building. It opened from the up arrival platform and was accessible to the public from that platform only. It was contended on the part of the employers in support of the appeal that the applicant was not employed in the business of the company in its capacity as a railway company. The company carried on business as a railway company, and it also carried on the business of purveyors of food and hotel-keepers. Those two businesses ought to be treated as quite distinct, and the Workmen's Compensation Act only applied to that business of the company which was concerned with traffic. On the part of the applicant it was argued that the case came exactly within the words of the Act. She was employed in this refreshment-room, which was part of the station, and the word "railway" included station, and therefore she was employed on a railway. It was not necessary, that each particular part of a station should be shown to be used for the purposes of traffic before it could be brought within the Act.

Mr. Montague Lush and Mr. A. Clutton-Brock appeared for the railway company; Mr. T. H. Walker for the applicant.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion a refreshment-room did not come within the meaning of a railway in the Workmen's Compensation Act coupled with the Regulation of Railways Act, 1873. By section 3 of the last-mentioned Act "railway" included every station used for the purposes of public traffic. The question was whether this refreshment-room was used for the purposes of public traffic, for in his opinion the section did not mean every part of the station, but that part of the station which was used for purposes of public traffic. He thought that a bookstall could not be said to be so used, neither could an hotel. The learned County Court Judge had held that a refreshment-room was used for the purposes of public traffic. There seemed, however, to be good authority for saying that this was not correct. In the case of "South-Eastern Railway Company v. Railway Commissioners" (6 Q.B.D., 586) the question was whether the Railway Commissioners had jurisdiction over refreshment-rooms. The Commissioners had assumed such jurisdiction, but the Court of Appeal held that they had been wrong in doing so, on the ground that refreshment-rooms did not come within the meaning of "facilities for the receiving, forwarding, or delivering traffic upon the railway," however desirable they might be for the comfort or convenience of passengers. That showed clearly in which way the point now before the Court ought to be decided. A refreshment-room at a railway station was not used for the purposes of public traffic, but was only for the convenience of passengers. The appeal must therefore be allowed.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—Bescoby and Williamson, Retford, for the applicant; R. Hill Dawe, for the railway company.]

Court of Appeal (A. L. Smith, }
Collins, and Romer, L.JJ.) }

1900.
March 3.

RIXSON V. FRITCHARD AND BENWICK.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—Building less than 30ft. in height.

The fact that a building less than 30ft. in height communicates with an adjoining building which is over 30ft. in height, does not bring the former within the Act.

This was an appeal by the employers from an award of the Judge of the County Court of Kent, holden at Dartford, in an arbitration under the Workmen's Compensation Act, 1897. In the High-street at Dartford, next to the Bull Inn, which was a building over 30ft. in height, there stood two buildings less than 30ft. in height, which were formerly shops. The wall between the inn and the nearer of the two buildings was a party wall. The two buildings had been acquired by the landlord of the inn, and a communication had been made between the inn and the nearer building, which was called the beerhouse. The landlord had recently determined to demolish the two low buildings for the purpose of extending the main building of the inn. This work was undertaken by the employers, and the applicant, in the course of his employment, was wheeling some rubbish from the houses which were being demolished when he fell and sustained injuries. The sole question in the case was whether the applicant was employed on, in, or about a building which exceeded 30ft. in height and was being demolished within the meaning of section 7, subsection 1, of the Workmen's Compensation Act. The County Court Judge held that because the beerhouse was connected with the inn the case came within the Act, and made an award in favour of the applicant.

Mr. F. Low appeared for the employers in support of the appeal; Mr. Cyril Dodd, Q.C., and Mr. Bassett Hopkins for the applicant.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said the only question the Court had to consider was whether the notes of the evidence taken before the County Court Judge contained any evidence that there was at the time of the accident a building over 30ft. in height which was being demolished. It was clear to him that they did not. The applicant was engaged in pulling down the beerhouse, which was less than 30ft. in height. The only building which was over 30ft. in height was the Bull Inn, and that was not being demolished at all. No part of the building which was being demolished exceeded 30ft. in height. The communication between the beerhouse and the inn did not make the smaller building a part of the larger building.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER concurred.

Court of Appeal (A. L. Smith, }
Collins, and Romer, L.JJ.) }

1900.
March 5.

SYMONS V. ANDREW KNOWLES AND SONS (LIMITED).*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—"Average weekly earnings."

A workman who has worked for his employer only two days is not within the Act.

To come within the Act he must have been in his employment not less than two weeks.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

This was an appeal by the employers from an award of the Judge of the County Court of Lancashire, holden at Salford, in an arbitration under the Workmen's Compensation Act, 1897. The employers were the owners of a colliery near Manchester. The applicant, who was a pitman, went into their employment as a piece worker at wages of 6s. a day on Tuesday, July 18, 1899. He went into the pit and did a day's work. On the next day, Wednesday, there was a holiday at the pit, and the applicant did not go to work. On Thursday he went to do another day's work, and while he was at work he was injured by the fall of a piece of coal. On Friday, July 21, he was paid 6s. for the work which he did on the Tuesday, and on Friday, July 28, he was paid 6s. for the work which he did on the Thursday. The colliery week ended on Tuesday evening. The question was, what was the right way of calculating the applicant's "average weekly earnings" under section 1 (b) of the first schedule to the Workmen's Compensation Act. The County Court Judge thought that, as the applicant had earned 12s. within seven days, his average weekly earnings were that sum, and he made an award for a weekly payment of half that sum—viz., 6s. By section 1 of the schedule "the amount of compensation under this Act shall be (b) where total or partial incapacity for work results from the injury a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous 12 months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed £1."

Mr. F. H. MELLOR appeared for the employers in support of the appeal, and argued that the applicant did not come within the Act, on the ground that the Act did not afford any machinery by which compensation could be awarded to him. It was impossible to ascertain the average weekly earnings of a man who had only worked for two days.

Mr. JOSEPH WALTON, Q.C., and Mr. POSTLETHWAITE, for the applicant, argued that the Act was not confined to men who were engaged by the week. The words were a "payment not exceeding 50 per cent. of his average weekly earnings." Section 1 of the Act gave the right to compensation, and these words in the schedule merely fixed a limit. The word "average" only applied where there was anything to average; if there was not, then the *maximum* sum, which was not to be exceeded, was the sum which the man had actually earned.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said this appeal raised a question of great importance, which was simply this—whether a workman came within the purview of the Workmen's Compensation Act, who, having entered into an employment and gone to work, was injured on the first day of his employment. In this case the workman had worked for two days, but the question was the same whether the man worked on two days or only on one day. The facts were that the applicant went into the masters' employment on Tuesday, July 18, 1899, and did a day's work. On Wednesday the pit was not at work, and the applicant did not go there at all. On Thursday he went into the pit to do a day's work, and while he was at work on that day he was injured. Was he within the Act? It was asked on behalf of the applicant, Why should he not be within the Act? His Lordship could not answer that question; his duty was to consider whether, on the true construction of the words used by the Legislature, the applicant was within the Act. They had already held that upon the words of the statute a painter painting the outside of a house on a ladder was not within the Act, though a builder under

the same circumstances would be within it; though why the one was included and the other excluded he could not say. The words which they now had to consider were very important words—viz., the words in Schedule I. which regulated the payment of compensation. His Lordship read subsections (a) and (b), and said the question was whether they embraced the case of a man who had only been at work a day, or whether they contemplated that the man should have been at work for such a time that his weekly earnings might be averaged. Mr. Walton's argument cut the word "average" out of the schedule. In his opinion the Court was driven to say that, in order to come within the Act, a man must have been at the time of the accident in his employment for at least two weeks. If he had not been in employment for two weeks, it was impossible to give any meaning to the words "average weekly earnings."

LORD JUSTICE COLLINS was of the same opinion. It seemed to him to be impossible to give any decision on this Act which should be logical and free from anomalies. The Legislature had not brought every workman within the Act, and they could not speculate on the reasons why certain classes had been left out. He thought that the schedule, reading it in its natural sense, contemplated that the relation of master and servant should have existed for not less than two weeks.

LORD JUSTICE ROMER said he felt great doubt as to this case, but he did not differ from his learned brethren.

[Solicitors—Rowdliffes, Rawle, and Co., agents for Fullagar and Hulton, Bolton, for the employers; Radford and Frankland, agents for Bowden and Widdowson, Manchester, for the applicant.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams,
L.JJ.)

1900.
March 6.

THE ATTORNEY-GENERAL (AT THE RELATION OF THE POWELL DUFFRYN STEAM COAL COMPANY, LIMITED, AND ALL OTHER THE RATEPAYERS OF THE MERTHYR TYDVIL UNION) V. THE GUARDIANS OF THE MERTHYR TYDVIL UNION.*

Poor Law—Relief—Able-bodied persons able to obtain work—Colliers on strike—Power of guardians—43 Eliz., c. 2—4 and 5 Will. IV., c. 76—11 and 12 Vict., c. 91, s. 4.

Guardians have no power to grant relief out of the rates to able-bodied men who are able to work and can obtain work sufficient to maintain themselves and their wives and families. Hence the guardians cannot grant relief to able-bodied colliers on strike, who might, had they chosen, have obtained work. If guardians have made any unlawful payment and it has been disallowed by the auditor, the Local Government Board may, under 11 and 12 Vict., c. 91, s. 4, authorize the allowance of such unlawful expense. The guardians, however, may grant relief to the wives and children of strikers.

Decision of Romer, J. (15 *The Times* L.R., 303), reversed.

Judgment in this appeal was delivered this morning. The appeal was brought by the relators against a decision of Mr. Justice Romer's, reported in 15 *The Times* L.R., 303. The arguments on the appeal will be found reported in *The Times* of February 9, 10, 14. The

appeal arose out of the great coal strike of 1898, and it raised a question of importance as to the power of the guardians of the poor to apply the rates in the relief of the men on strike and of their families. The facts were thus summarized by the learned judge in his judgment :—A strike of colliers occurred, whereby many men who were not colliers were thrown out of employ. Many colliers and other workmen in the Merthyr Tydvil Union applied for Poor Law relief. The guardians established labour yards and relief works, and, partly by these yards and works, and partly by gifts of food or money, the necessitous workmen and their families were relieved. So far as the colliers were concerned, work was offered to them in neighbouring collieries, and of this the guardians were aware. The plaintiffs alleged that, at any rate so far as related to the colliers or other able-bodied persons who could get work, the guardians ought not to have relieved them. The plaintiffs contended that the payments made to the colliers or persons in the same position ought to be disallowed, and the guardians be ordered to refund the sums paid. The plaintiffs further asked for an injunction to restrain any further relief being given to such colliers or able-bodied persons. The guardians, to provide for relief in the union, had in the usual way issued orders for contributions to the common fund of the union to the overseers of the parishes comprised therein, and the overseers thereupon levied and collected a rate in their parishes. The plaintiffs said that this rate was higher than it otherwise would have been by reason of the guardians having improperly relieved workmen in the manner above stated. And, accordingly, they asked for an injunction to restrain the guardians from enforcing or receiving payments in respect of such orders. The plaintiffs also asked a declaration "that the establishment and maintenance by the defendants of labour yards or relief works for the purpose of providing outdoor relief for able-bodied persons, to the knowledge of the defendants otherwise able to maintain themselves and their families, and the expenditure by the defendants of parts of the common fund of the union for the purpose of relieving such able-bodied persons and their families constituted a breach of the statutory duties of the defendants" as guardians. Ultimately, at the trial, the plaintiffs asked only for a declaration of this nature. Mr. Justice Romer held that the guardians had not exceeded their powers, and he dismissed the action with costs.

Mr. Neville, Q.C., Mr. Upjohn, Q.C., and Mr. S. G. Lushington were for the appellants; Sir Edward Clarke, Q.C., Mr. Swinfen Eady, Q.C., and Mr. Alexander Glen were for the respondents.

The COURT allowed the appeal.

The MASTER of the ROLLS said,—Under the Poor Law statutes passed before 1834 the only persons entitled to relief out of the poor-rates were those described in the 43rd Elizabeth, chapter 2, under three heads—namely (1) the children of parents unable to keep and maintain them; (2) such persons who, having no means to maintain themselves, used no ordinary and daily trade of life to get their living by; (3) the lame, impotent, old, blind, and such others as were poor and not able to work. The first two of these classes were to be relieved by being set to work. The third alone were to be relieved without work. Omitting children, and speaking only of adults, the older statutes drew a broad distinction between, first, the impotent poor, that is, poor unable to work and who were to be relieved without work, and, secondly, the able-bodied poor, that is, poor able to work but unable to maintain themselves. These were to be relieved, but only by being set to work. If a poor person able to work, and for whom work was found by the parish authorities, would not work, he became liable to imprisonment under section 2 of the

statute of Elizabeth and the subsequent Vagrant Acts; but I can find nothing in the statutes before 1834 which entitled an able-bodied person having the means of supporting himself to obtain relief from the parish authorities by being set to work or otherwise. On the other hand, orders for the relief of poor persons were constantly quashed on the ground that they were not stated to be impotent. A poor person able to work and able to procure work might become chargeable to the parish by refusing to work so long as to become physically unable to work or by reducing his wife and children to such a state as to render them chargeable to the parish. If he did this he would force himself and them on the rates and be punishable under the Vagrant Acts. This is the true explanation of the language used in the Vagrants Act of 5 George IV., chapter 83, section 3. It says, "Every person being able wholly or in part to maintain himself or herself or his or her family by work or by other means and wilfully neglecting or refusing so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish," shall be deemed to be an idle and disorderly person and be liable to imprisonment. The penalty here inflicted is for a wrong done by the person imprisoned; and the wrong done is by becoming chargeable or by rendering others whom he ought to support chargeable on the rates when he had no justification for so doing. It would be an entire perversion of this statute to construe it as entitling an able-bodied man who could support himself if he would to relief of any kind by the parish authorities. He could demand no relief in food or work from them if he could obtain work and could support himself and his family without their assistance. This conclusion as to the effect of the older Poor Laws is based upon a careful perusal of them, and upon what is to be found in Digests and Treatises, and, in particular, upon the resolutions of the Judges in *Lambard's Eirenarcha* 8, 9, and 10, which I regard as an extremely valuable exposition of the law by persons thoroughly well acquainted with it and its working in and shortly after the reign of Elizabeth. I have not succeeded in finding any judicial interpretation of the words "Such persons, married or unmarried, having no means to maintain them, as use no ordinary and daily trade of life to get their living by." These are the words used in section 1 of the statute of Elizabeth to describe the class of able-bodied poor able to procure work. It must be borne in mind that the Poor Laws have nothing to do with the regulation of labour. That was provided for by other statutes relating to labourers and artificers. The Poor Laws impose on the comparatively well-to-do the duty of supporting those who by reason of their poverty cannot maintain themselves. This being so, the inability to maintain himself which justifies an able-bodied man in requiring relief from the Poor Law authorities must, I apprehend, be a real actual inability to support himself on any terms which he can in fact comply with, and which, as between him and the ratepayers, do not justify him in refusing to support himself. He cannot, in my opinion, lawfully justify such refusal on the ground that he cannot obtain work except on terms which, as between him and his employer, he does not consider reasonable. What is a reasonable agreement for a man to enter into is one thing; what is a reasonable justification for a man compelling others to support him is quite another thing, but it is the latter alone which the Poor Law authorities ought to consider. This is a matter of the utmost importance in the present case, and, indeed, in all cases in which work can be got on terms which will enable a man to support himself and his family, but which he will not accept because he prefers to stand out in the hope of

obtaining better terms than those offered him. The short effect of the Poor Laws before 1834 I understand to have been as follows :—(1) No one who was starving could be lawfully refused relief, whether he was in that state by his own fault or not ; (2) poor persons physically unable to work were entitled to relief out of the rates without being set to work ; (3) poor persons physically able to work, but who could not obtain work, were entitled to relief by having work found for them at the expense of the ratepayers if no other work could be found ; (4) poor persons physically able to work were not entitled to relief in any other way ; (5) but poor persons able to work and able to procure it might, by refusing to work, become so weak as to be no longer able to work, in which case they became entitled to relief out of the rates and at the same time liable to imprisonment. This was an anomaly, for it enabled a person to obtain a legal advantage by his own wrong-doing. The anomaly was justified on grounds of humanity. The penalty for refusing to work was imprisonment, not death by starvation. Under various statutes passed in the reign of George III.—viz., 22 Geo. III., cap. 83, sections 29-35 (Gilbert's Act) ; 36 Geo. III., cap. 23, section 1 ; 55 Geo. III., cap. 137, section 3 ; 59 Geo. III., cap. 12, section 2, outdoor relief was authorized to be given to able-bodied poor who could not support themselves and families. But even when these Acts were in force, and abused as they were, I do not find that they, or any decisions upon them, authorized relief to able-bodied poor who could support themselves and their families if they chose to do so. "The King v. Hyworth" (1 Strange, 10) shows that before these Acts no relief could be lawfully given to such persons, and "The King v. Collett" (2 B. and C., 324), decided in 1823, proceeded on the supposition that the law in this respect remained unaltered, though the mode of relieving able-bodied poor who could not obtain work was left undecided. In 1834 the Poor Law was very greatly improved. Boards of guardians were formed and a Central Poor Law Board was created with very large powers of administration. (See 4 and 5 William IV., cap. 76.) But large as those powers are, I cannot find anything in the Act of 1834 or in any later Act which has enlarged the class of persons entitled to relief under the former statutes. I can find no section which entitles able-bodied persons to support out of the rates if they can obtain work and support themselves and their families, if they choose to do so. Section 54 of the Act of 1834 authorizes overseers to give temporary relief, but not money, in cases of sudden and urgent necessity. The object of this section is to enable overseers to act without reference to the guardians in cases which admit of no delay. The same section authorizes justices to order medical relief in case of sudden and dangerous illness. This section has no immediate bearing on the question which has to be decided on this appeal, and would not require further notice, except for the contention that the case before us was one of urgent necessity. I will examine this contention presently. Having ascertained the classes of persons entitled to relief under the Poor Law statutes, it is necessary to discover whether the Local Government Board can authorize relief to be given to persons not entitled to demand it, and to what extent this power, if it exists, can be exercised. The powers of the Local Government Board (who now represent the Poor Law Commissioners) are very large and must be carefully examined. The enactments which confer special powers upon them relating to this subject are 4 and 5 William IV., chapter 76, sections 15, 42, 52, and 105, and 11 and 12 Vict., chapter 91, section 4, amended by 29 and 30 Vict., chapter 113, section 5. Section 15 of 4 and 5 William IV., chapter 76, clearly confers no power to

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grant relief to any person not entitled to relief under the Poor Law statutes. It is in express terms confined to the administration of relief according to those statutes, and there is a remarkable provision at the end of the section to guard against the supposition that anything in the Act itself should enable the Commissioners to interfere in any individual case for the purpose of ordering relief. Section 42 of the same Act relates to regulations to be observed in workhouses, and has no direct bearing on this case. This section in no way authorizes relief to be given to persons not entitled to it by law. Section 52 is more important, for it relates to outdoor relief and gives the Commissioners very wide powers. But here, again, they are restricted to making regulations declaring "to what extent and for what period the relief to be given to able-bodied persons or to their families in any particular parish or union may be administered out of the workhouse." This language assumes that the persons referred to are entitled to relief, and enables rules to be made for their relief out of the workhouse, instead of in it. But I cannot read this section as empowering the Commissioners to order relief to be given to persons not entitled to relief at all under the statutes relating to the poor. Section 52, like the others already noticed, gives powers of administering those laws, but no power to alter them. That section enacts that relief given contrary to the regulations shall be deemed unlawful and shall be disallowed in the accounts, but the section contains a proviso enabling the local authorities to depart from the regulations of the Commissioners in cases of emergency and authorizes the Commissioners to approve of such departure, and any relief so given and approved "if otherwise lawful" is not to be deemed unlawful or be disallowed. So that even in cases of emergency no relief can be lawfully given except to persons entitled to it under the Poor Law statutes. The recital at the commencement of section 52 of 4 and 5 William IV., chapter 76, refers to the abuse of the powers to grant outdoor relief conferred by the statutes of George III., to which I have already referred. But, bearing them in mind and attending as we ought to the recital (which, I am sorry to say, is omitted from the last edition of the revised statutes), I cannot arrive at the conclusion that the Commissioners appointed under 4 and 5 William IV., chapter 76, to carry out the improvements made by it are empowered to extend the scope of the Poor Law statutes, and to extend their application to persons not entitled to relief under them. This general conclusion, arrived at from a study of the language of the sections referred to, is strengthened by section 105, which prohibits the removal of illegal rules by a *certiorari* into any Court except the Queen's Bench. This shows that the Commissioners have no legislative as distinguished from administrative power. If further authority for this proposition is wanted it is to be found in "Waddington v. Guardians of the London Union" (E. B. and E., 370 ; see pp. 399-400), where a retrospective rate, alleged to have been authorized by regulations made by the Commissioners, was held illegal. I pass now to another statute, which goes further than any I have yet referred to ; I mean the 11th and 12th Victoria, chapter 91, section 4, relating to the audit of Poor Law accounts. Under this Act an unlawful expenditure properly disallowed by the auditor may, nevertheless, be allowed by the Commissioners on appeal from his decision. If the Commissioners find the subject-matter of the disallowance was incurred "under such circumstances as to make it fair and equitable that such disallowance shall be remitted" they have the power to remit it—i.e., to authorize the allowance of the unlawful and properly disallowed expense. This is a very large power, which is now entrusted to the Local Government Board, and with the exercise of which, when it arises, this Court

cannot interfere. But the remission of the disallowance of an expense unlawfully incurred no more renders lawful the incurring of the expense than a pardon for a crime renders lawful the past criminal conduct of the person pardoned. The power of the Commissioners to allow an unlawful expense does not arise until such expense has been incurred and been disallowed; and if the High Court has jurisdiction to prevent the improper expense, that jurisdiction is not taken away by the power given to the Commissioners to allow the expense if it has been illegally made. So, if the illegal payment is a ground for indictment, its allowance by the Commissioners will afford no legal answer to the indictment. At the same time, the existence of this power ought to make the Court very careful in granting injunctions relating to Poor Law relief. Having now examined all the statutory enactments which have to be considered, I pass to those regulations made by the Commissioners which are applicable to the Merthyr Tydvil Union. They are dated October 1, 1870, and October 29, 1870. As might be expected, they relate to the mode of administering relief to poor persons in the union. They are purely administrative orders; they in no way (inadvertently or otherwise) purport to authorize the granting of relief to persons not entitled to it. Article 1 of the order of October 1, 1870, says that "every able-bodied person requiring relief" shall be relieved wholly in the workhouse, except in certain specified cases, the first of which is "where such persons shall require relief on account of sudden and urgent necessity." The expression "every person requiring relief" in the first article cannot mean every person asking for relief whether entitled to it or not. The regulations relate to the working of the Poor Laws, and the expression in question must in reason be confined to those persons who are entitled to relief under the Poor Laws, and who require such relief. Again, the first exception refers only to such emergencies as require outdoor relief instead of indoor relief. It has reference to the necessities of those entitled to relief. It in no way enlarges the class of persons entitled to relief under the Poor Law statutes. If the workhouse is full, the exception justifies giving outdoor relief to poor persons entitled to relief who cannot be received into the workhouse; and if the workhouse is not full a poor person entitled to relief may need it so urgently as to entitle him to outdoor relief before he can reach the workhouse. But to construe the exception as justifying relief in any shape to persons, few or many, who are not entitled to any relief at all is entirely to mistake the object of the exception and to put upon its language a meaning which it will not bear. The order or regulation of October 29, 1870, is again a merely administrative order directing how outdoor relief is to be given to the poor entitled to it. As I understand the order, outdoor relief is only to be given to the able-bodied poor who are entitled to relief and who will do a certain amount of work. But if they comply with that condition they are entitled to such relief for themselves and their families partly in food, clothing, and articles of necessity and partly in money as stated in the order. I now proceed to consider what has been done in this case. There is no conflict of evidence; all the material facts are admitted. Relief has been given:—

- (1) To wives and children reduced to destitution by the strike;
- (2) to able-bodied men thrown out of work by the strike and unable to obtain work and maintain themselves while it lasted.

Both of these classes of persons were entitled to relief under the statute of Elizabeth, and there has been no unlawful expenditure of the poor-rates in supporting them. It is true that the wives and children of the strikers were not themselves applicants for relief and were relieved indirectly through the strikers, but this only amounts to an impropriety in the

mode of relieving them. This impropriety is not a matter for this Court's interference. It is unimportant in considering whether the wives and children were entitled to relief or not. But the colliers who struck work were able-bodied men who might have obtained work and who might have maintained themselves and their families. These men, when relieved, were not so reduced by want as to be unable to keep themselves and their families off the rates, and it was their clear duty to do so if they could. In my opinion these persons had no right to be relieved when they applied for relief and the authorities were not justified either by the Poor Law statutes or by any regulations made under them in affording such relief. The evidence does not show that the colliers were physically too weak and ill to work, nor that any of them were prevented by fear of violence from accepting work within their reach. They are described as destitute, and in one sense they were so; they had neither food nor money. But they were able-bodied men physically well and able to work; and the answer to the fourth interrogatory shows that they might, if they had chosen, have obtained work at wages sufficient to support themselves and families. It was contended that this was only true if they all went to work in a body; and that it was not true of them individually. I cannot read the answer to the fourth interrogatory as open to this construction. No one of the colliers was willing to accept work unless the others did the same; and no one could have worked the colliery without others. But the admissions show in my opinion that each and every collier could, if he had chosen, have kept himself and his family off the rates. I draw no distinction between strikers and other able-bodied men who can support themselves but who will not. There is no difference so far as the Poor Law is concerned either for better or for worse between men on strike and other men who can, but will not, support themselves. To use the rates to support strikers or any other persons able to support themselves is in my opinion illegal; although, rather than let even such persons starve, relief may be given them when physically unable to work. This anomaly I have already alluded to. As I understand Mr. Justice Romer's judgment we do not differ in holding that, speaking generally, it is wrong to grant relief to able-bodied persons who can obtain work and support themselves and families. But he has treated this case as one of urgent necessity and as consequently justifying the guardians in granting relief as they did. Here I am unable to follow him. I have already pointed out that the guardians were justified in relieving the wives and children even of the colliers and in granting relief to non-strikers thrown out of employment by the strike. These persons were all entitled to relief without reference to any question of sudden emergency. The numbers of them might and very likely did create a sudden emergency entitling them to outdoor as distinguished from indoor relief. But that is a comparatively immaterial matter, and one which the Court ought not to concern itself about. But if a poor person physically able to work can obtain work and so support himself and family there is no urgent necessity, nor any necessity at all, for granting him relief. Moreover, numbers do not give a right to relief to persons not individually entitled to relief. The sense in which the colliers were destitute I have explained already. They were not so weak as to be unable to work, and they were not relieved on the ground that they were physically in that condition. They were relieved before they were entitled by law to relief, and, I suppose, from fear of a disturbance and of violence. I quite agree with Mr. Justice Romer that it is not the province of the High Court to administer the Poor Laws, nor to interfere with guardians in the performance of their very difficult

duties, the performance of which demands great judgment, sympathy, and discretion. Still less can the High Court interfere with the exercise by the Local Government Board of their powers to make regulations for the relief of persons entitled thereto by the Poor Law Acts. Moreover, the allowance by the board of expenses unlawfully incurred cannot be controlled by the Court. This prevents the Court from ordering the guardians to make good any expense which has been incurred, and which the Local Government Board may, in their judgment, think it right to allow. But this information was filed to restrain the guardians from misapplying the rates by granting relief at a great expense to persons not entitled thereto. Certiorari is no adequate remedy in such a case, nor is there any other. The jurisdiction of the High Court to grant an injunction to restrain an unlawful application of rates cannot be doubted, and the observations in the "Grand Junction Waterworks Company v. The Hampton District Council" ([1898] 2 Ch., 331) are not applicable to such a case as the present. The guardians, taking, in my opinion, an erroneous view of their power and duty to grant relief in such a case as this, contended that it was competent for them, and indeed their duty, to grant relief on the ground of emergency. In my opinion they were wrong so far as the colliers themselves were concerned, and, as the defendants from first to last have maintained that they were in the right throughout, I think the Court ought to make a declaration to show that the information was properly filed and to prevent any misconception as to the illegality of the conduct of the guardians. Such a declaration is not open to the objection against making abstract declarations on matters not within the Court's jurisdiction as in "Barracough v. Brown" ([1897] A.C., 615), and which objection was forcibly pointed out by Lord Davey in that case at page 623. The declarations asked by the information are much too wide and might be misunderstood. Labour yards may well have been wanted for persons entitled to relief, because, although able to work, they were unable to obtain work and could not have been taken into the workhouse. The proper order will be as follows:—Allow the appeal and discharge the judgment appealed from. Declare that the payment by the defendants out of the poor-rates of any money for setting to work or for the relief of able-bodied men, who were at the time able to obtain and perform work at wages sufficient to support themselves (and their wives and families if any), was unlawful and ought to be disallowed by the auditor on auditing the defendants' accounts. But this declaration does not include relief given to or for the wives and children of such men, and the said declaration is without prejudice to and is in no way to affect the power of the Local Government Board to remit such disallowed payments, although unlawfully made, under the Statute 11 and 12 Victoria, chapter 91, section 4, or any other statute enabling them so to do. The defendants must pay the costs of the appeal, but the relief claimed by the information and action was so much too wide that each party must bear his own costs of the information and action itself.

LORDS JUSTICES RIGBY and VAUGHAN WILLIAMS concurred.

[Solicitors—Bell, Brodrick, and Gray; Wrentmore and Son, for Frank James and Sons, Merthyr Tydvil.]

Prob., Divorce, and Adm. Div. } 1900.
(Jeune, P., Gorell Barnes, J.) } March 6.

THE ARROYO.*

Practice—Third-party procedure—Indemnity—
—Charter-party—Captain under order of charterers.

By a charter-party the shipowners were not to be liable for perils of the sea or other accidents of navigation even when occasioned by the negligence, default, or error in judgment of the master, mariners, or other servants of the shipowners. By another clause in the charter-party the captain, although appointed by the owners, was to be under the orders and direction of the charterers as regards employment, agency, or other similar arrangements; bills of lading to be signed at any rate of freight the charterers or their agents might direct without prejudice to the charter; the charterers indemnifying the owners from all consequences or liabilities that might arise from the captain doing so. Corn was shipped under a bill of lading by which the shipowners were not exempted from the same liabilities as under the charter-party. The corn was damaged on the voyage, and the endorsees of the bill of lading sued the shipowners, alleging that the damage was caused by negligent loading. The shipowners served a third-party notice on the charterers claiming indemnity from them under the above clause in the charter-party.

Held, that the shipowners were entitled to serve the third-party notice.

This case came before the Court by way of motion on appeal from a decision of the Judge of the Liverpool County Court, setting aside a third-party notice. It appeared that by a time charter, dated April 19, 1899, the owners of the steamship Arroyo chartered their vessel to F. Leyland and Co. (Limited) for the term of two round voyages to the St. Lawrence, at the rate of 6s. 9d. per gross register ton per calendar month. Under the exceptions contained in the charter-party the owners were not to be liable for, amongst other things, "perils of the sea, . . . and other accidents of navigation even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." The charter-party also contained the following clause:—"The captain, although appointed by the owners, shall be under the orders and direction of the charterers as regards employment, agency, or other similar arrangements. Bills of lading are to be signed at any rate of freight the charterers or their agents may direct, without prejudice to this charter, the captain attending daily at the offices of the charterers, or their agents, to do so: the charterers hereby indemnify the owners from all consequences or liabilities that may arise from the captain doing so." The Arroyo proceeded to the St. Lawrence and there loaded, amongst other cargo, a certain parcel of corn which was shipped under a bill of lading under which the shipowners were not exempted from the same liabilities as under the charter-party. The Arroyo then sailed for Liverpool, and on arrival there it was found that the parcel of corn had sustained sea damage, and the endorsees of the bill of lading thereupon commenced an action in the Liverpool County Court against the shipowners, seeking to recover the amount of such damage, alleging that it was caused by negligent loading of the deck cargo on the Arroyo, whereby the deck was started and rendered leaky, and sea water was enabled to get in among the cargo. The shipowners, the defendants in the action, disputed the negligence, but served a third-party notice upon F. Leyland and Co. (Limited), the charterers, claiming, under the clause of the charter-party set out above, to be indemnified by them in respect of their liability, if

*Reported by HUGH O. S. DUMAS, Esq., Barrister-at-Law.

any, for the damage. Application was then made by the charterers to the County Court Judge to have the third-party notice set aside, which the learned Judge directed to be done, saying that the contract of indemnity was obscurely worded, but it seemed to him to be confined to any consequences or liabilities that might arise from the captain's signing bills of lading at a rate of freight differing from that in the charter-party, and that it had nothing to do with the damages for breach of duty about the carriage and delivery of goods to which the claim in the action related. The shipowners appealed.

Mr. LESLIE SCOTT, for the appellants, contended that the indemnity extended to cover this liability, if in fact the shipowners were liable.

Mr. JUSTICE GORELL BARNES.—Surely, in any case, there is an implied indemnity, under which the charterers could be brought in by a third-party notice, where the master at the request of the charterers signs bills of lading in excess of his authority from his owners.

Mr. LESLIE SCOTT.—Yes, and that is an argument in support of my construction of the written clause. He then referred to the case of “*Milburn v. Jamaica Fruit, &c., Co. (Limited)*” (4 Com. Cas., 331). The indemnity clause would be mere surplussage if it only applied to the question of the rate of freight, as to which no liability could be imposed upon the shipowner.

He was stopped by the COURT.

Mr. ASPINALL, Q.C. (Mr. Collingwood Hope with him), for the respondents, the charterers, contended that the third-party notice was premature. The cause of the loss was not yet ascertained, and it might be that no question of indemnity would arise. He did not contend that the limit placed upon the indemnity by the Court below could be upheld.

The COURT allowed the appeal with costs.

The PRESIDENT, in giving judgment, said that the case was abundantly clear. The right to the indemnity was the only point taken in the Court below, and the Court would not now be justified in assuming a different state of facts. The appellants were entitled to an express indemnity under the clause of the charter-party, and the appeal must be allowed with costs.

Mr. JUSTICE GORELL BARNES concurred.

[Solicitors—Batesons and Co., of Liverpool, for the appellants; Hill, Dickinson, and Co., of Liverpool, for the respondents.]

Chan. Div. }
(Stirling, J.) }

1900.
March 7.

DEBENTURE-HOLDERS' ACTIONS.*

Practice—Chancery Division—Debenture-holders' actions—Inquiry as to creditors—Alteration in common form of judgment—Undertaking given by plaintiff.

HIS LORDSHIP stated that, before the paper was called, he desired to mention a matter which had been considered by all the Judges of the Chancery Division as to debenture-holders' actions. There were two points of everyday practice as to which there had been some diversity of opinion, but all the Judges were now agreed upon them. The first was as to an inquiry which was usually inserted in the common form of judgment in those actions—viz., the inquiry whether there were any creditors who were entitled to priority of payment. It was found in practice that that inquiry did not always reach the proper person—namely, the receiver. It was provided by the Preferential Payments in Bankruptcy Amendment Act, 1897, section 3, that where a receiver is appointed on behalf of the holders

of debentures or debenture stock of a company, secured by a floating charge, then, if the company is not at the time in course of being wound up, the debts mentioned in section 1 of the Preferential Payments Act, 1888, shall be paid forthwith out of any assets coming to the hands of the receiver, in priority to any claims for principal or interest in respect of such debentures or debenture stock. It was also found that the inquiry did not quite work in another respect, because it was suggested that payment ought not to take place until the inquiry had been answered. The matter had been considered and all the Judges were now agreed that, in all cases where a receiver is appointed in a debenture-holders' action, a direction is to be inserted that the receiver do forthwith out of any assets coming to his hands pay the debts of the company which have priority over the claims of the debenture-holders under the Preferential Payments in Bankruptcy Amendment Act, 1897; and that the receiver be allowed all such payments in his accounts. Inquiry No. 6 in the common form of judgment in these actions was to be omitted in future, it being considered that the object was sufficiently attained by the direction to the receiver. The other point related to the undertaking given by the plaintiff in a debenture-holders' action on the appointment of a receiver to act at once. The Judges had now agreed that a direction should be given to the Registrars that, in drawing up such orders in future, the undertaking was to be so framed as to extend to all liabilities which would be covered by the security when completed, and not to the receiver's receipts alone.

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams,
L.JJ.)

1900.
March 8.

IN RE SIR SPENCER MARYON-WILSON—WILSON V.
MARYON-WILSON.*

Revenue—Estate duty—Incidence—Settlement.

By a marriage settlement a testator covenanted for the payment by his executors of £25,000 to the trustees of the settlement “without any deduction”; *held*, that settlement duty was payable out of the residuary estate, and not out of the £25,000.

Decision of Kekewich, J. ([1899] 2 Ch., 489), reversed.

This appeal against a decision of Mr. Justice Kekewich's ([1899] 2 Ch., 489) raised a question of some importance on the construction of the Finance Act, 1894. By a settlement dated July 23, 1895, made on the marriage of one of his daughters, the late Sir Spencer Maryon-Wilson covenanted with the trustees that his executors should, within six months after his death, pay to the trustees the sum of £25,000, with interest at 3½ per cent. per annum from the day of his death, “without any deduction.” The trustees were to hold the £25,000 upon the trusts of the settlement. By his will, dated August, 1896, Sir Spencer devised some freehold estates to trustees for the term of 2,000 years upon trust to raise (*inter alia*) the above-mentioned sum of £25,000, and to pay it to the trustees of the settlement, with interest from the testator's death. The testator died on December 31, 1897. A question arose as to how the “settlement estate duty” imposed by the Finance Act in respect of the £25,000 ought ultimately to be borne. It was decided by Mr. Justice Kekewich, and was indeed admitted, that the “estate duty” as regarded the £25,000 must be borne by the testator's general residuary estate. But

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

the learned Judge held that the further duty known as "settlement estate duty" must be borne by the £25,000, and not by the general residuary estate, and that the testator's covenant had been fully performed when the £25,000 had been paid to the trustees of the settlement without any deduction in respect of "estate duty." The trustees of the settlement appealed.

Mr. Butcher, Q.C., and Mr. Austen-Cartmell were for the appellants; Mr. Warrington, Q.C., and Mr. O. Leigh Clare were for the executors and trustees of the testator's will.

The appeal was heard on February 13 and 16 last, when judgment was reserved.

The MASTER of the ROLLS read the following judgment:—The sections of the Finance Act, 1894, which are important are sections 1, 2, 5, 6 (2), 8 (3) and (4), 9, and 14 (1). The Finance Act, 1896, section 19, is also important. I do not stop to comment on their exact language. The argument for the appellants, so far as it is based on the Finance Acts, is reducible to the following propositions:—(1) That by the Act of 1894, sections 5 and 6 (2), the settlement estate duty is payable by the executors of the testator. (2) That the Finance Act does not say by whom the duty so payable is ultimately to be borne in a case like the present, section 8 (4) not applying. (3) That consequently the duty must be borne by the residuary legatees. The first two of these propositions are correct, but the third is, in my opinion, erroneous, although it was adopted by Mr. Justice North in "*In re Webber*" ([1896] 1 Ch., 914). The executors pay the settlement estate duty as trustees for somebody, but as trustees for whom? Certainly not as trustees for the residuary legatees, who take no interest whatever in the fund in respect of which the settlement estate duty is payable. The executors pay that duty as trustees for those who are beneficially entitled to that fund, and upon plain principles of equity the executors are entitled to be repaid out of that fund what they have by law to pay in respect of it. In my opinion it lies upon the beneficiaries of that fund to show why this burden which thus falls upon them should be borne by somebody else. The settlement estate duty, although described and imposed as a further estate duty, is imposed, not on the general estate of the deceased, but on specific portions of it, and ought in common fairness to be borne by those who take those portions. To facilitate collection the executors have to pay it, but this I regard as mere machinery. The Legislature has amended the law as expounded by Mr. Justice North (see 59 and 60 Vict., c. 28, section 19), and has declared that the settlement estate duty payable in respect of property settled by a will is to be borne by the settled property. Mr. Justice Kekewich treats this enactment as a recognition by the Legislature of the soundness of the reasoning which led to the decision. I cannot so regard the enactment. It corrected a mistake, and so saved further litigation. If Mr. Justice North's reasoning is adopted and applied to all settlements of money to be paid on death, we shall have this extraordinary anomaly—that if a settlement is made by will the settlement estate duty is to be borne by the settled property, whereas if the settlement is made by deed that duty is not to be borne by that property at all. This is an utterly irrational conclusion, and is not one at which we are compelled to arrive by the language of the statutes themselves. If there were nothing else in the case the settlement estate duty would, in my opinion, have to be borne by the settled fund. But then we have to consider the covenant of the testator. He covenanted to pay his daughter's trustees £25,000 "without any deduction." These words are very important. They show that possible deductions were thought of, and that the settlor clearly intended that his daughter's trustees

should be paid £25,000 in full, without any deduction of any sort or kind. It is urged that there is no difference between a covenant to pay £25,000 and a covenant to pay £25,000 without deduction. But, however this may be, the latter form of expression leaves no room for doubt as to the intention of the parties, whilst, if the words "free from deduction" are omitted, the intention is by no means equally clear. The language of the covenant in this case is too plain to be got over. It is agreed on all hands that the daughter's trustees are to receive £25,000 free from estate duty. But it is urged that the "settlement estate duty," although called a "further estate duty," and made payable by the executors of the covenantor in respect of the settled fund, ought not to be treated as a deduction from it, but rather as a charge on it when paid over. I cannot accede to this argument. It may be conceded that the settlement estate duty is a charge on the settled fund, and that, so far as the Finance Acts are concerned, the executors have to pay it simply for facility of collection. But in the present case we have to consider the trustees of the daughter's settlement on the one hand, and the testator's residuary legatees on the other, and, as between them, his covenant is so plainly worded as to preclude any deduction from the £25,000 in favour of the residuary legatees. They are entitled to nothing out of the testator's estate until the £25,000 has been paid without deduction, pursuant to his covenant. The executors have to pay the settlement estate duty not simply because the statute requires them to pay it, but also because their testator has thrown the burden of it on his general estate, in exoneration of the £25,000 which was settled on his daughter. Similar observations apply to the trusts of the term of 2,000 years created by the testator's will to raise and pay the £25,000 in performance of his covenant—that is, without deduction as above explained. As between the daughter's trustees on the one side and the devisees of the estates subject to the term on the other side, the burden of the settlement estate duty falls on the latter and not on the former. In other words, the trustees of the term must, if necessary, raise and pay not only £25,000, but also the settlement estate duty payable in respect of it. The result, therefore, is that the decision appealed from must be reversed, and the duty in question, and the costs of the litigation, must be borne by the testator's general estate.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Evans, Foster, and Wadham; Bell, Steward, and Co.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams,
L.JJ.) 1900.
March 8.

BURCHELL V. WILDE.*

Solicitor—Partnership—Dissolution—Right to use firm's name.

Decision of Byrne, J. (*ante*, p. 171), affirmed.

This was an appeal against a decision of Mr. Justice Byrne's, reported in *The Times* of February 1 last, and *ante*, p. 171. The plaintiffs applied to the learned Judge for an interim injunction to restrain the defendants from carrying on business as solicitors under the name or style of "Burchell and Co." or under any other name or style of which "Burchell" or "Burchells" should form part. In 1874 J. W. Burchell, one of the two plaintiffs, was admitted a partner in the firm of "Burchells" and in the year

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

1882 a new partnership was constituted. The partners were W. Burchell, the elder, and W. Burchell, the younger, who subsequently ceased to be members of the firm, the defendant W. G. Wilde, and the plaintiffs J. W. Burchell and C. T. D. Burchell. They took the style of "Burchell and Co." By an agreement of June, 1893, the plaintiffs and the defendant W. G. Wilde agreed to continue in partnership as solicitors in continuation of their then partnership under the style of "Burchell and Co." at No. 5, The Sanctuary, Westminster. The defendant W. Wilde is a son of the defendant W. G. Wilde, and there were provisions for his being admitted into the partnership under certain conditions. In the year 1899, differences having arisen, the partnership was dissolved as from December 9, 1899. Under the terms of dissolution the plaintiffs acquired the offices at 5, The Sanctuary. The defendants are carrying on business in partnership at No. 36, Victoria-street, Westminster. When the action was commenced they used the firm name "Burchell and Co." Since the hearing by Mr. Justice Byrne they have adopted the firm name "Burchell, Wilde, and Co." The plaintiffs use the name "Burchells and Co." Mr. Justice Byrne declined to make any order upon the motion. He thought that upon principle it was difficult to see why the rights of any partner upon a dissolution, in circumstances such as those of the present case, in reference to the use of the firm name should be greater than the right of a purchaser who had bought the goodwill of the business. And, having regard to more recent decisions, his Lordship thought that "Banks v. Gibson" (34 Beav., 566) must be read subject to the qualification that the use of the old name must not expose the other partners to any liability. His Lordship was not satisfied that either of the plaintiffs would be under any tangible risk of liability if the defendants were to practise as "Burchell, Wilde, and Co." (as they were willing to do), especially if the plaintiffs were to use a style carrying their initials, or were to take the name of "Burchell and Burchell," or "Burchell, Burchell, and Co." The plaintiffs appealed.

Mr. Swinfen Eady, Q.C., and Mr. W. E. Vernon were for the plaintiffs; Mr. Levett, Q.C., and Mr. Norton, Q.C., were for the defendant W. G. Wilde; Mr. Alexander, Q.C., and Mr. T. B. Napier were for the other defendant.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that under the arrangement made upon the dissolution of partnership the clients' papers were to be divided between the partners. Nothing was said about the use of the firm name. The goodwill of the business was not to be sold for the benefit of the partners, but, so far as it depended upon the possession of the clients' papers, it was to be divided. It was left undetermined what was to be done about the use of the firm name. It followed that each partner was entitled to use the firm name, of which they all had been tenants in common, subject to a limitation which his Lordship would mention presently. This distinguished the present case from "Gray v. Smith" (43 Ch.D., 208) and similar cases. Apart from agreement a man had no right to represent that his late partner was still a partner with him. But were the defendants doing that? They had used the old firm name, and had since altered it to "Burchell, Wilde, and Co." Why did that represent that the plaintiffs in particular were partners with them? The defendants had, in the circulars which they had issued announcing the dissolution, taken pains to state who the partners were. In no business sense were they holding out that the plaintiffs were their partners, and there was no practical or tangible risk to the plaintiffs. Mr. Justice Byrne had decided the case on

correct principle, and the appeal must be dismissed. It would, however, be more satisfactory if the defendants would give an undertaking to use the name "Burchell, Wilde, and Co."

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS concurred.

Mr. LEVETT and Mr. ALEXANDER said that their respective clients were ready to give the undertaking suggested and make an end of the matter if the plaintiffs would give a counter undertaking to use some such name as "Burchell and Burchell."

[Solicitors—Burchells and Co.; Burchell, Wilde, and Co.]

Court of Appeal (A. L. Smith, }
Collins, and Romer, L.JJ.) }

1900.
March 8.

ELLIS V. ROWBOTHAM.*

Landlord and Tenant—Letting for a year—Rent
:—Payment by instalments.

Where, by an agreement, rent is payable in quarterly instalments in advance, the Apportionment Act does not apply if the tenant makes default and the landlord re-enters in the middle of a quarter.

Decision of Kennedy, J. (15 *The Times* L.R., 301), affirmed.

This was an appeal by the defendant from the judgment of Mr. Justice Kennedy at the trial of the action without a jury, reported in 15 *The Times* L.R., 301. The action was brought to recover the sum of £55 18s. 4d. for rent alleged to be due from the defendant to the plaintiff. By an agreement dated June 8, 1898, the plaintiff let the premises called Creek-house at Shepperton to the defendant for a year from June 10, 1898, till June 9, 1899, at the rent of 340 guineas. By the terms of the agreement the rent was to be payable as follows:—£189 5s. on taking possession; £55 18s. 4d., on September 10, 1898; and the same amount of £55 18s. 4d. on December 10, 1898, and on March 10, 1899. The defendant paid £189 5s. on going into possession, and also paid the instalment which became due on September 10, but he made default in payment of the instalment which became due on December 10. By the clause in the agreement as to re-entry, if any rent reserved by the agreement should be in arrear for fourteen days the landlord might, after giving one week's notice in writing, retake possession of the premises. But this was to be without prejudice to any other remedies the landlord might have. The writ in the action was issued on February 7, 1899, but was not served till February 21. The claim was for £55 18s. 4d., the instalment of rent which became due on December 10. On February 24 the plaintiff gave notice in accordance with the clause as to re-entry, and on March 2 he retook possession of the premises. The defendant contended that, by virtue of the Apportionment Act, 1870, rent must now be taken to accrue from day to day, and that the defendant was only liable for rent proportionate to the period during which he had actually occupied the house. The defendant paid into Court the sum of £15 14s. 5d., which he said was sufficient to satisfy the plaintiff's claim. Mr. Justice Kennedy gave judgment for the plaintiff.

Mr. C. A. RUSSELL, Q.C. (Mr. Frank Dodd with him), for the defendant, in support of the appeal said that by the Apportionment Act all rents were to be considered as accruing from day to day, and were to be apportionable in re-

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

spect of time accordingly. The learned Judge had held that the Act did not apply to an agreement to pay rent in advance in specified sums on specified days. But the Act was express and general in its terms, and the matter could not be affected by the day on which the rent was made payable. [LORD JUSTICE A. L. SMITH.—Is not the Apportionment Act an Act passed for the benefit of landlords?] There was no reason why it should be so considered. The Act applied to "all rents," which must include rents payable in advance.

Mr. Rawlinson, Q.C., and Mr. Woodfin appeared for the plaintiff.

The COURT, without calling upon counsel for the plaintiff, dismissed the appeal.

LORD JUSTICE A. L. SMITH said he was of opinion that the judgment of Mr. Justice Kennedy was right. The defendant relied on the Apportionment Act. By the common law, if a tenant who had agreed to pay rent in respect of each quarter at the end of the quarter went out of possession before the last day, the landlord received no rent for the current quarter. The effect of the Act was that now rent accrued due *de die in diem*, and the tenant who went out in the middle of a quarter was liable to payment of rent for the time during which he was in occupation. That did not seem to him to apply in any way to the present case. The rent in question accrued due long before the tenant went out of possession. By the agreement the rent fell due in advance as the quarters arrived. The defendant relied on the expression "all rents." But what the Act said was that all rents should be considered as accruing due from day to day. In his opinion that did not apply to a case where rent had already accrued due.

LORD JUSTICE COLLINS said he was not free from doubt in this case, for he felt the force of the argument which had been addressed to them by Mr. Russell. But he did not differ from his learned brethren.

LORD JUSTICE ROMER said he thought that the Act only applied to sums accruing, not accrued, due at the time when the apportionment was said to be required, and that it did not apply to any sums duly and properly paid before the happening of the incident which was said to necessitate the apportionment. To hold otherwise would lead to extraordinary results not contemplated by the Legislature, and would put a forced and unsound construction on the Act. He would add, with regard to this particular agreement, that it seemed to him that by it the landlord was entitled to retain the rent reserved and paid in advance, though he subsequently became entitled to re-ent.

[Solicitors—C. D. Travers Wire, for the plaintiff; George Trenam, for the defendant.]

House of Lords (Lords Macnaghten, } 1900.
Morris, Shand, Davey, and Brampton) } March 9.

FOXWELL AND OTHERS V. VAN GRUTTEN.*

Will—Construction—Devise of real estate—Estate tail—Rule in Shelley's case—Gift over—Purchase.

Decision of the Court of Appeal (15 *The Times* L.R., 115) affirmed.

This was an appeal from part of an order of the Court of Appeal (Lords Justices A. L. Smith, Rigby, and Collins) dated December 14, 1898, and reported in 14 *The Times* L.R., 293; 15 *ib.*, 115. This House on July 5, 1897, had ordered a new trial of the original action, and Mr. Justice Bigham on that trial dismissed

the action, in which the appellants were plaintiffs and the respondent defendant. This decision was affirmed by the Court of Appeal. The arguments on the appeal to this House were heard on July 18, 20, and 21 last, when their Lordships reserved judgment. The action was brought to recover possession and an account of rents and profits and means profits of certain lands and hereditaments in the county of Cornwall, of which the defendant was in possession. These lands were shortly described as "Rosewarne." The appellants claimed to be entitled to Rosewarne as heirs in coparcenary of one William Harris, who died on December 8, 1815, having by his will, dated October 31, 1804, devised Rosewarne to his only child, Mary Harris, afterwards Mary Hartley, for an estate which has been held by this house to be an estate tail. The will contained a legal devise to trustees in fee, the trusts of the fee being declared in the words following:—"In trust in the first place to have, receive, and take the rents, incomes, issues, and profits of all and singular my said freehold lands and tenements and tyn bounds to and for the use and benefit of such my child or children as shall be living, or wherewith my wife may be ensient at the time of my death, and to pay, apply, and dispose of such rents, incomes, and profits, or such and so much thereof as they my said trustees, or the major part of them, or the survivors and survivor of them, or the heirs of such survivor shall deem right and proper into and about the maintenance and education of such child or children until he, she, or they shall severally and respectively attain the age of 21 years, or be married. And from and after such child or children shall have attained the age of 21 years or be married then in trust to permit and suffer such child or children as they shall severally attain the said age of 21 years or be married to have, receive, and take, if more than one, in equal shares and proportions the said rents, incomes, and profits of all and singular my said freehold lands, tenements, and hereditaments hereby devised to my said trustees to and for her, his, and their own use and benefit for and during the term of her, his, and their natural life and lives. And if I leave only one child and my wife not ensient, or if ensient and such child or children wherewith she may be ensient shall not be born alive or die before he, she, or they shall attain the age of 21 years or be married, then to permit and suffer in like manner such one child to have, receive, and take the said rents and profits of my said freehold lands, tenements, and hereditaments, tyn bounds, and premises to and for her or his sole use and benefit for and during the term of her or his natural life. And from and immediately after the death of such child or children then my will is that my said trustees shall stand seised and be possessed of all, every, and singular my said freehold lands, tenements, hereditaments, tyn bounds, and premises hereinbefore devised to them in trust unto and to the use of the heirs of the body and bodies of such child or children lawfully begotten; if more than one, to be equally divided between them, such freehold lands, tenements, hereditaments, tyn bounds, and premises to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of 21 years or be married, and to their several and respective heirs and assigns for ever." Mary Harris in the year 1819 married one Winchcombe Henry Hartley, by whom she had one child only—namely, William Henry Harris Hartley. Mary Hartley died on October 22, 1868, without having, as the appellants contend, in any way dealt with or purported to deal with her interest under the said will. William Henry Harris Hartley (who was born on January 1, 1823) attained the age of 21 years on January 1, 1844, and died intestate and unmarried

*Reported by J. EYBE THOMPSON, Esq., Barrister-at-Law.

on June 27, 1894. Upon the death of William Henry Harris Hartley the respondent, Lucien Stanislaus Leon Van Grutten, who was a stranger in blood to the said William Harris, the testator, took possession of Rosewarne, claiming to be entitled thereto as heir to the said William Henry Harris Hartley through Winchcombe Henry Hartley, his father, who had left issue by a former wife prior to his marriage with the said Mary Harris. At the trial before Mr. Justice Bigham the respondent contended that although it was shown that under the clause above set out in William Harris's will Mary Hartley took an estate tail in Rosewarne which had never been barred, the appellants were not entitled to judgment in the action, for that William Henry Harris Hartley took, by virtue of the said clause, a remainder in fee expectant on the determination of such estate tail, and that such remainder in fee was now vested in the respondent by virtue of his heirship to William Henry Harris Hartley, as set forth above. This view was adopted by the Court of Appeal, and the appellants appealed to this House.

Mr. Crackanthorpe, Q.C., and Mr. Alderson Foote, Q.C., were for the appellants; Mr. Haldane, Q.C., Mr. T. H. Carson, and Mr. Boome for the respondent.

LORD MACNAGHTEN.—The will of William Harris, the testator in this case, has in its time given occasion for a vast amount of discussion, profitable and otherwise. But, happily, there is very little room for argument in regard to the question which your Lordships are now called upon to decide. The point is a short one and plain enough, I think, if only you are content to take the testator's words as the guide to his meaning, and suppose it possible that the testator meant what he said. The will contains a devise to trustees (who are vested with the legal estate) of all the testator's lands, tenements, and hereditaments upon trust for the testator's children, if more than one, in equal shares as tenants in common in tail, or, if there should be but one child (as in the event happened), upon trust for that only child as tenant in tail. So far the construction of the will has been settled in this House. After the death of such child or children the trustees are directed to convey and assure the said lands, tenements, and hereditaments in fee simple to the heirs special "as they shall severally and respectively attain the age of 21 years or be married." The real question seems to be whether that direction is part and parcel of the machinery and apparatus employed by the testator in and about the limitation of the estates or estate tail, or whether it is an independent gift to take effect in favour of designated persons in the line of succession. Judicial opinion is divided on the subject. On the original trial, where the question arose indirectly, the latter view was adopted incidentally by all the members of the Court of Appeal, consisting of Lord Halsbury and Lords Justices Lopes and Rigby. In your Lordships' House it found favour with a majority, which included Lord Herschell and Lord Watson. On the rehearing it was supported by Mr. Justice Bigham in a very able and lucid judgment which was approved in the Court of Appeal by Lords Justices A. L. Smith and Rigby. But my noble and learned friend Lord Davey, on the former occasion, was of a different opinion, and on the rehearing Lord Justice Collins expressed "a strong preference" for Lord Davey's view. The learned Lord Justice begins by stating his belief as to what the meaning of the testator really was. He thinks that the testator meant to give a life estate to Mary Harris, who was his only child, and then to give "a remainder in fee simple" to her children. Before it was taken up by the appellants that was once Mr. Haldane's favourite contention. On the former occasion it was put forward as the principal ground of appeal. But then the parties to this litigation seem to

me to have acted every now and then just like duellists in a play, dropping and exchanging their weapons, and each in his turn receiving the sharpest thrust from some point which was once his own. I cannot think Mr. Haldane lost very much when this weapon was forced out of his hand. It is difficult to grasp. And certainly there are serious flaws in it. The gift is to "the heirs of the body or bodies" of the testator's child or children—a technical expression which must be understood in its technical sense, unless it can be shown from the will that the expression was used in another sense, and that other sense can be ascertained. Now the majority of the noble and learned lords who heard this case originally were satisfied that there was nothing whatever in the will from first to last inconsistent with the words in question having their proper and technical meaning. There was nothing to be rejected, nothing to be modified. But the odd thing about this view is that when you have changed the expression "heirs of the body" into "children" you are further off than ever from an estate in fee simple. At the date when this will was made a gift of lands, tenements, and hereditaments to a designated person was a gift for life merely, and not a gift in fee. It is difficult to suppose that the person who drew the will was ignorant of an elementary rule of law which at that time was common knowledge with all lawyers, good, bad, and indifferent. The opinion of the Lord Justice as to the testator's real meaning is, I think, the key to his judgment. "What construction," he asks, "is to be placed on the concluding words of the clause directing the trustees to convey the legal estate at a given date to the persons whom he had intended to make the object of his bounty?" So framed the question bears on its face its own answer. But I need hardly remind your Lordships that there is no provision in the will directing the trustees "to convey the legal estate." The expression which the learned Judge attributes to the testator seems to be taken from a passage in one of the judgments in the former case where it was used to explain and enforce a particular view of the testator's meaning ([1897] A.C., p. 687, l. 21). If you restore the testator's own words, the question will then run:—"What construction is to be placed on the concluding words of the clause directing the trustees to convey the testator's lands, tenements, and hereditaments, at a given time to the persons whom he had intended to make the objects of his bounty?" Now, if you assume that the testator was under the impression that he had already given the proposed objects of his bounty an equitable "remainder in fee simple," the direction in question could only be intended, as the Lord Justice says, "to clothe these persons with the legal estate." There would be nothing upon which the direction could operate except the bare legal estate. But it is always dangerous, I think, to speculate on the unexpressed meaning of a testator. And there is much force in Lord Cranworth's observation that "it is not the duty of a Court of justice to search for the testator's meaning otherwise than by fairly interpreting the words he has used." "*Abbott v. Middleton*" (7 H.L.C., 68). There is one part of the judgment of Lord Justice Collins against which I feel bound to enter a respectful protest. The learned Lord Justice claims that his view has the support of the Lord Chancellor and Lord Justice Lopes, founding himself or rather speculating upon some interlocutory observations thrown out by them in the course of the argument and ignoring altogether the language of their considered judgment. It would, perhaps, be sufficient for the purposes of the present case if I were to content myself with pointing out what really took place during the argument, and what was really said in the judgment. The Lord Chancellor expressed no opinion of his own.

All that the Lord Chancellor did was to put into plain and pointed language a proposition which the learned counsel addressing the Court was aiming at with trope and metaphor. On that Lord Justice Lopes no doubt said something in approval of the proposition. "That is," he said, "exactly how it strikes me. That seems a reasonable way of considering the words." First impressions are always interesting, but sometimes second thoughts are best. In his written judgment Lord Justice Lopes points to "the provision that the trustees are ultimately to convey the fee simple to the beneficiaries," and concludes that they had the legal estate vested in them throughout, "that is," he adds, "until it became their duty to convey it in fee simple to those who were to be absolutely entitled." Now, your Lordships will notice that Lord Justice Lopes gives due effect to the words of limitation in the direction to the trustees. The conveyance, he says, was to be made "in fee simple." But more than that, it was to be made "to those who were to be absolutely entitled." What does that mean? It does not, of course, refer to acquisition of title by a disentailing assurance, for such an assurance would have got rid of the direction to the trustees as well as of the estate tail. It must mean "absolutely entitled" under the provisions of the will. But the only provision in the will under which the heirs special could become absolutely entitled is the gift to be found in the direction to convey. When you bear in mind that Lord Justice Lopes was under the impression (as appears from the shorthand notes) that the gift of the reversion in fee to a tenant in tail would operate to destroy the tenancy in tail and vest in the donee an immediate estate of fee simple in possession, his meaning is perfectly plain. It differs in nothing except in that one mistaken point from the opinion of Lord Herschell and those who agreed with him. Lord Herschell asks:—"What is there inconsistent with the creation of estates tail that the testator should direct his trustees to convey the reversion in fee to the heirs of the tenants in tail at a particular time?" Lord Justice Lopes speaks of the time when it would become "their duty to convey it in fee simple to those who were to be absolutely entitled." The language is all but identical. With the exception to which I have referred the meaning is precisely the same. Lord Justice Rigby expressed himself in very similar language. He observes that the extent of the legal estate vested in the trustees is shown to be nothing less than the fee simple "by the direction that the property is when the trust for maintenance ceases to be legally conveyed in fee simple." And the Lord Chancellor agreed with each of his colleagues. So there can be no doubt as to the opinion of every member of the Court. But to come to a matter of far greater importance than the opinion of individual Judges on a question of construction I must say I rather doubt the expediency of treating a casual remark thrown out in the course of the argument by a Judge, however eminent, as something committing him to an opinion or as being in any way binding upon anybody else. A Judge who interposes in the course of counsel's address does so, I should imagine, either to invite attention to some difficulty which occurs to him at the moment, and which counsel ought to have an opportunity of meeting or else to elicit some information which he thinks, rightly or wrongly, will not come from counsel in due course, or perhaps to direct and shorten the argument, though I know some people fancy that interruptions from the Bench have not the effect of shortening arguments—at least not always. But the very last thing that a Judge means to do when he interrupts counsel is to express an opinion on any matter still open to debate. When the case was before your Lordships on the former occasion I intimated my view on the present question. It

was necessary to consider the meaning and effect of the clause. Almost every Judge before whom the case came took it into consideration, though in the result it did not form a ground of the decision of the House. I am not going to repeat what I said then. I am quite prepared to accept the judgment of Mr. Justice Biggam as expressing more fully and more clearly the view which I was led to take. I would only venture to add a very few words. On a critical examination of the will I am inclined to think that the clause now in question did not form part of the instrument as originally prepared. It seems probable that originally the gift to the collateral relations was intended to take effect in every case on the determination of the previous limitations. If this suggestion be well founded it would account for the way in which the direction to the trustees is introduced. It was introduced, I think, by way of amendment, and causes perhaps a little awkwardness in the run of the sentence as amendments so introduced frequently do. However that may be, when once the testator determined that the gift to the collaterals was not to take effect if any one of the tenants in tail married or attained 21, the question must have suggested itself—What is to become of the reversion in fee if that condition is fulfilled? Surely the most obvious and the most natural thing for the testator to do was to give it in that case to his own issue fulfilling the prescribed conditions. The learned counsel who spoke second for the appellants argued, as I understood him, that the reversion expectant on the determination of an estate tail was so shadowy and trumpery a thing that no testator would be likely to concern himself about it at all. I do not think that this is the general opinion among people who have property of that sort to dispose of. Certainly this testator, who evidently bestowed much thought and care on the disposition of his property, did concern himself about this reversion, and that in a very special manner. The learned counsel for the appellant, adopting the argument of Lord Justice Collins, laid much stress on the words "such heirs." The Lord Justice observes that, "the words 'heirs of the body' being once decided to be words of limitation only, the words 'such heirs' following cannot, without undue straining, be interpreted to mean individuals who are to be the objects of a new gift." Now I must say that I cannot follow that observation. No doubt the words "heirs of the body" have been decided to be words of limitation only. What difference could it make if they were words of purchase also? Heirs of the body who take by descent are just as much human beings and just as much individuals as heirs of the body who take by purchase. If a testator chooses to make a gift to heirs of the body taking by descent "as and when they shall attain 21 or be married," I cannot see what difficulty there is in ascertaining the persons intended. If the clause is to be construed as meaning only that the trustees are to convey the legal estate when their active duties have come to an end there is no difficulty about the matter. But the advocates of that construction contend that if it is the reversion in fee which is to be conveyed, and not a bare legal estate, a sort of mist or darkness descends upon the scene, and no one can find the persons to take, though they are the very same persons who on the other construction would take the legal estate, and are described by the very same words. In my opinion the expression "such heirs" creates no difficulty. It refers to the preceding words, and means, of course, "heirs of the body or bodies of the testator's child or children"—the persons forming as they come into existence the whole line of succession capable of inheriting. But, however numerous they may be, the first in the line on attaining 21 or marrying carries off the whole estate or the whole share, as the case may

be, and there is nothing left for those who come after. That is, I think, the solution of the suggested difficulty. I had thought at one time that the difference of view which has been expressed in this case might possibly have sprung out of the notion, which prevailed with the Court of Appeal on the former occasion, that the gift of the reversion in fee to a tenant in tail would have the effect of merging or defeating the tenancy in tail. Certainly if the gift of the reversion had such an effect, I should have admitted that the limitations in this will were so unmeaning and whimsical that there would have been some difficulty in construing the words of the testator in their natural and ordinary sense. But after the argument we have heard I rather think that the difference of opinion is due to the very different estimates formed of the capacity of the lawyer who drew this will. It was suggested in argument, and broadly hinted, I think, by the Court of Appeal in the former case, that the lawyer who drew the will was so incompetent that his words were hardly deserving of close and serious attention. On the other hand, there are some who think that the draftsman of this will was a fairly competent lawyer. And I confess I share that opinion. I do not even see any evidence to prove that he did not know or appreciate the rule in *Shelley's case* as well as it was known and appreciated at the time. The will was drawn in what may be called the dark ages, when Lord Eldon confessed that his mind was "overpowered" by the number and perplexity of the decisions. But I think it is extremely likely that the draftsman of the will was not acquainted with the case of "*Harton v. Harton*," which was decided only a short time before the date of the will, and, as far as I can make out, not even reported then. Certainly it had not then acquired the authority which, in spite of Lord Eldon's criticism and the qualified approval or disapproval of Vice-Chancellor Wigram, it afterwards acquired. It was the rule laid down in "*Harton v. Harton*," or rather, I should say, the rule derived from that case, which as it seems to me upset the draftsman's calculations. Another argument addressed to your Lordships was that the direction to the trustees might be rejected altogether on the strength of a well-known line of cases which decide that limitations superadded to a gift to heirs of the body which are inconsistent with the devolution of an estate tail are to be rejected. But why are they rejected? They are rejected because they are repugnant to the gift. But no one can say that a gift of the reversion in fee to a tenant in tail (if that be the true construction of the testator's will) is repugnant to the gift of the tenancy in tail. On the contrary, it is perfectly consistent with it. It seems to me that if you construe the will fairly, giving to technical expressions their technical meaning, and to expressions not technical their ordinary and grammatical signification, you have a sensible construction perfectly natural and quite consistent with the scheme of the will. In my opinion the testator meant exactly what he said, and deliberately provided for the event which actually occurred. If I am told that, after all, that is a matter of opinion on which no certain judgment can be pronounced, I can only take refuge in Lord Thurlow's maxim, that "the good sense of all these cases is to believe that, where persons have expressed themselves right, they knew what they meant" ("*Jones v. Morgan*," 1 Bro.C.C., 221). I think the Court of Appeal was perfectly right, and therefore I move your Lordships that the appeal be dismissed. Your Lordships have been given to understand that an arrangement has been made between the parties as to the costs of the appeal. It will therefore not be necessary to say anything about costs.

LORD MORRIS and LORD SHAND concurred.

LORD DAVEY.—I have endeavoured to consider the point of construction on this will which has now been fully argued, and is directly brought before us for decision, with an open mind, unprejudiced by anything which was said by me on the former occasion. But I am bound to say that I cannot find any sufficient reason for altering the substance of the opinion I then expressed. It has been said that opinions were expressed by both Lord Herschell and Lord Watson on this point in agreement with that of my noble and learned friend Lord Macnaghten. I need scarcely say that if I found myself at variance with the deliberate judgments of these eminent lawyers as well as that of my noble and learned friend, I would bow to authority and not trouble your Lordships with any observations of my own. But the point was not argued at the bar on the previous occasion, and it was not necessary for the judgment then pronounced, because the present respondents were then insisting on the validity of a disentailing deed which, if established, would have barred all subsequent limitations, including the one in question, if it be a new limitation. I therefore feel myself at liberty shortly to state the grounds upon which I adhere to my previous opinion. It is quite true that I was in error in speaking of the opposite construction as operating a defeasance of the estate tail. I used the expression inadvertently in reference to a suggestion to that effect in the judgment of Lord Justice Rigby. If anything, it is a remainder to take effect on the termination of the estate tail. But that accidental slip does not alter the substance of my opinion that the words in question do not create a new limitation but are merely ancillary to the previous limitation, which we have construed to be an estate tail (in the events which happened) in *Mary*. The words are, "such freehold lands, &c., to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of 21 years, or be married, and to their several and respective heirs and assigns for ever." The will is obviously drawn by a draftsman who was acquainted with legal phraseology, but not a sufficiently good lawyer to be master of it or know how to use it accurately. A succession of estates is carefully provided for in the will, and in every other instance a new limitation is introduced with the appropriate language for that purpose. The words "to be legally conveyed, &c.," follow immediately after the words "to be equally divided, &c.," which are clearly ancillary to or rather form part of the previous gift to the heirs of the body. So far as the form of the clause goes it appears to me appropriate for expressing a direction annexed to the previous gift and inappropriate for creating a new gift in succession. Then, again, who are referred to as "such heirs"? According to the scheme of the will and the conception of the testator they mean a class of persons whom he describes as heirs of the body of his children, and between whom he desired his estate to be divided on their deaths. According to their legal construction the words used by the testator included all the heirs of the body taking in a course of succession, and, therefore, the rule in *Shelley's case* applies. But the construction of the clause in question adopted in the Courts below appears to me to confine the description in that clause to the first members of the class who attain 21 or marry, and so to give a meaning to the words different from that which they bear in the previous gift. This testator did not know or forgot the rule in *Shelley's case*, and in my opinion he has attempted to engraft on words which created an estate tail, a direction to convey to the heirs in tail in fee simple. Such a direction is repugnant and may be disregarded, as has been held in a line of cases beginning with "*Goodright v. Pullyn*" (2 Lord Raymond, 1,437) and

"Wright v. Pearson" (Amb., 358). I think my noble and learned friend has been too severe in his criticism of the judgment of Lord Justice Collins. The rule in Shelley's case is a rule of law, and not a rule of construction, and in its application frequently overrules the intention plainly expressed on the face of the will where it is one which the law cannot carry into effect. I believe that such is the case on the will before us. It seems to me extravagant to suggest that this testator intended or supposed that his children would take more than a life estate. But the law says otherwise, and must prevail. For the purpose, however, of construing such words as those we have before us, and saying whether they create a new limitation or one to be regarded only as an ancillary provision to the previous limitation, I think it is legitimate to look to the intention expressed in the instrument, although it is not one which can be carried into effect, *modo et forma*, and this I understand to be the basis of the learned Lord Justice's argument. The Lord Justice was, of course, aware that under the old law a gift to one without words of limitation passed only a life estate unless a contrary intention appeared on the will. But I presume the Lord Justice would have said, if he had been asked, that he found such an intention in the direction to the trustees to convey to the heirs of the body in fee simple. The second point argued by Mr. Crackanthorpe depends on the true construction of the settlement of August 31, 1819, made by Mrs. Hartley on her marriage. It raises questions of some difficulty and nicety. But as I understand that the majority of your Lordships are in favour of the respondents on the principal point argued, in which case these questions do not arise, it is unnecessary for me to express any opinion upon them. As I understand the costs of the appeal have been arranged by the parties themselves, I will not say anything about them.

LORD BRAMPTON read a judgment to the effect that the appeal should be dismissed.

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.JJ.) } March 9.

THE GUARDIANS OF THE POOR OF THE BRAMLEY UNION
V. THE GUARANTEE SOCIETY.*

Principal and Surety—Guarantee—Fidelity policy—Clerk to guardians—Guarantee as to faithful discharge of duties—Loss, whether within policy.

This was an appeal by the plaintiffs from the judgment of Mr. Justice Day at the trial of the action without a jury, reported in *The Times* of March 17, 1899. The action was brought on a fidelity policy issued to the plaintiffs, the guardians of Bramley, by which the defendant society, to the extent of £300, guaranteed that Alexander Wiley, the clerk to the plaintiffs, would duly and faithfully discharge all and every the duties of his office. Wiley, after having served the plaintiffs as clerk for a number of years, was dismissed for misconduct in 1896. It appeared that down to 1890 annual elections of guardians were held, in respect of which Wiley received certain fees. In 1890 a resolution for triennial elections was passed, and Wiley asked for compensation. Down to 1890 he received £255 per annum and a fee in respect of each election. On June 30, 1890, a resolution was passed by the guardians for an increase of his pay. The resolution was that his salary should thenceforth be £410 per annum, to include salary for general duties and services in connexion with the settlement and removal of the poor, and conducting all future guardians' elections, and the

proceedings connected therewith. The salary was under the control of the Local Government Board, as the guardians could only recommend the amount subject to the sanction of the Local Government Board. It was the duty of Wiley to communicate the resolution to the Local Government Board, but instead of sending the whole resolution he suppressed the words "and conducting all future guardians' elections, and the proceedings connected therewith." The Local Government Board approved of the increase, and, before the plaintiffs discovered the misrepresentation which had been made by Wiley, he received from them in excess of his previous salary sums exceeding £300. The plaintiffs brought this action to recover that sum under their policy. They contended that there was a loss covered by the policy, which was caused by Wiley not faithfully discharging his duties; that the amount of the loss was the increase of salary which Wiley had obtained by deliberately suppressing part of the resolution of the guardians and thereby obtaining the approval of the Local Government to the resolution; and that such approval was, in the circumstances, no approval at all, as it was an approval of a resolution which had never been passed, and was therefore invalid; and the plaintiffs could have recovered the extra salary from Wiley as money paid under a mistake of fact. Mr. Justice Day gave judgment for the defendants.

Mr. C. A. Russell, Q.C., and Mr. S. G. Lushington appeared for the plaintiffs; Mr. English Harrison, Q.C., and Mr. Boydell Houghton appeared for the defendants.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether Wiley, in knowingly sending the resolution of the guardians, with part of it omitted, to the Local Government Board for approval, was duly and faithfully discharging the duties of his office within the meaning of the policy. In his Lordship's opinion he was clearly not. It was not necessary to say whether there was any fraud. He was unable to agree with Mr. Justice Day. There was a good cause of action upon the policy. The guardians were therefore entitled to be recouped the loss caused by Wiley's not having duly and faithfully discharged his duties. With regard to the damages they would be referred to the Official Referee, who would report his findings to this Court, and then judgment would be entered.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER concurred.

Upon the application of counsel, it was ordered that, if the parties agreed upon the figures, the damages need not be assessed by the Official Referee, and the case would come back for judgment upon the agreed figures.

[Solicitors—Mogro, Slack, and Co., for Scatcherd, Hopkins, and Middlebrooks, Leeds, for the plaintiffs; Budd, Johnson, and Jecks, for the defendants.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.JJ.) } March 9.

BURGE V. ASHLEY AND SMITH (LIMITED).*

Gaming—Stakeholder—Right to recover deposit—Gaming Act, 1892.

Money deposited with a stakeholder to abide the event of a boxing match is not money "paid" under or in respect of a wagering contract within the meaning of the Gaming Act, 1892, and can be recovered from the stakeholder if demanded before payment over to the winner.

"O'Sullivan v. Thomas" ([1895] 1 Q.B., 698) approved and followed.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by W. F. BARRY, Esq. Barrister-at-Law.

This was an appeal by the defendants from the judgment of Mr. Justice Lawrance. The case raised an important question under the Gaming Act, 1892 (55 and 56 Vict., c. 9). The action was brought to recover £300 deposited with the defendants as stakeholders, to be paid over to the winner of a boxing match. A boxing match was arranged between the plaintiff and a man known as Bobby Dobbs, of New York, for £300 aside and the best purse offered. The plaintiff and Dobbs deposited £300 each with the defendants, who were the proprietors of the *Sportsman*, as stakeholders. The match was fought at Newcastle-upon-Tyne, and Dobbs was declared the winner. Subsequently, but before the stakes were paid over by the defendants to the winner, the plaintiff gave the defendants notice not to pay the £300 which he had deposited with them to Dobbs, but to pay it back to him. The defendants, notwithstanding the notice, paid the sums to the winner. The plaintiff thereupon brought this action, and the defendants contended that no action would lie by reason of section 1 of the Gaming Act, 1892. That section provides that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth of Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." The plaintiff contended that the old law prior to that Act was not altered, under which a sum of money which had been deposited with a stakeholder could be recovered from the stakeholder if claimed from him before he had paid it over to the winner (see "*Diggle v. Higgs*," 2 Ex. D., 422); and that the Divisional Court, consisting of Mr. Justice Wills and Mr. Justice Wright, in "*O'Sullivan v. Thomas*" ([1895] 1 Q.B., 698), had so held. Mr. Justice Lawrance held, upon the authority of this last case, that the plaintiff was entitled to recover, and he gave judgment accordingly.

Mr. DUKE, Q.C., and Mr. W. ELLIS HILL, for the defendants, contended that the decision in "*O'Sullivan v. Thomas*" ([1895] 1 Q.B., 698) was wrong, and ought to be overruled. Before the Gaming Act, 1892, the plaintiff could have recovered the deposit if he claimed it before the defendants had paid it over to the winner. But the law had been altered by section 1 of the Gaming Act, 1892, and the present case came within the very words of that Act, because the £300 was a sum "paid" by the plaintiff to the stakeholder under or in respect of a contract made void by the Gaming Act, 1845 (8 and 9 Vict., c. 109), section 18, and the action was based upon an implied promise by the defendants to pay back this sum. The intention of the Act was to sweep away any implied promise to pay a sum of money under or in respect of a contract rendered null and void by 8 and 9 Vict., c. 109. Clearly the contract in the present case was a gaming contract and was rendered null and void by section 18 of 8 and 9 Vict., c. 109, and therefore the implied promise to pay a sum of money in respect of such contract was itself rendered null and void. The obligation of the defendants was based upon an implied contract to repay the amount of the deposit to the plaintiff if it was claimed before payment over to the person entitled. The Act of 1892 did away with that implied promise. The word "paid" in the Act covered a deposit with a stakeholder. The decision of the Court of Appeal in "*Carney v. Plimmer*" ([1897] 1 Q.B., 634) was in favour of the defendants, especially the judgment delivered by Lord Justice Chitty (at p. 637). They also

referred to "*Shoolbred v. Roberts*" ([1899] 2 Q.B., 560), "*Read v. Anderson*" (13 Q.B.D., 779).

Mr. Ashworth Harrison (Mr. Marshall Hall, Q.C., with him), for the plaintiff, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether the case of "*O'Sullivan v. Thomas*" was or was not rightly decided. It must be taken that each party had deposited the sum of £300 with the defendants, and that the plaintiff gave notice to the defendants, before the sums had been paid to the winner, not to pay the £300 deposited by him to the winner of the match. The question was whether the Gaming Act, 1892, prevented the plaintiff from recovering the sum so deposited by him. That depended upon whether it was a sum of money "paid" by him within the meaning of section 1 of that Act. He did not think that a person who deposited a sum of money with a stakeholder would say that he had paid it to the stakeholder. In "*Strachan v. Universal Stock Exchange*" ([1895] 2 Q.B., 697) the decisions on the Act of 8 and 9 Vict., c. 109, were discussed, and he (the Lord Justice) said that "it is manifest that no action can be brought by the one against the other to enforce any contract so declared to be void; but it has been held by authorities, which it is far too late now to question, that as soon as one party to a gaming contract receives notice from the other party that the former declines to abide any longer by the wagering contract money deposited by him thereupon ceases to be money deposited in the hands of the latter 'to abide the event upon which any wager shall have been made'; and any money still in the latter's hands unappropriated by him becomes money of the former, without any good reason for the latter detaining it; and in such circumstances an action for money had and received to the plaintiff's use will lie." That was a summary of the opinion of the learned Judges in the prior decisions. In his opinion the defendants could not bring themselves within the first branch of section 1 of the Act of 1892. Nor, for the same reason, could they bring themselves within the second branch of that section. A deposit with a stakeholder was not a sum "paid" to him within the meaning of the Act. It was now attempted to stretch the Act so as to include a deposit of a sum of money with a stakeholder. No such words were in the Act. It would be passing strange that, if such were intended, proper words to cover such a common and well-known case had not been inserted in the Act. With regard to the authorities, "*O'Sullivan v. Thomas*" was exactly in point. In that case the Divisional Court held that the Act of 1892 applied to a payment out and out, and did not apply to a deposit with a stakeholder. In his opinion that case was rightly decided. The case of "*Carney v. Plimmer*" was quite a different case, though a dictum of Lord Justice Chitty was relied upon by the defendants. But that learned Judge was not thinking of such a case as the present, and it was to be noted that, though "*O'Sullivan v. Thomas*" was referred to in the argument, it was never mentioned in the judgment. In his opinion the judgment of Mr. Justice Lawrance was right, and must be affirmed.

LORD JUSTICE COLLINS concurred. The case was virtually an appeal from the decision of the Divisional Court in "*O'Sullivan v. Thomas*." The question was whether the Gaming Act, 1892, had substituted a new law for that existing under the Gaming Act, 1845. Under the earlier Act it was well settled that a person who deposited money with a stakeholder could recover it back if he claimed it from the stakeholder before it was paid over by the latter. Then came the Gaming Act, 1892. It was suggested that the true reading of that Act was that it was no longer possible for the person depositing the money to recover it from the

stakeholder. It was said that the money deposited was money "paid" by the depositor to the stakeholder within the meaning of the Act, and that, as it was paid under a wagering contract, that was a contract rendered null and void by the Gaming Act, 1845, there was an implied promise to repay it, and that implied promise was rendered null and void by the Act of 1892. The words of the Act seemed capable of covering such a case. But the Court must look further. The Act of 1892 was passed after a long current of authorities, and if it was intended to overrule them, he would expect to find apt words in the Act to carry out that intention. There were no such apt words in the Act. Further, one could not shut one's eyes to the fact that the Act was passed after the decision in "Read v. Anderson," and it was intended to deal with that decision. The Act was passed with the intention of dealing with cases where money was paid in the full sense of the term. He could not escape the conclusion that the Act was "passed *alio intuitu* so far as this case was concerned. In his opinion the word "paid," though it was possible to construe it as covering the case of money deposited with a stakeholder, yet coming where it did and at the crisis when it did, did not, upon its true construction in this section, cover the deposit of a sum with a stakeholder. Such a sum was merely handed to a stakeholder with a mandate to pay it in a certain event to a particular person.

LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—Bernard, Abrahams, and Co., for the plaintiff; Gush, Phillips, Walters, and Williams, for the defendants.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.JJ.) } March 10.
FENN V. MILLER.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—Employment "on, in, or about a factory"—Accident occurring at a distance from factory—"About," meaning of.

This was an appeal from the award of Judge French, Q.C., sitting at Bow County Court, under the Workmen's Compensation Act, 1897. The appellant, the employer, was a builder, and was building houses upon a building estate which was being developed at Chingford, in Essex. At the time of the accident the houses were between 5ft. and 6ft. in height. There were two steam engines in sheds on different parts of the building estate used for working two mortar mills for the purpose of making mortar for the buildings. The respondent on the appeal, who claimed compensation under the Act, was a builder's labourer in the employment of the appellant, and his duty was to drive or conduct a water-cart and horse along a public road to Ching Brook to fetch water for the engines and the mortar mills. On March 13, 1899, the respondent had gone with the cart to the brook, and on his way back to the mortar mill the horse ran away and knocked the respondent down and the cart went over him. For the injuries thus caused he claimed compensation. The spot where the accident happened was about 110 yards to 160 yards distant from the nearest engine. The County Court Judge held that the respondent was at the time of the accident employed "about" the engine shed, and therefore about a factory within section 7 of the Workmen's Compensation Act, 1897, and he made an award in his favour for 15s. a week.

Mr. RAWLINSON, Q.C. (Mr. P. Rose-Innes with him), for the appellant, contended that the question was whether the respondent was employed "on or in

or about a factory" within the meaning of section 7 of the Workmen's Compensation Act, 1897. The steam engines working the mortar mills were "factories" within the Act, as decided in "McNicholas v. Dawson" ([1899] 1 Q.B., 773). But the respondent was not employed "about" the factory within the meaning of the Act. "About" meant in close propinquity or in physical contiguity to the factory—"Powell v. Brown" ([1899] 1 Q.B., 157); "Lowth v. Ibbotson" ([1899] 1 Q.B., 1,003). There was no evidence that the respondent was employed about the factory when the accident happened. A man might be employed about the business of the factory, and yet not employed about the factory. The County Court Judge was therefore wrong. He also referred to "Holness v. Mackay" ([1899] 2 Q.B., 319).

Mr. RUEGG, Q.C., and Mr. W. M. THOMPSON, for the respondent, contended that, this being a building estate with buildings being erected on it, and there being on the estate a steam engine, which was a factory within the Act, and which was used in connexion with the building of the houses, the estate might be considered as in the position of a factory yard. It was a question of fact in each case for the County Court Judge whether the workman was at the time of the accident employed "about" a factory. It was not a question of law. Where could the Court draw the line? Would 100 yards away from the factory, or 50 yards, or ten yards, be the limit? The Court had never yet in such a case interfered with the finding of the County Court Judge. "Chambers v. Whitehaven Commissioners" ([1899] 2 Q.B., 132) was referred to.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, the facts in the present case showed that the finding of the County Court Judge was wrong. But he felt a difficulty in the case, which he would state presently. There were two mortar mills worked by steam engines, and the respondent was employed to take a water-cart to a brook in order to fill it with water, and then to return with it to the mills. While returning from the brook to the mill along a public road the horse ran away and knocked the respondent down and injured him. The place where the accident happened was from 110 yards to 160 yards distant from the nearest engine. It was quite clear from the decision in "McNicholas v. Dawson" that the engine was a "factory" within the meaning of section 7 of the Workmen's Compensation Act, 1897. Therefore the question was whether the respondent was employed "on or in or about a factory" within the meaning of section 7. It he (the Lord Justice) had been the judge of fact in the case he would not have found that the employment was "about" the factory. The County Court Judge considered that the word "about" was an elastic word, and that he was entitled to say that 110 yards away from the factory was "about" the factory, that was, in close propinquity thereto, as he (the Lord Justice) had expressed its meaning in "Powell v. Brown," or in physical contiguity thereto, as Lord Justice Collins had expressed it in the same case. The difficulty he (the Lord Justice) had was in saying that there was no evidence upon which the County Court Judge could so find. In "Powell v. Brown" a cart belonging to the owners of a factory was standing in a street close to the entrance of the factory yard where timber was usually loaded from the factory on to carts. The workman was employed in loading the cart, and in doing so was injured. The question was whether he was employed "about" the factory. This Court undoubtedly held that the word "about," following the words "on or in," was an enlarging word, intended to cover more than was included in the preceding words. He (the Lord Justice) said it meant in close propinquity;

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Lord Justice Collins used the words physically contiguous. In "Chambers v. Whitehaven Commissioners" the Court held that the word "about" indicated locality, and he had said that the locality of the accident must be within the purview of the section, and that the employment must be on, in, or about the named locality at the time of the accident. In "Lowth v. Ibbotson" a workman met with an accident a mile and a half away from the factory, and the County Court Judge held that he was not at the time of the accident employed "about" the factory. This Court held that the Judge was right. In those cases he had said, and he thought that the other Judges also said, that the question whether the employment was about a factory was a question of fact for the County Court Judge to decide. He saw no reason to withdraw from what he had then said. In the present case the workman was conducting a cart along a public highway when he was injured, the accident happening not less than 110 yards from the factory. If he (the Lord Justice) had to determine whether the workman at the time of the accident was employed about the factory he would say no. But the difficulty he felt was in saying that there was no evidence upon which the County Court Judge could say that the employment was about the factory. However, though he felt great difficulty in saying that there was no evidence, inasmuch as his brethren were of opinion that there was no evidence to justify the finding of the County Court Judge, he would not differ from the conclusion at which they had arrived.

LORD JUSTICE COLLINS said that he agreed that in each case it was a question of fact for the County Court Judge, and that this Court could not interfere with the finding of the Judge on a question of fact where there was evidence to support his finding. But a County Court Judge could not under the Workmen's Compensation Act, 1897, any more than under any other Act, exercise that jurisdiction without any evidence to support his finding or without a proper direction to himself. If the case were one that could be tried with a jury the County Court Judge would have to give the jury a direction as to what constituted employment "about" a factory. He could not simply tell them that it was a question of fact for them whether the employment was about a factory when the accident happened and then leave it to them without any further direction to say whether in fact the employment was about a factory. He would have to give them some direction upon the word "about." Under the Act of 1897 the Judge must direct himself. It was not easy to define what constituted employment "about" a factory. Still he thought that a Judge could give some assistance to a jury by giving illustrations of cases which would or would not be employment about a factory, or by giving extreme cases which would obviously fall on one side or the other of a line which had to be drawn. Here it was quite possible to point out extreme limits on the one side and on the other, limits which were to be observed and avoided. In his opinion the word "about" was a geographical expression, and denoted physical contiguity. It was not enough to establish that the workman was about the business of his master. There was that broad distinction. A factory presumably involved the carrying on of some business. Take the case of a factory where some article of commerce was produced. The article had to be manufactured and distributed over the country. In all probability coals would be required for the factory, and he should say that the carter who fetched the coals for the factory would be employed about the business of, but not in physical contiguity to, the factory. The jury would have to disabuse their minds of the idea that, because a man was employed about the business, he was therefore employed about the factory. What,

then, was employment "about" a factory? A case obviously within the line was where a factory involved the use of an area of land outside the physical factory itself. In such a case he would say that the piece of land was about the factory. It was easy to give illustrations. In "Powell v. Brown" the cart upon which the man was working was outside the physical limits of the factory, but was receiving timber from the factory at the usual and accustomed place of loading. There the Court held that the employment was about the factory. It was easy to put cases which fell inside and outside the line, and it would be for the jury, if that were the proper tribunal, to say whether the particular case before them fell inside or outside the line. He drew a clear distinction between employment about the business, involving no physical contiguity with the factory, and such a physical contiguity with the factory as a jury might say was necessary for the purposes of the business. Applying the above considerations to the present case, he did not think that the facts brought the case within the rule above mentioned as to physical contiguity. It might therefore well be said that there was no evidence upon which a jury could reasonably find that the employment here at the time of the accident was "about" the factory. That being so, there was no evidence upon which the County Court Judge could so find. His decision must therefore be reversed.

LORD JUSTICE ROMER was of the same opinion. It was clear that when the Act spoke of "on, or in, or about" a factory it was speaking of a place. It was not necessary or advisable to attempt to lay down general rules and propositions as to when a man could or could not be properly said to be on, or in, or about a factory or a building. He would not attempt to do so. He would, however, go as far as this. A man who, at the time when the accident occurred, was only employed in driving or conducting a cart containing materials necessary for the business of the factory to or from the factory, and was not in obvious proximity to the factory, was not employed on, or in, or about the factory. The facts in the present case clearly showed that at the time of the accident the workman was in no true sense employed on, or in, or about his master's factory. He agreed with Lord Justice Collins that there was no evidence that the workman was so employed. If this case had been tried with a jury, assuming, of course, such a mode of trial were possible, he thought that the Judge should have ruled that there was no evidence to go to them that the workman was so employed.

[Solicitors—Ponsford and Devenish, for the appellant; Buchanan and Hurd, for the respondent.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.JJ.) } March 10.
COOPER V. DAVENPORT—WINSTANLEY, THIRD PARTY.*
Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—Sub-contractors—Indemnity—"Undertakers," who are.

This was an appeal from the award of the Warrington County Court Judge under the Workmen's Compensation Act, 1897. The applicant for compensation was the widow of a deceased workman who had been in the employment of the appellant, William Winstanley. The respondent, Charles William Davenport, was a builder, and he had entered into a contract with the Warrington guardians to build a workhouse infirmary. Davenport sublet the plumbing work of the building to Winstanley.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

The deceased man Cooper was employed by Winstanley, and on September 28, 1899, he was at work on a scaffolding on some of the plumbing work—namely, fixing the piping to the exterior of the building—when the scaffolding gave way, and he fell and was killed. The building exceeded 30ft. in height, and was being constructed by means of a scaffolding. The deceased man's widow claimed compensation under the Act against Davenport, and Davenport thereupon claimed to be indemnified by Winstanley, under section 4 of the Workmen's Compensation Act, 1897. The County Court Judge made an award in favour of the widow for £260 as against Davenport, and ordered Winstanley to indemnify Davenport in respect of that amount. Winstanley appealed.

Mr. RUSSELL, Q.C. (Mr. Hartley with him), for the appellant, contended that, as the Court had already decided that a sub-contractor was not an "undertaker" within the Act, and was therefore not liable to pay compensation—"Cass v. Butler" (*ante*, p. 227)—the appellant was not liable to pay compensation, and, that being so, he was not liable under section 4 to indemnify the contractor Davenport, who was the undertaker, and therefore liable. Section 4 only provided that the undertakers should be entitled to be indemnified by any other person who would have been liable independently of that section. That did not apply to a sub-contractor, who was not made liable by the Act at all. The undertakers could only claim indemnity from a person who was himself liable to pay compensation under the Act.

Mr. C. A. RUSSELL, Q.C. (Mr. E. Acton with him), for the respondent, Davenport, contended that the decision in "Cass v. Butler" did not touch the present case, though some of the reasons given by the Court were not favourable to the respondent's contention. In order to see who was liable to indemnify, section 4 must be considered as cut out of the Act. That section said, "who would have been liable independently of this section." Independently of section 4, a sub-contractor was an "undertaker," and would be liable as such. Therefore a sub-contractor was bound to indemnify under section 4. [LORD JUSTICE ROMER.—That argument is dead in the teeth of "Cass v. Butler." It was the argument addressed to us in that case, which we rejected.] The decision in that case did not touch the present point. If section 4 were out of the Act, a sub-contractor would be an undertaker within the meaning of sections 1 and 7.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the point which had been taken by the respondent was not open. It had been decided in "Cass v. Butler" that a sub-contractor was not an undertaker within the Act. He saw no ground for quarrelling with the reasons which were given for that decision. A person could only be liable to pay compensation under the Act if he was an undertaker. A sub-contractor was not an undertaker, and was therefore not liable to pay compensation under the Act. He was not therefore liable to indemnify another person liable under section 4.

LORD JUSTICE COLLINS concurred. The meaning of the word undertakers was given in section 7 of the Act. Any reference in section 4 to that point would merely be corroboration of the meaning of the word in the Act. Section 4 might be of assistance in helping the Court to construe the word, but the meaning was given in the definition clause.

LORD JUSTICE ROMER agreed.

[Solicitors—Busk, Mellor, and Norris, for Slater, Heelis, Williamson, Colley, and Tulloch, Manchester, for the appellant; T. M. Richards, for A. J. Willett, Warrington, for the respondent.]

Court of Appeal (A. L. Smith, }
Collins, and Romer, L.JJ.) }

1900.
March 10.

FRID V. FENTON.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—Building being "constructed."

A building is in course of construction within the Act until the scaffolding has been taken down.

This was an appeal from the award of Sir W. L. Selfe, the Judge of the Rochester County Court, under the Workmen's Compensation Act, 1897. The respondent on the appeal was in the employment of the appellant, who was constructing a shaft at the cement works of Messrs. Francis and Co., at Cliffe. The respondent was employed as a bricklayer on the work. The shaft was a brickwork erection 100ft. high, resting upon cement foundations. The shaft was built at the top of a perpendicular bank or precipice about 20ft. high. For the purpose of doing the work it was necessary to erect a staging from the lower level to the top of the foundations. This staging was about 20ft. in height from the lower level to the top of the cement foundations, and was constructed in the manner in which a scaffolding was usually constructed—namely, by poles, ledgers, and putlogs. At the top of the staging, on a level with the top of the cement foundations, boards were laid to form a flooring. The only access to the work was by means of the staging and from it through an opening left at the bottom of the brickwork of the shaft. The materials used in the construction of the shaft were brought in at the bottom of the shaft through the staging and were hauled up the shaft by means of a winch on the lower level and a pulley with a rope running through the pulley on the top of the shaft. The construction of the brickwork of the shaft was done by means of scaffolding erected upon putlogs inside the shaft, the putlogs being supported by being placed through apertures left in the brickwork, and this scaffolding and the putlogs on which it rested were raised from time to time, as the building rose, at intervals of 5ft. On June 8, 1899, the day before the accident, the construction of the brickwork of the shaft had been completed, and the scaffolding inside the brickwork and the gear used in the construction had been removed and brought down to the staging; the opening at the bottom of the shaft, which had been used for access to the shaft and for taking in the materials, was bricked up; and the shaft was in working order and in actual use, with the exception that a lightning conductor, which had been run from the top of the shaft, required a copper plate to be fixed on the end of it and buried in the ground at the lower level. On June 9 the respondent was engaged in removing gear, which had been used in the construction of the shaft, from the staging erected outside the shaft when he stepped upon a plank which tipped up, and in consequence he fell about 20ft. and was injured. The County Court Judge held that the shaft was a "building" within section 7 of the Workmen's Compensation Act, 1897, and that it was, at the time of the accident, being constructed by means of a scaffolding—namely, the staging erected from the lower level to the top of the foundations of the shaft. In his opinion the staging, which was erected for the purpose of giving access to the shaft and bringing up materials for its construction, was a "scaffolding" within the Act, and the building was at the time of the accident being "constructed," because the building could not be said to be completed until the scaffolding was

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

removed, the removal of the scaffolding being part of the work of construction. He accordingly made an award in favour of the respondent for 10s. 7d. a week.

Mr. A. POWELL, for the appellant, contended that the shaft was not being "constructed" at the time when the accident happened. It had been completely finished, and was in actual use. It was not like a house with a scaffolding round it, when it might well be said that the house was not constructed until the scaffolding was removed. There was no construction going on here. This scaffolding was below the shaft, used merely for the purpose of bringing up materials to the upper level for the construction of the shaft. It might have remained where it was for other purposes long after the shaft was finished and in use. The County Court Judge was therefore wrong.

Mr. A. J. Tassell, for the respondent, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, the learned County Court Judge was right. In order to build the shaft it was necessary to go down to a lower level than that on which the shaft was to stand, and to erect a scaffolding on the lower level up to the foundations of the shaft for the purpose of bringing up materials for the construction of the shaft. It was necessary afterwards to get down the scaffolding outside as well as inside the shaft. It was said that the accident did not arise in the course of employment on a building exceeding 30ft. in height which was being "constructed" by means of a scaffolding. In his opinion the job had not been finished. The "construction" was not finished until the scaffolding was taken down. If a builder agreed to build a house, could it be said that the construction of the house was finished before the scaffolding was taken down? Clearly not. The Judge was therefore right.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER agreed.

[Solicitors—Lewin and Birdseye, for R. Page, Manchester, for the appellant; A. Booth Hearn, Chatham, for the respondent.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } March 12.

NASH V. DE FREVILLE.*

Bill of Exchange—Promissory note—Fraud—Holder in due course—Overdue note—Bills of Exchange Act, 1882, secs. 29 and 61.

Decision of Lord Russell of Killowen, C.J. (15 *The Times* L.R., 264), reversed.

This was an appeal from the judgment of the Lord Chief Justice at the trial of an action without a jury, reported in 15 *The Times* L.R., 264. The action was brought on five promissory notes amounting to £5,300. The plaintiffs were tailors carrying on business in Savile-row, London. The defendant was Major Edward Henry G. de Freville, a gentleman residing in Gloucestershire, formerly in the 11th Hussars, and now the master of the Cotswold hounds. In 1885 the defendant came into some property which was settled on him for life with remainder to his sons in tail. He employed as his solicitor Mr. William Peed, of Cambridge, who subsequently negotiated loans and made advances to him. At Peed's request the defendant from time to time gave him promissory notes to cover these advances. On January 14, 1895, the defendant gave Peed a promissory note for £800 with the express stipulation that he should not negotiate or part with it.

On January 31 and April 4, 1896, he gave Peed two notes for £500 each. On February 6, 1897, the defendant received an account from Peed showing the amount due to Peed to be £3,500, and at his request the defendant gave him two more notes on February 8, one for £1,500 and the other for £2,000. The defendant did not ask for the return of the notes that he had previously given to Peed, and they were left in Peed's hands, together with the two fresh notes. All the notes were made payable on demand to Peed or order. In March, 1897, Peed called on the plaintiffs and told them that he required to raise £5,000, for which he had excellent security to offer—viz., five promissory notes of his client, Major de Freville, which he said would certainly be paid on June 30, when Major de Freville's eldest son would come of age and the property would be resettled. The plaintiffs, knowing something of the position of Major de Freville, gave Peed a cheque for £4,800. Peed endorsed the five above-mentioned notes generally and handed them to the plaintiffs. The plaintiffs' cheque for £4,800 was endorsed by Peed and was duly met. On June 30, 1897, the amount advanced by the plaintiffs was not repaid, and they applied to Peed for payment, but Peed put them off with an excuse as to a difficulty in getting the signature of a trustee. In July, 1897, after the defendant's eldest son had come of age, the entail was barred, and a mortgage over the estate was created, and in that month and in August, 1897, two sums amounting to £22,000 were paid by the defendant to Peed for the purpose of discharging various liabilities, including a sum of £4,000 to meet the two notes for £2,000 and £1,500. The notes were not handed back by Peed to the defendant. The defendant did not then know that the notes had been negotiated with the plaintiffs, and he was justified in assuming that they were in Peed's possession. On September 28, 1897, at an interview between Peed and the plaintiffs, a sum of £5,581 was agreed upon as due upon the notes, this sum including principal and interest from June, 1897, and Peed gave the plaintiffs his cheque for £5,581, and the five notes were handed to Peed. Peed then sent the five notes by post to the defendant, who received them on September 29, and immediately burnt them. On the same day Peed absconded, and his cheque for £5,581 was dishonoured. The plaintiffs then brought this action against the defendant, suing on the notes, and at the trial it was agreed that the action should be treated as if there were an alternative claim for conversion of the notes. The Lord Chief Justice found that when Peed drew the cheque he knew that it would not be met, and that he was contemplating the perpetration of a fraud on the plaintiffs. He held that by virtue of section 61 of the Bills of Exchange Act, 1882, the notes had been discharged, the defendant having himself become the holder of them after maturity in his own right, and he therefore gave judgment for the defendant. The plaintiffs appealed.

Mr. Herbert Reed, Q.C., and Mr. Montague Lush appeared for the plaintiffs; Mr. Rawlinson, Q.C., and Mr. Harry Dobb appeared for the defendant.

The COURT, having taken time to consider, delivered judgment, allowing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—In this case the plaintiffs, who are tailors and moneylenders, sue Major de Freville upon five promissory notes amounting in all to £5,300, payable on demand, of which notes the defendant was the maker and a solicitor named Peed was the payee. These notes at one time had been in the plaintiffs' possession, though they had been fraudulently induced by Peed to hand them back to him, and the notes then got back into the defendant's hands, as hereafter will appear.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

There is also a count in trover. This case is complicated, as ordinarily is the case when fraud intervenes in the matter of negotiable instruments; but, having heard excellent arguments on each side, for the reasons I will now state I think the question in the cause is, Did the defendant, when he received the notes back into his possession from Peed, take them under such circumstances as to give him a better title to the notes than Peed had when he gave them back to the defendant? If the defendant took no better title than Peed had, then the plaintiffs, in my judgment, can succeed in this action, *aliter* if the defendant had. Peed was a solicitor who for years had carried on business at Cambridge, and down to September 29, 1897, when he absconded and afterwards became bankrupt, was a man of unimpeachable credit and above suspicion. Between the years 1885 and September, 1897, inclusive, Peed was the trusted solicitor of the defendant, and from time to time made advances of money to and disbursements for the defendant, and in January, 1895, the defendant owed him for so doing about £800. Peed then suggested that the defendant should give him a promissory note payable on demand by way of security for the debt. This the defendant did, and it was a note for £800 dated January 14, 1895, payable on demand in favour of Peed, and it was expressly agreed between the defendant and Peed that Peed should not negotiate or part with this note. For further advances and disbursements the defendant made two other notes payable on demand in favour of Peed, and handed them to him. The one was dated January 31, 1896, for £500, and the other was dated April 4, 1896, also for £500, and there was the like agreement about not negotiating or parting with these two notes. The reason for this agreement as to Peed not negotiating or parting with these notes was that the defendant did not then wish to be called upon to pay the amounts represented by them, it being anticipated, as turned out to be the case, that in the month of June, 1897, when the defendant's son would come of age, by means of barring an estate tail the defendant would be placed in funds. In the next year—namely, upon February 9, 1897—the defendant gave to Peed two notes, the one for £1,500 and the other for £2,000—*i.e.*, for £3,500 in all, payable on demand and in favour of Peed. These two notes were given to and taken by Peed to pay off the first three notes for £1,800 and to cover further advances. These two notes were also by agreement between the defendant and Peed not to be parted with or negotiated by him. The defendant did not take back from Peed the first three notes thus paid by the defendant, but left them in Peed's possession, and this, as will be seen, was what enabled Peed to commit the fraud which he subsequently practised upon the plaintiffs as regards these three notes. In the month of March, 1897, Peed, without the knowledge of the defendant, broke faith with him and negotiated all five notes with the plaintiffs, they paying to him the sum of £4,800 and taking a bonus of £500 for so doing. These notes were endorsed by Peed, and he also deposited with the plaintiffs an insurance upon the life of the defendant's son. In June, 1897, the defendant's son came of age, the estate tail was barred, the defendant became possessed of funds, and a settlement of accounts was then come to between the defendant and Peed, and the only material fact as to this settlement is that the defendant then gave to Peed £4,000 wherewith to pay the two notes for £3,500 and interest. The defendant did not get back from Peed those two notes when he paid them, but left them in Peed's hands, as he had done when he paid the first three notes. By his doing so Peed was enabled to perpetrate the fraud he subsequently practised upon the plaintiffs as regards these two notes. It is not denied that the plaintiffs,

when they discounted the five notes for Peed, became holders of them in due course and for value, and without notice of anything which would have impeached the plaintiffs' title to sue *de Freville* or Peed upon these notes. That the plaintiffs could have sued the defendant upon these five notes I have no doubt, and the defendant would have been undefended. It is true that up to this point the plaintiffs have no cause of complaint and were in no way prejudiced by the defendant not having taken back the notes from Peed as and when they were paid; and, on the contrary, the plaintiffs, by reason of the notes not having been returned by Peed to *de Freville* when they were paid, have been enabled to discount the notes for Peed at the rates they did, and were also enabled to enrich themselves by the sum of £500, being the bonus they took when they discounted them for Peed. But the prejudice to the plaintiffs comes in later on. The plaintiffs pressed Peed for payment of the notes, but could not get payment, and upon September 28, 1897, this took place. Peed, desiring to have the notes back, gave to the plaintiffs his cheque for £5,581 in exchange for the notes which they then held for £5,300, and also what the plaintiffs call a contango amounting to £26—whatever that may mean—they preferring, I suppose, Peed's cheque coupled with the contango of £26 to the signature of the defendant upon the notes with no contango. This, however, the plaintiffs were clearly entitled to do. The Lord Chief Justice finds, and I have no doubt correctly, "that the plaintiffs then voluntarily or intentionally parted with the notes, intending that Peed should take them, and intending that they should take and rely upon Peed's cheque which he had given in exchange for them"; and he also finds, and I think correctly, that "when Peed drew his cheque he knew that it would not be met, and he did not intend that it would be met, and in point of fact he was contemplating the perpetration of a fraud upon the plaintiffs." That Peed defrauded the plaintiffs is clear. What is the effect of this? Before I discuss this, I should state that Peed, when he thus got back the notes by means of his worthless cheque in exchange, at once placed them in an envelope and sent them to the defendant, who received them upon September 29, 1897, and knowing, as was the fact, that he had paid them long since to Peed, and not knowing that Peed had ever parted with them, put them into the fire and treated the matter as at an end. Upon October 1, 1897, Peed's cheque was returned to the plaintiffs marked "referred to drawer." The plaintiffs made no communication to the defendant upon the matter until some four months after the cheque was thus returned, and the question arises, in these circumstances, who has the better title to the notes, obtained as they were by fraud from the plaintiffs, who were the *bona fide* holders for value of the notes. Now, the notes having been obtained by Peed from the plaintiffs by fraud, although the property in the notes passed to Peed, the plaintiffs as against Peed were entitled to disaffirm the transaction on discovering the fraud, and, if, before the transaction with Peed was disaffirmed by the plaintiffs, the defendant had become holder in due course of the notes, it would then be too late in my judgment to disaffirm, so far as the defendant was concerned, and the plaintiffs could not then successfully sue the defendant either upon the notes or in trover; and the real question, therefore, as I have above stated, comes to this—Did the defendant, when he took the notes on September 29, 1897, from Peed, obtain a better title to them than Peed had? which means—Did he take them *bona fide* and for value and without notice of Peed's fraud and before they were due? For, if so, the defendant would in my judgment have taken a better title to the notes than Peed had, and a title

which would prevail over that of the plaintiffs. That the defendant received back the notes *bona fide* and without notice of Peed's fraud is clear. The defendant, when he received the notes from Peed, knew nothing of Peed having ever parted with them, nor had he ever heard of the plaintiffs in the matter. That the defendant received back the notes before the fraud of Peed was discovered is clear, for he received them the day after the fraud was committed. But did he give value for the notes when he received them back, and did he take them from Peed before they were overdue? As to the question of value, what value did the defendant give for the notes when he took them back from Peed? He had given value for the first three notes, when, upon February 9, 1897, he gave the second two notes to Peed in order to pay off the first three notes, and he gave value for the second two notes when he paid the £4,000 in June, 1897, to Peed to pay them off; but this was months before the fraud was perpetrated by Peed upon the plaintiffs and before he got the notes back, which took place on September 29, 1897. When he got the notes back the defendant gave nothing for them. How can it be said then that he took back the notes for value? For he did not. If the case cited of "London and County Banking Company v. London and River Plate Bank" (21 Q.B.D., 535), were to be held to apply to this case, we should have to hold that the defendant gave real value for the notes and then a supposed value over again for the same notes, which cannot be. But supposing the defendant did give value for the notes when he took them back, which in my opinion he did not, did he take the notes after they were due? I cannot see how it can be held that the defendant, when he received back the notes in September, 1897, though payable on demand, did not take them when overdue; for he must have known they were overdue if he thought about it at all, inasmuch as he had himself paid them off, the first three notes in January, 1897, and the last two notes in June, 1897. How can the defendant now say that they were not overdue in September, 1897, when he received them back? It seems to me that as the defendant did not give value for the notes when he took them back, and as, even if he did, the notes were then overdue, the defendant did not take a better title to them than Peed had, and that the plaintiffs, having disaffirmed, as they were entitled to do, the transaction with Peed, can maintain trover for the notes and bring an action upon the notes against the defendant, who has no better title to set up than that of Peed. I must point out that the difficulty which the defendant unfortunately is in arises through his own default in not getting the notes back from Peed when he paid them, thereby giving Peed the opportunity of cheating the plaintiffs as he did. It is a well-known principle of law that whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it. See the well-known case of "Lickbarrow v. Mason," in Smith's Leading Cases. And there is a case of "Babcock v. Lawson" (4 Q.B.D., 394), which contains matters very apposite to the present case. In my opinion counsel for the plaintiffs are right in their construction of section 61 of the Bills of Exchange Act, which was so much relied upon by the defendant's counsel, and that section does not apply to the present case, and the words "in his own right" do not mean in contradistinction to a representative right as argued for the defendant. For these reasons I think that the appeal must be allowed, and that judgment must be entered for the plaintiffs upon the notes with costs here and below.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER delivered written judgments to the same effect.

[Solicitors—Chester, Broome, and Griffiths, for the

plaintiffs; Cole and Jackson, agents for Francis, Francis, and Collin, Cambridge, for the defendant.]

House of Lords (Lord Halsbury, L.C., } 1900.
Lords Macnaghten, Morris, Shand, }
Davey, and James of Hereford) } March 13.

WYMAN OR FERGUSON (PAUPER) V. PATERSON AND OTHERS.*

Scotland, Law of—Trustee—Breach of trust—
Negligence—Leaving moneys in hands of law
agent.

Trustees held liable (Lord Morris dissenting).

This appeal was twice argued. The first hearing was on December 7, 8, and 11 before a House constituted of the Lord Chancellor, Lord Macnaghten, and Lord Ludlow. The death of Lord Ludlow made a second hearing necessary, and arguments were heard before a House constituted as above on February 5 and 8 last when judgment was reserved. The decision of the House, by which liability has been attached for a breach of trust committed about a dozen years ago, is one of great importance to trustees, especially in Scotland, where, as Lord Macnaghten observes, though there is no difference apparently in the law, "an extraordinary laxity of practice" seems to have grown up, "which the learned Judges of the First Division reprobate and yet allow." The appeal was from an interlocutor of the First Division of the Court of Session in an action in which the appellant, Mrs. Ferguson, widow of James Maxwell Ferguson, suing both as an individual and as executrix dative of her late husband, was pursuer and the respondents defenders. The action was for the recovery of trust funds alleged to have been lost through the gross negligence of the trustees. The Lord Ordinary (Lord Low) on June 3, 1897, held that the claim had not been established, and the Judges of the First Division (the Lord President and Lords Adam and Kinnear) on March 4, 1898, affirmed this decision. The object of the action was to have the respondents ordained to make good to the trust estate the sum of £3,140 12s. 2d., with interest thereon at the rate of 5 per cent. per annum from November 11, 1887. This sum was lost in January, 1888, by the misconduct of the then agent and factor of the trustees, the late Mr. John Clark Junner, W.S. Mr. Paterson and the late Mr. Lyon and Mr. Gordon were then the sole surviving and acting trustees of the trust. The testator, Mr. James Ferguson, was a pawnbroker, and died at Edinburgh on April 1, 1854, leaving a trust disposition and settlement, dated December 13, 1849, and four relative codicils, dated respectively December 31, 1849, August 15, 1850, March 28, 1851, and October 25, 1852, all recorded in the books of Council and Session, April 8, 1854. By these instruments the testator nominated a number of persons to act as his trustees, and disposed to them his whole estate, heritable and movable. By his second codicil, dated August 15, 1850, the testator, reciting that he was about to enter into a second marriage with Miss Joanna MacHardy, directed his trustees to give effect, as if it formed part of his trust settlement, to the antenuptial contract of marriage entered into between him and the said Joanna MacHardy. By the contract of marriage the testator bound himself and his heirs and successors whomsoever, to make payment to the said Joanna MacHardy, in case she should survive him, and while she remained his widow, yearly, during all the days of her life and widowhood after his decease, of a free liferent annuity of £130. By the fourth purpose of his

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

trust disposition and settlement the testator directed his trustees, so soon as his youngest child attained majority, to make up a state of the trust estate, and to divide and convey over the same, equally, among his children. The testator had six children by his first marriage, of whom James Maxwell Ferguson, the pursuer in said action before the Lord Ordinary, and now deceased, was the third, and one daughter, who was born on January 7, 1852, by his second marriage. This daughter, now Mrs. Emma Ferguson, or Burnet, came of age on January 7, 1873, when, in terms of the trust disposition and settlement, the truster's estate became divisible, subject always to the retention of such a sum as was necessary to implement the truster's obligation in his contract of marriage to pay an annuity of £130 to his widow, who is still alive. When Mrs. Burnet came of age the trustees proceeded to realize the truster's estate, and to distribute it among his children, retaining, however, a sum of about £4,700 in their hands to meet the widow's annuity. As at March 31, 1887, the funds belonging to the trust estate, and still held by the trustees, amounted to £4,755 16s. 2½d. Of that sum £3,700 was lent on bond secured over the estate of Mr. C. H. Home Purves, of Purves, and a policy of assurance on his life. Mr. Purves died in February, 1887, and Mr. Junner, who was law agent and factor for the trustees and also, unknown to them, law agent for Mr. Purves, then informed the trustees that the bond was to be paid up at May, 1887. The money was, however, not paid until July, 1887. Mr. Junner was instructed by the trustees to look out for another investment for the money, but by Martinmas, 1887, Mr. Junner had only been able to find an investment for £800. At a meeting of the trustees, held at Mr. Junner's office on December 19, 1887, Mr. Junner reported that he had not yet been able to find an investment for the balance. Mr. Junner was at that time asked if the money was on deposit receipt, and he stated that it was; and he was then requested to exhibit the deposit receipt. He did not then do so, explaining that his cashier was out, and that he could not, therefore, get at the deposit receipt. He was then asked by the trustees to send the deposit receipt to them that they might see it. On December 20 or 21, 1887, Mr. Junner sent a clerk to show each of the trustees a deposit receipt. It was dated December 20, 1887, was for £3,000, and bore that the money was received from Messrs. Ferguson and Junner, W.S., for behoof of the trustees of the late James Ferguson. Mr. Paterson and the late Mr. Gordon objected to its terms, and told Mr. Junner's clerk that the deposit receipt must be altered so that the money should be deposited in the trustees' names. Two or three days afterwards the deposit receipt, in name of the trustees, not having been shown to them, the respondent, Mr. Paterson, and the late Mr. Lyon went to Messrs. Ferguson and Junner's office to inquire into the matter, and were then told that Mr. Junner had met with a very serious accident, and was totally unfit for business. Inquiries were repeatedly made, and a letter was sent to Mr. Junner requesting the alteration in the deposit receipt. On January 19, 1888, the trustees stated that they first heard that Mr. Junner was in embarrassed circumstances. They immediately employed a new agent who on the same day intimated to the British Linen Bank that Ferguson and Junner had ceased to act for the trustees, and that they were not authorized to uplift the sum on deposit receipt, and on the following morning (January 20) called to see the secretary of the bank on the subject. The secretary then explained that Mr. Junner had uplifted the deposit receipt on January 18, 1888, and had remitted the amount thereof by a draft to Mr. Barty, solicitor, Dunblane. Mr. Barty was country

agent for another trust for which Mr. Junner was the town agent. Ferguson and Junner's estate was sequestrated, and the trustees received dividends amounting in all to £259 7s. 10d., leaving the total loss to the trust-estate, as at Martinmas, 1887, £3,140 12s. 2d., or thereby. This sum consisted of £2,900 received from Home Purves's estate, and uninvested, and of a small balance uninvested and in the hands of Mr. Junner. In February of 1888 the trustees sent a circular to the beneficiaries, informing them of the loss and how it had been sustained, and another circular was sent to the beneficiaries in March, 1890, detailing what the trustees had done to recover the money. By the truster's trust disposition and settlement it was provided:—"My said trustees shall not be liable for the intrusions of such factors, or for debtors or companies to whom or where said estate shall be lent or invested, further than their being habit and repute responsible at the time of such loan or investment; neither shall they be liable for any agent who, in transacting the business of this trust, shall receive any part of my said estate into his hands. And I do hereby declare that my said trustees, whether original or assumed, or tutors or curators after appointed, shall not be liable for omissions or neglect of management, or *singuli in solidum*, but each only for his own actual intrusions." For the respondents it was argued that the loss sustained was not due to any fault or negligence for which the respondents were responsible, but was sustained through the fraud or fault of the respondents' law agent and factor, for which they were not liable, and that the appellant was barred by *mora*, taciturnity, and delay from insisting on the claim in the present action.

Mr. A. Houston, Q.C. (of the Irish Bar) and Mr. J. C. Guy (of the Scotch Bar) for the appellant; the Dean of Faculty (Mr. Asher, Q.C.) and Mr. Henry Johnston, Q.C. (of the Scottish Bar), for the respondents.

The LORD CHANCELLOR.—In my view it is not necessary to go earlier in the history of this case than to note that the £3,000 which has been lost through the fraud of the law agents and factors of the respondent, was paid to those law agents and factors in the month of July, 1887; but £3,000 of the money handed to the agents of the trustees at that time remained uninvested at Martinmas. The Lord Ordinary in terms says that in his opinion the trustees were quite entitled to entrust the money to the care of their law agent and factor pending an investment being found. This is a somewhat formidable proposition, and one to which I cannot assent. How long that may be done appears, according to the breadth of the proposition, to be simply till an investment is found, however long that operation may take. I am glad to see that the two learned Judges of the First Division take a totally different view of a trustee's duty. Lord Adam says:—"I see that evidence has been led to the effect that it is a common and recognized practice for agents and factors to deposit trust moneys in their own names, for behoof of their clients. I quite recognize that such moneys as may be necessary for carrying on the current business of the trust should be so deposited or lodged in bank as to be payable on the receipt of agents or factors. But the trust money in question was not at all in that position. It was simply deposited until a permanent investment should be obtained, which apparently there was no immediate prospect of obtaining. It is the duty of the trustees to see that the money entrusted to them is so invested or deposited as not to be exposed to any unnecessary risk. That money deposited in an agent or factor's name is not in that position the result of this case sufficiently demonstrates, and the only reason assigned for taking such receipts in the names of agents or factors—viz., the trouble of obtaining the signatures of

the trustees when it is desired to uplift the money, appears to me to be perfectly trivial." And Lord Kinnear takes the same view. His Lordship says:—"The chief difficulty in the case arose from the argument which was maintained to us that trustees are justified in allowing factors or agents to mix the funds of the trust with their own. I am clearly of opinion with Lord Adam that this is contrary to their duty, and that the reasons which were given for following such a practice are quite inadequate." My Lords, I am not quite clear why, if these be the principles applicable to the conduct of a trustee, how both those learned Judges have come to the conclusion that they have, to assuage the defenders. I cannot understand upon what ground these defenders can escape from the consequences of their negligence, because they not only allowed the agent or factor to deal with the money, but took no pains to ascertain in what manner the money had been deposited. I observe the learned Judge further says that he would have taken a different view of their position had the trustees taken steps when they became aware that the money in question was not deposited in their own names. But why did they not? Whose duty was it to see, not in the month of December, 1887, when for the first time they asked to look at the receipt, but originally when the money was entrusted to the care of their agent or factor? What single act is proved to have been done by these trustees to see (in the words of Lord Kinnear) "that the funds of the trust were not mixed with the funds of the factors and agents"? I find in Mr. Paterson's evidence that he says:—"We were constantly inquiring about the reinvestment of the money. He says at an earlier period of his evidence that the trustees were informed by the agent that he had no investment that he could recommend. When asked whether it was not leaving the money with the agent to do what he liked with, he says:—"It might be so, but it would be reinvested by the agents. The agent told him in reply to his inquiries that he had found nothing suitable that he could recommend. Now, assuming that it was the duty of the trustees to see that the money was not left in the hands of the agent, what excuse is there that no inquiry was made in the period elapsing between July and December 19? My Lords, I am not prepared to say that I should not, upon the grounds mentioned by the learned Judges, have held the trustees liable on the facts as they stood on December 20. But the facts do not end at that date. On that date the trustees became aware that the money was deposited in the names of the agents and factors themselves. It is brought to their attention, therefore, that the money (in the language of Lord Adam) "was exposed to unnecessary risk," and I understand both the learned Judges, to whom I have referred, are of opinion that it was the duty of the trustees, when that fact was ascertained, to have taken steps to remove that risk, and to have the money invested in the names of the trustees themselves. The excuse for not doing so appears to me to be wholly inadequate. The fact that the agent had suffered an accident could not have prevented a proper communication to the bank. The only excuse given for not doing so—and the money was allowed to remain for a month in what has been described as an unnecessary risk—is that it might have injured the factors' credit with the bank if any such communication had been made. I cannot assent to the propriety of such an argument, even if an injury to the factors' credit had resulted; but I think nothing could have been easier, without any imputation on either the credit or honesty of the factor, to communicate with the bank and state, as the fact was assumed to be, that it was only an accident that prevented the money from being properly transferred into the names of the trustees; but they as trustees felt it

their duty to insist upon its being secured from risk. Moreover, in the event of the factor's death it might have caused confusion and difficulty. These, to my mind, were ample reasons for a communication to the bank without in the least degree injuring the credit of the factors. This was not done, and in the result the agent was enabled to withdraw the whole sum of £3,000 and to use it for his own purposes. My Lords, I observe that neither of the learned Judges who have given judgment nor the Lord Ordinary rely upon the judgments they have pronounced on the immunity clause of the trust deed. But the Dean of Faculty has, in his very able argument before your Lordships, insisted on it that, granting a certain amount of negligence in the conduct of the trustees, it is only such an amount of negligence as is protected by the clause in question. I confess, for myself, I have great difficulty in weighing the exact amount of what is described as negligence. But I do not think the question of negligence properly arises upon the facts of this case. It seems to me there was a plain breach of duty, and I do not think that upon the principles laid down in "*Seaton v. Dawson*" (4 Dunlop) it is possible to rely on the immunity clause. There was no authority in the trustees to treat their agent and factor as a banker into whose account they might pay the money. If, while acting strictly within the character of factor and agent, there was something which he might have lawfully done but which he did fraudulently, it may well be that the liability of the trustees is cut down and qualified by the immunity clause. But in this case it was not as factor or agent in any sense that could be supposed to be covered by that character, but as guardian of the money without any control or check, that the trustees thought proper to allow the defaulting agent to remain in possession of the money. I am not certain that it is very important to show that the trustees did know what their duty was. People who undertake a duty are bound to know what their duty requires. But even if it were necessary to show knowledge, I am clear that in this case they did know. Their own conduct on December 18 exhibits their knowledge. Under these circumstances, apart from the original error which, in common with Lord Adam and Lord Kinnear, I think, was committed by the trustees, the interval between December 20 and the period when the money was finally lost appears to me to have exhibited on the part of the trustees very gross negligence, for which I think they must be held to be responsible. My Lords, under these circumstances I move your Lordships that the judgment of the First Division and that of the Lord Ordinary be reversed, and that judgment be entered for the pursuers, to replace the £3,000 with interest at 3 per cent.

LORD MACNAGHTEN.—I am of the same opinion, and I have only a very few words to add. If the gentlemen whose conduct is impugned had been English trustees acting in the execution of an English trust, the case against them would have been, I think, too clear for argument. And though there seems to have grown up in Scotland an extraordinary laxity of practice, which the learned Judges of the First Division reprobate and yet allow, it has not been suggested that there is any difference between the law of England and the law of Scotland as to the duties and liabilities of trustees in regard to the custody and investment of trust funds. Those gentlemen were trustees of a fund set apart to answer a life annuity and divisible on the death of the annuitant among the persons entitled in remainder. The sum of £3,700, part of this fund, was invested in a heritable bond. On July 15, 1887, the bond was paid off. The trustees allowed their law agent to receive the money and to retain it in his hands uninvested for rather over six months. At the end of that time the law agent became bankrupt and the

greater part of the fund was lost. The surviving trustee and the representatives of the other two who are now dead contend that the trustees are not responsible for the loss. In my opinion the trustees were guilty of a plain and positive breach of trust, and are liable to replace the money lost by reason of their gross neglect. The learned counsel for the appellant said that he did not complain of the trustees allowing the money to be received by the law agent. He admitted that the receipt was proper. I think that the learned counsel was probably right in making that admission. But I think the admission ought to have been qualified. If the trustees were justified in allowing their law agent to receive the money on the score of convenience, or, what is much the same thing—because it is in accordance with the ordinary course of business in Scotland—they were not, in my opinion, justified in leaving the money in the law agent's hands for a longer time than might be reasonably required to enable him to pay it over to them. No Scottish authority was cited on this particular point. Nor is there much authority to be found in England. It is plain that it is no part of the duty of a solicitor as such to receive trust money. And there is a dictum attributed by Lord Chancellor Hart to Lord Eldon to the effect that if trustees permitted their solicitor to receive trust money and he became bankrupt next day they would be held responsible. That probably is an extreme view, and not in accordance with modern opinion. It is, however, unnecessary to pursue the point, because in this country it has been set at rest by the Legislature. The Trustee Act, 1888, authorizes trustees to appoint a solicitor to be their agent to receive trust money, but it attaches to the authority thus conferred the following proviso:—

“Nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed in case he permits such money . . . to remain in the hands of the solicitor . . . for a period longer than is reasonably necessary to enable such solicitor to pay or transfer the same to the trustee.” It seems to me that this enactment must be taken to be a statutory declaration of the law in this country, and although the Act does not extend to Scotland it appears to me that by analogy the law thus declared must be treated as applicable in the case of Scottish trustees. Tried by this standard it is obvious that the trustees in the present case committed a gross breach of trust in leaving the money in the hands of their law agent. The immunity clause does not, in my opinion, afford the trustees any protection. It has been determined in this House that such a clause affords no protection against a positive breach of trust. And although the trustees described the law agent as their factor, and desire that he should be regarded as such, it is obvious that it is no part of a factor's duty to retain in his hands the money of his employers and to act as their banker. The provision as to immunity in regard to the acts of factors cannot, I think, extend to what the factor is known by the trustee to be doing outside the scope of his employment as factor. There is only one other observation I desire to make. We are told that the delay was necessary or at any rate excusable because the trustees were directed to invest the trust money in heritable securities, and it was difficult to find an eligible security of that description. No doubt the law agent put the trustees off by an excuse of this sort; but the law agent must have known, and the trustees would have known if they had made any inquiry, that under the Trusts (Scotland) Amendment Act, 1884, it was competent for them to invest the trust money in their hands in any one of the securities therein mentioned. The Act places a wide range of investments at the disposal of trustees, although the investment mentioned in the trust disposition may be

of a very limited character. I think the appeal must be allowed.

LORD MORRIS dissented, and held that there had been no departure from established custom or breach of duty on the part of the trustees in leaving the money with the agent for so short a period. The trustees, in his opinion, had neither done nor omitted anything which a prudent man would have done or omitted. They had pressed Junner repeatedly to find an investment and did not purpose to leave the money indefinitely in his name. They had no reason to suspect Junner, who was a man of high reputation, and they could hardly, in the absence of suspicion, have practically intimated to the bank that Junner was an untrustworthy person. In his opinion a decision against the trustees would be a draconic decision and operate as an additional terror to any honest and solvent person who was asked to act as trustee.

LORD SHAND concurred in thinking the appeal should be allowed.

LORD DAVEY.—This appears to me a very plain case. The first duty of the trustees was to preserve the trust fund under their own control. Instead of doing so, they allowed it to remain under the sole control and in the sole disposition of their law agents for five months. They took it for granted that the money would be placed on deposit, but made no inquiry whether it was so; and, indeed, it appears from Mr. Paterson's evidence that he did not even suppose that the deposit would be in the names of the trustees, as it ought to have been. The Lord Ordinary was of opinion that the trustees were quite entitled to entrust the money to their law agent and factor, pending an investment being found. Lords Adam and Kinnear were clearly of opinion that this was contrary to their duty, and that the reasons which were given for following such a practice were quite inadequate. I entirely agree with the learned Judges in the Inner House in that opinion. The trustees might properly employ their law agent to receive the money from the mortgagees, but it was their duty to see that the money, when received, was immediately reinvested or placed on deposit in their own names and under their own control. Where I differ from the learned Judges is in thinking that the ineffectual attempts made by the trustees to recover the money from the law agent did not absolve them from the consequences of their previous neglect of duty. It is, in my opinion, a clear breach of trust and *culpa lata* on the part of the trustees thus to abandon the performance of their primary duty, and the loss that has ensued was the direct consequence of their doing so. It was argued that the trustees are exempted from liability by the immunity clause to be found in the will. I think that this point is covered by the decision of the full Bench in “Seton v. Dawson” (4 D., 310), which has more than once been referred to with approval in this House. I agree with the opinion expressed by the Lord Justice Clerk in that case, that where trustees give a joint receipt for trust money, though it is, in fact, received by the hand of an agent, it is the intromission of the trustees themselves. I also think that the immunity from liability for the intromissions of a factor or agent extends only to the acts of a factor or agent properly appointed and acting within the legitimate scope of his agency. In the present case the law agent's duty was to receive the money and at once place it in safety under the control of the trustees, and they could not properly, and did not, in fact, authorize him to retain the money in his own control. If trustees think fit to delegate their duties to their law agents in a matter in which they cannot properly authorize him to act for them, they are not, in my opinion, protected by a clause of immunity from liability for the intromissions of factors or agents. The learned counsel for the respondents relied on some

words used by Lord Watson in "*Knox v. Mackinnon*" (13 App. Cas., 763), but, if the whole passage in which these expressions occur is read, they do not appear to me to have any application to the present case. I am rather surprised to find it stated in the evidence in this case that it is the practice of Scotch solicitors to place trust funds in their own names for "behoof of the trustees," instead of placing them in the names of the trustees themselves. I am not aware that such a practice has ever been directly made the subject of judicial decision. If the case ever arises, it will have to be considered whether such a practice is consistent with the primary duties of trustees to retain the funds in safety under their own control. I agree that the order hereby appealed from should be reversed. A question was raised as to the rate of interest which should be allowed. There appears to be no settled rule on the subject in the Scottish Courts. I think the rate should be 3 per cent. An order should be made for payment by the surviving trustee and the representatives of the deceased trustees to the judicial factor of the sum of £3,140 12s. 2d., with interest at 3 per cent. from July 15, 1887.

LORD JAMES OF HEREFORD gave judgment to the same effect, and the appeal was allowed.

[Solicitors—H. Percy Beecher, for the appellant; A. and W. Beveridge, for the respondents.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } March 13.
HICKMAN V. MAISEY—HICKMAN V. MATTHEWS.*

Highway — Trespass — Unreasonable user of highway.

The user of a highway by touts for the purpose of watching the trials of race-horses on adjoining downs held to be an unreasonable user, and such as to render them liable in an action of trespass to the owner of the soil.

These were two applications by the defendants for judgment or a new trial in two actions tried before Mr. Justice Day and a special jury at Devizes. The two actions raised the same question, and were tried together. The plaintiff was the owner and occupier of a farm in Wiltshire across which a public road ran. The land owned by the plaintiff included a quantity of down land, over which the plaintiff had granted to one William Thomas Robinson, who was a trainer of race-horses, a licence for value to exercise and train his race-horses. The defendants in the two actions were the owners of a newspaper in which they recorded the doings and trials of race-horses, and they went each day for about an hour and a half on the road and walked up and down it between two points 15 yards apart and watched with glasses the trial gallops of the race-horses and took notes thereof. It was admitted that the soil of the road belonged to the plaintiff. Notice was given to the defendants to discontinue the acts complained of, which they refused to do. The plaintiff then brought an action of trespass against each of them, and claimed an injunction to restrain them, their servants or agents, from any repetition of the acts complained of, alleging that the acts of the defendants were an annoyance and caused damage to the plaintiff and to Robinson, his licensee. It was admitted that the defendants, unless restrained by injunction, intended to continue doing as they had done. At the trial the learned Judge told the jury that the question was whether the defendants had used the road as wayfarers for the purpose of passing and repassing or for some

other purpose, and that if the defendants had frequented the road, not for the purpose of travelling along it as wayfarers, but to stop on it in order to view the trial gallops and carry on their business there, it was a trespass; that the jury had to say whether the coming on the road and watching and standing about for an hour and a half was a user of the road by the defendants as wayfarers, that was to say, for the purpose for which it was dedicated to the public; and that if the defendants only used it as wayfarers the verdict would be for them; but if they exceeded their user of it as wayfarers and used it for the purpose of carrying on their business thereon, the verdict would be for the plaintiff. The jury found that the defendants did not use the road as ordinary wayfarers, and assessed the damages at 1s. Judgment was accordingly entered for the plaintiff and an injunction was granted.

MR. DUKE, Q.C. (Mr. J. W. McCarthy and Mr. T. H. Parr with him) for the defendants contended that there was no trespass committed by the defendants upon the highway. A person could not be prevented from walking along or up and down a highway and looking at what was to be seen. If it was an annoyance to the plaintiff he ought to take measures to keep his land private and prevent people from seeing what was going on there. The jury were not properly directed as to what constituted a trespass upon a highway. Many people were accustomed to stand on a highway in order to see a race or a procession, and it could not be said that they were guilty of trespass. There must be some act of trespass subsequent to the original entry on the highway. There was no such act here. The intent with which a person went upon a highway was not material. "*Harrison v. Duke of Rutland*" ([1893] 1 Q.B., 142) was not in point, because in that case the plaintiff was substantially driving away the grouse on the defendants' land and was interfering with the lawful user by the defendant of his own land. There was no such act here. He also referred to "*Dovaston v. Payne*" (2 H. Bl., 527); "*Reg. v. Pratt*" (4 E. and B., 860); "*Shorland v. Govett*" (5 B. and C., 485); "*Raugeley v. Midland Railway Co.*" (L.R., 3 Ch., 306, at p. 310).

MR. J. A. FOOTE, Q.C., and MR. F. R. Y. RADCLIFFE, for the plaintiff, were not called upon.

THE COURT dismissed the applications.

LORD JUSTICE A. L. SMITH said that the soil of the road belonged to the plaintiff, and the defendants, who were what had been called racing touts, had for a period of time, in spite of notice not to do so, used the road for the purpose of watching the trial gallops of the horses on the downs, and then published the information they thus obtained, the result being a detriment not only to the trainer, but also to the plaintiff. Thereupon this action of trespass was brought upon the ground that the defendants had broken into the plaintiff's close, that was, the soil of the road belonging to the plaintiff. The defendants justified the alleged trespass by stating that the *locus in quo* was a public highway and that they were lawfully using it. Therefore the question was whether it was made out that the defendants were using the highway for the purpose for which it was dedicated to the public, that was, for the purpose of passing and repassing along it. Unless the defendants showed that they were lawfully using the highway they had not proved their plea. The user for which a highway was dedicated was that of passing and repassing—"Dovaston v. Payne." His Lordship agreed with what fell from Lord Esher in "*Harrison v. Duke of Rutland*" upon that point. It seemed to him that the doctrine as to the user of the highway being simply for passing and repassing was somewhat broadened by the last decision. There were many acts which came

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

within the ordinary and reasonable user of a highway. Could they say that the acts of the defendants, who used the road not for the purpose of passing and repassing but for the purpose of carrying on their business to the detriment of the owner of the soil of the road, constituted a reasonable user of the highway? In his opinion it was not a reasonable user. It was sufficient to say that the case of "*Harrison v. Duke of Rutland*" was directly in point, and covered the present case. Nor could he see that there was any misdirection. As regards one argument urged on behalf of the defendants he did not agree that what the defendants intended to do, and their purpose when going on the highway was not to be taken into account in determining whether or not they were using the highway for the purpose of passing and repassing. The applications must be dismissed.

LORD JUSTICE COLLINS agreed. It was not easy to give an exact definition where the line should be drawn between a user of a highway as a highway, and a user beyond that conferred by the dedication. But, as in many other cases, it was not difficult to put instances which were well on one side or the other of the line. In the present case the user went well beyond the line which marked the proper user of the highway as a highway. It was contended on behalf of the defendants that when a person entered on a highway under the guise of a public right, if it was going to be questioned whether the entry was in exercise of that public right, there must be some act afterwards which amounted to a trespass so as to enable the Court to say that the original entry was a trespass. Accepting that proposition, in his opinion there was evidence to show a trespass by the defendants after their entry on the highway, because in the last resort the question must be whether what the defendants did was a reasonable user of the highway. Primarily a highway was dedicated for the purpose of the public passing and repassing along it. In modern times there was a legitimate extension of the doctrine that the reasonable user of a highway was limited to passing and repassing along it. "*Dovaston v. Payne*" was an illustration. In that case it was stated that cattle passing along a highway and grazing as they went would not be trespassers. That was only an illustration of the principle that the right of passing and repassing along a highway was subject to all reasonable and legitimate extensions recognized as necessary or customary owing to a change in the habits of people as districts became more populous and as times changed, considering the larger user to which a highway might become liable owing to the requirements of the public becoming more extended in a way not inconsistent with the paramount right of transit over it. That was the extended kind of user referred to by Lord Esher in "*Harrison v. Duke of Rutland*." It was then contended on behalf of the defendants that the Court could not inquire into the motive with which a person went on a highway. That contention was contrary to all the leading authorities, including "*Dovaston v. Payne*." It was said that there was nothing here to show the intent with which the defendants entered on the highway. That was not so, because the acts of the defendants on the highway could be looked at to see, as stated in the "*Six Carpenters' Case*" (8 Co., 146a) *quo animo*, or with what intent, they entered, and that intent was not for the proper user of the highway.

LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—Goodall and Hobson, for Butterworth, Rose, and Morrison, Swindon, for the plaintiff; Prior, Church, and Adams, for A. E. Withy, New Swindon, for the defendants.]

Q.B. Div. }
(Kennedy, J.) }

1900.
March 12.

THE HARROWING STEAMSHIP COMPANY (LIMITED) V.
TOOHY.*

Ship—Transfer of shares—Registration—Fees—
Merchant Shipping (Mercantile Marine Fund)
Act, 1898, sec. 3—Scale of fees.

This was an action brought to recover damages for the defendant's refusal to register transfers of shares in the plaintiffs' vessels. The question in the action was as to the amount of fees payable under the Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 and 62 Vict., c. 44), s. 3, upon the transfer of shares in ships where the transferee at one time registers the transfer of a number of shares transferred from several holders. The facts, which were agreed, were as follows:—The defendant was registrar of British ships at the port of Whitby. In July, 1899, the plaintiffs produced to the defendant 20 bills of sale for the transfer to the plaintiffs of 58 64th shares in the steamship *Ethelburga*, together with the declaration of transfer required by section 26 of the Merchant Shipping Act, 1894, and requested the defendant to enter their name as transferees in the register book as owners of the said shares. These bills of sale represented 2,015 gross tons out of a gross tonnage of 2,223 tons. The plaintiffs at the same time tendered £4 as the amount due for fees upon such registration. The sum of £4 was arrived at by charging one fee on the scale mentioned in the Act upon the 2,015 gross tons represented by the shares transferred and dealt with by the transfers. The defendant refused to register the plaintiffs' name without the payment of a separate fee upon the said scale on the tonnage transferred by each bill of sale. The amount payable on this principle in respect of the *Ethelburga* would be £14 15s. The point for the decision of the Court was whether the fees tendered by the plaintiffs were sufficient. If they were, it was agreed that the plaintiffs were entitled to judgment and damages for a nominal amount with costs. The same question was raised in the action with reference to five other vessels.

Mr. Horridge appeared for the plaintiffs; the Solicitor-General and Mr. Rowlatt for the defendant.

MR. JUSTICE KENNEDY, in giving judgment, said that by the Act there had to be upon a transfer the payment of a fee according to the gross tonnage represented by the ships or shares of ships transferred. In the case in point the plaintiffs had transferred to them a number of shares from different persons. Those shares were transferred, not only by a number of separate documents, but by a number of separate transactions, and each of those transactions was a separate transfer. The Act imposed the payment of fees mentioned in the schedule in the case of a transfer, and as there had been a number of separate transfers that payment must be made in each case.

Judgment for the defendant.

Prob., Divorce, and Adm. Div. }
(Jeune, P.) }

1900.
March 12.

THE SWIFTSURE.†

Practice—Evidence—Account book—Entry of
deceased person—Entry against interest—Ad-
missibility.

This matter came before the Court by way of motion to vary the Registrar's report. The action was brought

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

†Reported by HUGH C. S. DUMAS, Esq., Barrister-at-Law.

by the executors of the will of one John Hudson claiming to be paid the amount due to them for principal and interest under a mortgage on the barge *Swiftsure*, of Rochester. The mortgage was dated March 25, 1893, and was granted by the registered owner of the barge, one George Bartlett, to John Hudson to secure the repayment to Hudson of the sum of £200 with interest at the rate of 6 per cent. The defendant Bartlett alleged by his defence that the whole of the sums due under the mortgage had been paid by him. The plaintiffs by their reply pleaded that an agreement had been entered into between Hudson and Bartlett that, in consideration of Hudson paying for all the repairs, disbursements, and outgoings in connexion with the barge, Hudson should receive 50 per cent. of the gross earnings of the barge, and that all payments made by Bartlett to Hudson had been made under this agreement, and not in discharge of sums due under the mortgage. On February 16, the case came before Mr. Justice Gorell Barnes, who referred it to the Registrar assisted by merchants to report upon. The Registrar, by his report, which was dated February 24, found that there was no evidence of any such agreement as was pleaded by the plaintiffs on their reply, except what might be gathered from the entries in Hudson's own account-book, and these he thought could not be used for that purpose. He found on the evidence of the defendant that all the payments made by the defendant to Hudson were made in satisfaction of the mortgage debt, which was extinguished by them. The plaintiffs appealed.

Mr. KILBURN, for the appellants, contended that the learned Registrar ought to have admitted Hudson's account-book in evidence, there being entries in it which were against Hudson's interests. He cited the cases of "*Wilkinson v. Stern*" (9, Mod. Rep., 427) ; "*Taylor v. Witham*" (3 Ch.D., 605) ; "*Cockburn v. Edwards*" (18 Ch.D., 449).

Mr. NELSON, for the respondent, argued that the account-book had been rightly rejected. He cited the cases of "*Doe v. Bevis*" (18 L.J., C.P., 128) and "*Knight v. The Marquis of Waterford*" (10 L.J., Exch., Eq., 57).

The PRESIDENT, in giving judgment, said that it was sought to be proved by the books of the deceased man Hudson that certain payments made by Bartlett to Hudson were not made as Bartlett now stated in discharge of a mortgage debt, but under an agreement to pay to Hudson half the gross earnings of the barge. The books were admittedly in the handwriting of Hudson, and he thought that *prima facie* they were admissible in evidence, as being books kept by Hudson in the ordinary course of business. He thought also that they were admissible on the ground that they contained entries of payments made to Hudson, and as such could be said to be against his interest. The cases cited by Mr. Kilburn were authority for this. What the effect of the evidence might be when admitted was another matter. The case must go back to the Registrar with an intimation that the books must be received in evidence, and proper inferences drawn from them. The costs of the appeal would be reserved.

[Solicitors—Indermaur and Brown, agents for G. Robinson, of Strood, for the appellants ; Farlow and Jackson, for the respondent.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams,
L.JJ.) } 1900.
March 14.

DIXON V. WINCH.*

Vendor and Purchaser—Fraud—Purchase of land
—Mortgage not disclosed to purchaser—Liability.

This appeal against a decision of Mr. Justice Cozens-Hardy's raised the question, which of two innocent persons is to suffer by the fraud of a solicitor. On July 14, 1886, some land at Harlow, in Essex, was conveyed in fee to one Dent, a solicitor. On March 24, 1892, Dent conveyed part of the land to the defendant Winch, who is a builder. Winch built houses on this land, and on January 11, 1893, he mortgaged the land and houses to Dent to secure £350, with interest. On January 16, 1893, Dent transferred this mortgage to Miss Ellman, another defendant. The conveyance to Winch and the mortgage to Dent (on which the transfer to Miss Ellman was endorsed), were handed over to her, but she did not give notice to Winch of the transfer of the mortgage to her. Dent paid her interest on the mortgage debt until 1898, when he absconded. After his disappearance the following facts were discovered :—On September 15, 1893, a deed was executed, to which Dent, Winch, and the plaintiff, Mrs. Dixon, were parties. This deed contained an untrue recital that Dent, being seised for an unencumbered estate in fee simple in possession of some land (part of that comprised in the deed of March 24, 1892), had agreed to sell it to Winch for £100, but that no conveyance had been executed, and that Winch had erected houses on the land and had agreed to sell the land and houses to Mrs. Dixon for £685. And Dent and Winch, in consideration of £100 and £585 paid to them respectively by Mrs. Dixon, conveyed to her in fee the land and houses in question. Nothing was said in this deed about the mortgage to Dent. By another deed, dated April 25, 1894, made between the same parties and containing similar recitals—and a recital that the £100 had been already paid by Winch to Dent—the remainder of the land comprised in the deed of March 24, 1892, was, in consideration of £325 paid by Mrs. Dixon to Winch, conveyed by Dent and Winch to her. No investigation of title was made on her behalf, it being arranged that she was to have a free conveyance prepared by Dent and "to accept Winch's title" from him. She was, in fact, in complete ignorance of the mortgage. The purchase-money on the first purchase was paid to Dent, and he afterwards, by arrangement with Winch, retained out of it £451 10s., which was said to be made up of the £350 mortgage debt, some further advances by Dent to Winch, and interest. The plaintiff under these circumstances claimed to hold the property conveyed to her free from Miss Ellman's mortgage. Mr. Justice Cozens-Hardy held that the plaintiff took the property subject to Miss Ellman's mortgage. The plaintiff and the defendant Winch appealed.

Mr. Eve, Q.C., and Mr. Christopher James were for the plaintiff ; Mr. W. G. Hayter was for the defendant Winch ; Mr. Micklem, Q.C., and Mr. Harman were for Miss Ellman.

The COURT dismissed the appeals.

The MASTER of the ROLLS said that it was unnecessary for him to deal with the authorities which had been cited, for there was one view of the case which seemed to him sufficient to dispose of it. The question was whether Mrs. Dixon, the purchaser of this property, was entitled to compel Miss Ellman, the transferee of the mortgage upon it, to give up her security. It was clear that Dent was an unmitigated scamp. It did not occur to Miss Ellman to give notice to Winch of the transfer of the mortgage to her. It was really the duty of Dent, both to her and to Winch, to give that notice, and not to leave Winch exposed to the risk of paying the mortgage debt to the wrong person. In the subsequent sale of the property to Mrs. Dixon, Winch left everything to Dent, and he inserted in the conveyance a deliberately false recital, suppressing both the mortgage and the transfer of it. The result was that a gross

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

fraud was perpetrated on Mrs. Dixon, the property being subject to the mortgage of which she was ignorant. Winch was a tool of Dent in the transaction, but he could not derive any benefit from the fact that he did not know what was being done. Then Dent proceeded to cheat Winch in the payment of the mortgage debt. The plaintiff said that this payment enabled her to throw the loss upon Miss Ellman. She said that Miss Ellman had been paid by means of the payment to Dent. This was a refinement based on the equitable doctrine that a mortgagor was entitled to pay his original mortgagee so long as he had no notice of a transfer by him. But was this payment to Dent such a payment as would have entitled Winch to a reconveyance of the property from Miss Ellman? Considering the mode in which Winch placed himself entirely in the hands of Dent in these transactions, the knowledge which Dent had must be imputed to him. He was affected by notice of that which Dent knew, and could not avail himself of his own actual ignorance. He must be taken, therefore, to have had notice of the transfer of the mortgage to Miss Ellman, and could not be heard to say that she was paid off by the payment to Dent.

LORD JUSTICE RIGBY agreed, observing that there was no reason to attribute any fraudulent intention to Winch, though every act of Dent was tainted with fraud.

LORD JUSTICE VAUGHAN WILLIAMS had felt troubled about this case because it dealt with a matter his familiarity with which was of recent acquisition. He did not think he should be discharging his judicial duty if he differed from his brethren, unless he was perfectly satisfied that he should be right in so doing, or merely because he might, but for their view, have arrived at a different conclusion. But he thought he ought to state what his doubt was. That doubt arose from the difficulty he felt in treating the conveyance to the plaintiff and the subsequent payment of the mortgage debt to Dent as one transaction. They were, no doubt, closely connected, and, if you could arrive at the conclusion that there was a general agency of Dent for Winch, it might be right to impute the knowledge of Dent to Winch. On this point he adopted the judgment of his brethren. He only intended to point out the difficulty of treating all the transactions as one.

[Solicitors—Druces and Attlee; West, King, Adams, and Co.; C. F. Ingham.]

Chan. Div. } 1900.
(Farwell, J.) } March 13.

WATTS V. DRISCOLL.*

Partnership—Assignment of share by way of mortgage—Dissolution of partnership—Action by mortgagee for an account—Partnership Act, 1890, sec. 31.

This action raised a question as to the construction of section 31 of the Partnership Act, 1890.

Mr. Bramwell Davis, Q.C., and Mr. J. H. Boome appeared for the plaintiff; Mr. Hughes, Q.C., and Mr. F. P. Onslow for the defendant Dennis Driscoll; the other defendant, William Seymour Watts, was not represented.

It appeared from the evidence that the plaintiff, James Watts, had been for some years on intimate terms with the defendant Driscoll, who carries on business as a fishmonger at 145, High Holborn. Towards the end of 1898 the plaintiff agreed with Driscoll to purchase from him for the benefit of his son, the de-

fendant Watts, a half-share in the lease and goodwill of the said business for £1,500 and in certain trade fixtures and stock for £141, and to find £250 for working capital. Articles of partnership were accordingly drawn up and signed by the two defendants on January 9, 1899. The plaintiff alleged that Driscoll well knew that the defendant Watts had no capital and that the plaintiff was advancing to him all the moneys required to start him in business upon the terms that the defendant Watts should assign his interest in the business, assets, and share of profits to the plaintiff to secure his advance. By a deed dated March 23, 1899, the defendant Watts assigned to the plaintiff all his partnership interest in the business, assets, and share of profits by way of security for the moneys advanced by the plaintiff, of which deed the plaintiff alleged that the defendant Driscoll had full knowledge and notice. Shortly after the execution of the articles of partnership differences arose between the two defendants, and, ultimately, as the plaintiff alleged, Driscoll induced the defendant Watts to agree to a dissolution of the partnership upon the terms of Driscoll paying the defendant Watts £500 in satisfaction of his share and interest in the partnership, and on September 12, 1899, without the plaintiff's knowledge, a deed of dissolution to that effect was carried out. Prior to the execution of the deed a balance-sheet for the half-year from January 1 to June 30 had been prepared, in which the share of capital standing to the credit of the defendant Watts was £1,860 and the share of profits £161. The plaintiff claimed a declaration that he was entitled to a charge upon the share of the defendant Watts in the partnership assets, and also claimed all proper and necessary accounts. The defendant Driscoll, who cannot read and can write only his name, denied that he ever had any notice of the plaintiff's charge upon the share of the defendant Watts in the partnership, and alleged that the defendant Watts was himself anxious to retire from the business.

After hearing the evidence, MR. JUSTICE FARWELL said that he found, as a fact, that the defendant Driscoll had knowledge and notice of the plaintiff's charge.

MR. HUGHES then submitted that on the proper construction of section 31 of the Partnership Act, 1890, the plaintiff was not entitled to an account. Subsection (1) was as follows:—"An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners." He contended that the meaning of that subsection was that, in the absence of fraud, whatever was agreed on between the partners was binding on the assignee. Here the partners had agreed that Driscoll should purchase the share of the defendant Watts for £500, and consequently the plaintiff could not claim an account against Driscoll. The assignee could not interfere in the administration of the partnership, and had no rights whatever, beyond a share in the profits, against the other partners. Driscoll and the defendant Watts were entitled to come to any terms they pleased as to ending the partnership. This view was supported by subsection (2) of the section. There was no case directly in point, but "*Whetham v. Davey*" (30 Ch.D., 574) showed that the assignee was only entitled to an account as from the date of the dissolution. Moreover, an assignee took subject to all the equities subsisting between the partners—"Kelly v. Hutton" (3 Ch.App.,

703)—and one of the equities was a right to settle the partnership affairs.

MR. JUSTICE FARWELL, without calling on Mr. Bramwell Davis to argue the point of law, said that he agreed with Mr. Hughes that an assignee took subject to all equities, among which was the partners' right to settle the affairs of the partnership among themselves. The section of the Act in question provided that the mortgagee could not interfere in the ordinary dealings of a going concern, but that, when it came to a dissolution, he was entitled to an account as from the dissolution. But it did not appear to him that the present case came within the section, as there had been a sale of a share in the partnership, and a sale was a matter outside an account of the assets after dissolution. The mortgagor had no power to sell his share without the consent of the mortgagee, and the present sale was not binding on the plaintiff. Driscoll had in fact bought from a mortgagor who had no title. He thought the plaintiff was entitled to an account as from June 30, 1899, the date of the last balance-sheet.

[Solicitors—T. Durant, for the plaintiff; W. W. Boud, for the defendant.]

Chan. Div. } 1900.
(Farwell, J.) } March 14.

RUDD V. LASCELLES.*

Vendor and Purchaser—Contract—Sale of houses and land—Restrictive covenants unknown to the parties—Compensation.
Specific performance with compensation refused.

This was an action for specific performance of a contract to purchase certain houses and land in Harrogate for the sum of £3,500. After the conclusion of the alleged contract the plaintiff, Henry Rudd, discovered that the property was subject to certain restrictive covenants, the existence of which, as he alleged, depreciated the value of the property to the extent of £1,000. The plaintiff admitted that the defendant, Marian Elizabeth Lascelles, was also ignorant of the existence of the restrictive covenants at the date of entering upon the alleged contract, but he claimed specific performance with a due and proper allowance or abatement from the purchase money. The defendant pleaded that the plaintiff was not entitled to specific performance, as the compensation which he claimed for the restrictive covenants was incapable of being assessed, and that specific performance with compensation would inflict great hardship upon her.

After hearing the correspondence which had passed between the parties and their respective solicitors MR. JUSTICE FARWELL held that it constituted a binding contract.

MR. BRAMWELL DAVIS, Q.C. (Mr. T. P. Perks with him), then submitted that the plaintiff was entitled to specific performance of the contract with adequate compensation for the depreciation produced by the restrictive covenants, and cited the following cases in support of his argument:—"Ramsden v. Hirst" (4 Jur., N.S., 200); "Powell v. Elliot" (10 Ch. App., 424); "Westmacott v. Robins" (4 De G., F. and J., 390); "Cato v. Thompson" (9 Q.B.D., 616); and "Hexter v. Pearce" ([1900] 1 Ch., 341). He also referred to Fry's Specific Performance, pars. 1,210, 1,257, 1,276, 1,278, and 1,279.

MR. HUGHES, Q.C. (Mr. A. L. Ellis with him), contended that to deprive the defendant of nearly a third of her purchase money would be to inflict great hardship on her, and, on the question of compensation, cited

"Collier v. Jenkins" (1 Younge, 295); "Thomas v. Dering" (1 Keene, 729); "Durham v. Legard" (34 Beav., 611); "Barnes v. Wood" (8 Eq., 424).

MR. JUSTICE FARWELL, in delivering judgment, said that it was clear from the correspondence that neither the plaintiff nor the defendant really knew what the defendant's title, as vendor, was. Therefore there was no fraudulent misrepresentation or deceit on the part of the vendor, as there was in "Powell v. Elliot," nor even any direct representation on her part, which was sufficient to distinguish the present case from "Barnes v. Wood," although, as Mr. Bramwell Davis had said, that case went a long way. Moreover, the contract between the parties contained no express condition for payment of compensation in certain contingencies, and therefore "Ramsden v. Hirst," where there was such an express condition, had no bearing on the present facts. There was simply a bargain to sell, and if specific performance with compensation should be enforced, he would be making an entirely new contract for the parties. He entirely agreed with, and would be guided by, what Sir George Jessel had said in "Cato v. Thompson" at p. 618:—"It is almost impossible to assess compensation for covenants of this nature (i.e., restrictive covenants). I think that the cases of specific performance with compensation ought not to be extended. In many of them a bargain substantially different from that which the parties entered into has been substituted for it and enforced, which is not right." It was true that that was only a *dictum*, but a *dictum* of Sir George Jessel was entitled to the greatest respect. Were he to order specific performance with compensation in the present case, he would be enforcing a bargain "substantially different" from that which the parties entered into, as the purchaser himself had admitted in the correspondence. It would be almost impossible to assess compensation of the restrictive covenants which bound the property. He would have, in the first place, to find out whether the purchase-money was adequate, and the plaintiff had admitted that he had been offered £1,000 more for the property than he proposed to give for it. As to the question of hardship, he agreed with Mr. Hughes that to enforce specific performance would inflict great hardship on the defendant. If the plaintiff's estimate of depreciation was correct, the defendant would lose nearly one-third of the purchase-money, and that was a serious matter for a woman with a limited income. On all these grounds the plaintiff's action failed, and must be dismissed with costs.

Q.B. Div. } 1900.
(Kennedy, J.) } March 14.

BECKHUSEN AND GIBBS V. HAMBLET.*

Stock Exchange—Custom—Broker buying in his own name—Liability of client.

The Stock Exchange usage by which a broker, instructed by two or more different clients to purchase certain shares to be carried over from time to time, lumps the orders together, and purchases the shares in his own name from a jobber, does not create any contractual relationship between the jobber and his clients so as to enable the former to sue latter in the event of the broker's failure to meet his liabilities.

Judgment was delivered in this case, which was tried on the 6th and 7th inst. The action was brought by a firm of jobbers on the Stock Exchange to recover

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

damages from the defendant for the non-acceptance of certain shares. The defendant had dealt with a firm of brokers who had been declared defaulters on the Stock Exchange before the transaction was completed. The case raised questions of great importance as to the rights and liabilities of the jobbers and of the client in such circumstances. The facts are fully stated in the judgment.

Mr. Rufus Isaacs, Q.C., and Mr. G. A. H. Branson appeared for the plaintiffs; Mr. Herbert Reed, Q.C., and Mr. E. Morten for the defendant.

MR. JUSTICE KENNEDY read the following judgment:—The plaintiffs in this case are a firm of jobbers on the London Stock Exchange. They claim from the defendant £186 7s. 6d. as damages for an alleged breach of contract in not taking delivery of 210 Louisville shares and paying the plaintiffs for the same on December 29, 1899. The history of the case, so far as it is material to my decision, appears to be this:—The defendant, who is not a member of the Stock Exchange but carries on business as an "outside broker," had for some time before December 12, 1899, been [employing Messrs. E. Preston and Co., who were members of the Stock Exchange, as his brokers in dealings on the Stock Exchange in Louisville shares. Messrs. Preston and Co. had 210 such shares open for him on December 12 and had instructions to "carry over" for him to the end of December account. What they did was this:—They bought [from] the plaintiffs for the end of December account 360 Louisvilles; of these they apportioned, or intended to appropriate, and so far as book entries are concerned they recorded in the usual way in their books their apportioning or their intention to appropriate to the fulfilment of the defendant's instructions, 210 out of the 360 shares, to the delivery of which, under their contract with the plaintiffs, they would become entitled on December 29. That "carrying over" so far as relates to the 210 shares was notified to the defendant in the usual manner. No writing passed between Preston and Co. and the plaintiffs. The plaintiffs knew no one in the making of the contract but Preston and Co. The defendant was not informed of the name of the firm with whom Preston and Co. were carrying over for him. The balance of the 360 shares beyond the defendant's 210 was carried over with the plaintiffs by Preston and Co. in fulfilment of the orders of a Mr. Brister. A further number of Louisvilles for the same account was carried over with another jobber of the name of Spyer, but these Preston and Co. intended to appropriate to the fulfilment of the instructions of a third client, a Mr. Gingold. On December 15, in consequence of the failure of certain clients (other than the defendant) to fulfil their obligations, Preston and Co. failed, and were declared defaulters on the Stock Exchange. Thereupon, in accordance with rule 177 of the Stock Exchange rules and regulations, and for the purpose of closing the transaction between the plaintiffs and Preston and Co., Mr. Richardson, the official assignee appointed by the committee of the Stock Exchange, fixed the price of the 360 Louisville shares at the price current in the market immediately before the declaration of the failure of Preston and Co. In the plaintiffs' ledger book the transaction in respect of the 360 Louisvilles is entered as closed between them and Preston and Co. by a buying back at the closing or "hammer" price, and a difference of £93 2s. 6d. appears in favour of the plaintiffs. On December 16 and 18 Mr. Leslie Gibbs, a member of the plaintiff firm, called at the office of Preston and Co. and ascertained, in respect of 210 out of the 360 Louisvilles for which they were under contract to Preston and Co., that they had been bought on the instructions of the defendant. Gibbs proceeded to see him. The defendant told Gibbs that his account with Preston and Co. was closed when that firm failed,

refused to have anything to do with the plaintiffs in the matter, and referred Gibbs to his solicitors. On December 29 Gibbs tendered 210 Louisvilles to the defendant and was refused acceptance. Gibbs immediately sold on the Stock Exchange 210 Louisvilles to the firm of Leon Brothers for cash. It is for the difference—viz., £186 7s. 6d.—between the contract price and the selling price on December 29 that the plaintiffs sue the defendant in this action. The plaintiffs assert a right to sue the defendant as undisclosed principal of Preston and Co. upon the contract made by that firm with the plaintiffs on December 12 in respect of 210 out of the 360 Louisville shares which formed the subject of their contract. The defendant denies this right altogether, relying both on principles of law which are of general application and also upon the particular incidents of this transaction as a transaction which is affected by the printed rules and the unwritten usages of the London Stock Exchange. It is convenient therefore that, before I deal with the points raised by the respective parties at the trial, I should state concisely my view of the effect of the Stock Exchange rules and practice, so far as they can be held to be relevant to the issues raised for decision in the present case. The general scheme of the rules and regulations is plain enough. The Stock Exchange does not recognize in its dealings any other parties than its own members (See Rule 53). It forbids the institution of legal proceedings against the principals of a member or of a defaulter without the consent of such member, of the defaulter's creditors, or of the committee (Rule 54). In a Stock Exchange transaction such as that between Preston and Co. and the plaintiffs, if all goes regularly, the jobber, as I understand the procedure, throughout deals with the broker. It is only in the case of the failure of the broker, ordinarily, that any application is made by the jobber to the broker's client. In that event the jobber does put himself into communication either indirectly through the broker, or directly, as Gibbs did here, with the broker's client. But at this point, and before we consider the nature of this application, we have to look at the operation of Rule 177, which a broker's failure brings immediately into play. It is to the discussion of the effect, in practice and in law, of this Rule 177 that a large portion of the evidence and the argument at the trial of this action was devoted. As will appear in a later part of this judgment, my decision of this case is based upon a point which is independent of this branch of the case; but as it was agreed by counsel to be a matter of some importance and was very fully and carefully argued it is, I think, my duty to deal with it. Rule 177 runs thus:—"In every case of failure the official assignee shall publicly fix the prices current in the market immediately before the declaration, at which all persons having accounts open with the defaulter shall close their transactions by buying of or selling to him such stocks, shares, or other securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to or claimed from the official assignee. In the event of a dispute as to the prices named, they shall be fixed by two members of the committee." As to the purpose and the working of this rule, nothing that I have heard in the argument or in the evidence in the case had in any material respect shown a variance from the very lucid exposition of the meaning and operation of the rule (then numbered 168) which was set forth in the report of "*In re Plumbly, ex parte Grant*" (13 Ch.D., at pp. 673, 674) as part of an affidavit sworn in that case by some of the leading members of the Stock Exchange, or from the evidence of the official assignee given nine years later in "*Hartas v. Ribbons*" (22 Q.B.D., 254, at p. 255). The object of the

proceeding under this rule of the Stock Exchange, as I understand it, is what may properly be termed a domestic object. The purpose is to adjust the accounts of the members of the Stock Exchange *inter se*, dropping the defaulter, by reason of his default, out of the bargains in which he has been one of the contracting parties. The method employed is the creation of a fund in the hands of the official assignee. This fund is formed by the payment to him by members of the Stock Exchange of the difference in value of the stocks or shares in which they have dealt with the defaulter as determined by the prices fixed by the official assignee at the time of the default, when the change in price of any of such stocks or shares is against such members, and out of the fund members are entitled to claim payment for any such differences when in their favour. The defaulter does not by reason of his default acquire any right or claim to differences or damages in respect of differences in his favour between the contract price and the closing price, nor can he make any claim for himself to the moneys which are paid in respect of such differences to the official assignee by the members from whom such differences are due. What is effected is an artificial settlement of the defaulter's dealings with his fellow-members, after which he and they are precluded *inter se* from claiming from each other the performance, or moneys in respect of the non-performance, of any contracts of purchase or sale which were existent and open at the time of the default. But the settlement is essentially a domestic settlement. According to the practice of the Stock Exchange the defaulting broker's client, if he is not himself in default to the broker, has the right either to have the transaction carried through between himself and the jobber with whom the broker has contracted in respect of shares in which he is interested, or to accept the assignee's closing, or to transfer the account in respect of his shares to another broker for the purpose of carrying out the bargain through him. If the client chooses to accept the closing price, then according to "*Hartas v. Ribbons*," but not otherwise ("*Duncan v. Hill*," L.R., 8 Ex., 242), he is bound to indemnify the defaulting broker in respect of the difference found, upon the official closing under Rule 177, to be against him and in favour of the jobber. If the client of the defaulting broker does complete the transaction which the jobber had open with the defaulter at the time of his default, and if upon completion the jobber receives any amount in excess of the price fixed by the official assignee at the time of the default for the stock which is the subject of the bargain, the jobber is bound to account for and pay over that excess to the official assignee. It goes into the fund out of which the indebtedness of the jobber as ascertained artificially by the official closing is liquidated by the official assignee. Upon the foregoing state of facts in regard to the history of the particular case and in regard to the rules and practice of the Stock Exchange, so far as they appear to me to be relevant, have the plaintiffs a right of action against the defendant? It appears to me that if privity of contract can be made out they have that right. If the contract between the plaintiffs and Preston and Co. was one by virtue of which the plaintiffs as the sellers and the defendant as the principal of the buying broker came under an enforceable liability to each other in respect of its performance, I am of opinion that there was a breach of the contract on December 29, whereby the plaintiffs suffered loss, and that, as the plaintiffs notwithstanding the defendant's repudiation on December 16 and 18 were entitled to wait till December 29, the date for the completion of the contract, the sum claimed by them as the damages ascertained on December 29 would represent the amount legally claimable for that loss. I am further of opinion—subject to the

same proviso—that there is nothing in the application of the rules or the practice of the Stock Exchange which would, in case of a breach of contract, prevent the plaintiffs, after the broker's default, from suing the defendant in respect of it, or, if the refusal to complete had been upon the part of the plaintiffs, would have prevented the defendant from suing the plaintiffs. The defendant's contentions that, whatever might otherwise have been the plaintiffs' rights against the defendant, they ought not to be allowed to have recourse to those rights now, because they must be held to have chosen to give credit exclusively to the defaulting broker, and that, under the operation of Rule 177, there had been a conclusive election on their part to have recourse only to the defaulting broker are contentions which, in my judgment, ought not to prevail. If the contract between Preston and Co. and the plaintiffs did, as originally constituted, place the defendant in the position of an undisclosed principal, liable when disclosed to be sued by the plaintiffs upon the contract in case of breach as the broker's unnamed principal, I see no proof of credit being given by the plaintiffs to the apparent principal exclusively in such a way as to bar the right of recourse against the defendant; and as to the operation of Rule 177 it appears to me that the "closing" thereby rendered obligatory upon members of the Stock Exchange (and, therefore, I may point out, affording no evidence of "election" on the part of those who are affected by it) leaves the jobber, both according to the practice of the Stock Exchange and in point of law, liable, in respect of any contract open with the defaulting broker at the time of his declaration, to be called upon by the broker's principal to complete on the due date; and, if this be so, why may he not, *pari ratione*, claim completion from that principal? It was stated before me in the course of the evidence that in fact the jobber upon the broker's failure often does make such a claim and the claim is acceded to. Be that as it may, it appears to me to be clear in regard to these Stock Exchange proceedings that, to borrow the language of Lord Justice James in "*In re Plumblly*" (*ubi supra* at p. 679), "whatever the liabilities and the rights of the outside world may be, they remain unaffected." But the failure of these contentions on behalf of the defendant leaves standing, as it seems to me, that which, according to my view of the case, is a real and fatal obstacle to the plaintiffs' success in this action. It appears to me that no contractual liability of the defendant to the plaintiffs ever existed in respect of this transaction. The defendant's authority to the broker was to "carry over"—in substance and effect to buy for him for the end of December account—210 Louisville shares. What the broker did was to buy in his own name from the plaintiffs for that account 360 Louisville shares. He did that which is, I believe, a common thing, and often no doubt from the business point of view a very convenient thing. He lumped, if I might use the word, the orders of two clients in one contract of purchase in his own name. In so doing he acted, I doubt not, in perfectly good faith, allocating in his books a proper proportion of the total number of shares contracted for to his two clients respectively; but it appears to me that the contract he so made was his contract and not a contract of either of his clients. A very similar course had been taken by the broker, the plaintiff in the action, upon the London tallow market, in "*Mollett v. Robinson*" (L.R., 5 C.P., 646); (L.R., 7 C.P., 84); (L.R., 7 H.L., 802). The defendant there was in a position analogous to that of the defendant here, and Simpson and Co. in a position analogous to that of the plaintiffs here. Mr. Justice Blackburn, at p. 108 of his judgment in the Exchequer Chamber, points out the necessary result:—"The defendant

could not call upon Simpson and Co. to deliver him 50 tons of tallow under the contract of April 2, because Simpson and Co. had not engaged to deliver any smaller quantity than 150 tons. Nor could Simpson and Co., if willing to deliver the smaller quantity of 50 tons, compel the defendant to accept them, because if they had been unwilling sellers the defendant could not have forced them to deliver the smaller quantity . . . and I cannot think that the difficulty is cured by any equity entitling the now defendant to use the plaintiffs' name and sue upon the contract *pro tanto* for himself." Mr. Justice Brett, in the opinion delivered by him in the same case when in the House of Lords (L.R., 7 H.L., at p. 824), expressed his concurrence with Mr. Justice Blackburn in regard to the "supposed equity," and at p. 820 said:—"It is admitted on all hands that the contracts with W. W. Simpson and Co. on April 2, and with Rayner and Co. and Simpson and Co. on April 28"—who were the firms mentioned as standing in the same position with the defendant as the present plaintiffs do here—"were not contracts between any of those firms and the defendant. The difference between the quantity of tallow mentioned in them (the contracts) and in the orders of the defendant prevents them from being contracts with the defendant." The same point in regard to Stock Exchange transactions had been recently dwelt upon in the judgments of Lord Esher, Master of the Rolls, and Lord Justice Rigby in the case of "May and Hart v. Angeli," of which, so far as I am aware, the only published report is to be found in 13 *The Times* L.R., 568. Counsel has furnished me with a copy of the shorthand note of the judgments in the Court of Appeal in the appendix to the printed case on the appeal to the House of Lords. The judgment of the majority of the Court of Appeal was there reversed, but, as I understand the judgment of the Lord Chancellor (14 *The Times* L.R., 551), not on any ground of difference from the majority of the Court below upon this point, but upon a difference as to the view to be taken of the facts, because the Lord Chancellor held that the transaction was one the real nature of which was absolutely different from the ordinary case of a buying of shares through a broker. There is no usage of business on the Stock Exchange which can, as the counsel for the plaintiffs seemed to suggest, avail to help the plaintiffs through this difficulty. There is a usage, no doubt, that the stockbroker contracts in his own name. It by no means follows from this that he should lump the orders of several clients, and buy, not what a particular client has authorized, but a different and larger quantity. But let it be assumed that the usage exists in its most ample form. Let it be assumed that there is a usage on the Stock Exchange, legally valid and known to and binding upon a client such as the defendant, that a stockbroker employed in the purchase of shares for a client properly may, if he thinks it convenient, fulfil his duty to his client, although, instead of creating, as it is ordinarily a broker's duty to create, a contractual relation between his client and the seller, he lumps the client's order with other orders and in his own name contracts in a single transaction with the selling jobber for the purchase of a larger number of shares than the client has instructed him or authorized him to buy. What follows from this assumption? This only, as it appears to me—that, as the broker will have fulfilled his duty according to usage, the client cannot complain, and is bound to pay the broker his commission and indemnify him against such liabilities as the broker may necessarily or properly incur in the course and for the purpose of his employment. Surely the usage in no way assists the plaintiffs' case here. The plaintiffs' case is not a case of a broker suing his client for indemnity in respect of shares bought for the client

in a way which is sanctioned by the rules and usages of the Stock Exchange, but it is the case of a seller seeking to have recourse against the principal of a broker who has contracted with the seller in his own name by a contract for the purchase of a larger number of shares than that which the client authorized and which included a number which were being obtained by the broker for a different client. The usage cannot operate, in my judgment, so as to make a man liable upon a contract which is not, in point of law, his contract; it cannot create contractual rights between parties where none exist according to legal principle. Indeed, the very meaning of the usage may, as it seems to me, be stated in language used by Mr. Justice Blackburn in his judgment in "*Mollett v. Robinson*" (L.R., 7 C.P., at p. 109) in regard to the custom which was under discussion in that case—it is "not to require the broker to take care that privity of contract is established between the broker's client and the person who makes the contract with the broker into which he enters in consequence of his client's order." In my opinion no such contractual relation has existed between the plaintiffs and the defendant as is necessary to support this action, and therefore I must give judgment for the defendant with costs.

A stay of execution was granted on the usual solicitor's undertaking.

[Solicitors—Spyer and Sons; Albert Myers.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.JJ.) } March 16.

ILLINGWORTH V. WALMSLEY.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—Amount of compensation.

The *maximum* amount of compensation allowed by Clause 1 (b) of Schedule 1 is not cut down by Clause 2.

This was an appeal from the award of Judge Coventry, sitting at the Blackpool County Court, under the Workmen's Compensation Act, 1897. On December 20, 1898, the respondent was injured while in the employment of the appellant, three of his fingers being severely damaged by a circular saw at which he was working. His weekly wages before the accident were £1 13s. 8d. On December 22 the respondent sent to the appellant notice of the accident, and the appellant paid the respondent 16s. 10d. a week, being 50 per cent. of his weekly wages, from that time until May 27, 1899. The respondent then resumed work at the weekly wages of 15s., and continued at work at those wages until September 19, 1899, when he filed a request for arbitration to assess compensation under the Act for the injury sustained on December 20, 1898. The County Court Judge, on October 25, 1899, awarded the respondent a lump sum of £9 13s. 6d. and 15s. a week from October 25, 1899.

Mr. J. D. CRAWFORD, for the appellant, contended that "the claim for compensation" was not made within the six months required by section 2, subsection 1, of the Act.

Mr. F. H. MELLOR, for the respondent, contended that the point was not open to the appellant, because it was not taken in the answer to the particulars annexed to the request for arbitration, as required by rule 17 (1) of the Workmen's Compensation Rules, 1898, and the County Court Judge refused to allow the appellant to amend his answer.

The COURT said that, that being so, the point could not be raised now.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Mr. CRAWFORD said that there was another point raised by the appeal. The respondent's weekly wages before the accident were £1 13s. 8d. He received half those weekly wages until May 27, 1899, when he resumed work at 15s. a week wages. The difference between his old wages and the wages he earned after May 27 was 18s. 8d. a week. Therefore his loss was that sum, and the County Court Judge could only award him 50 per cent. of that sum under Schedule 1, Clause 1 (b), and Clause 2, to the Act. By Clause 1 (b) the amount of compensation in the case of total or partial incapacity for work was not to exceed 50 per cent. of the workman's previous average weekly earnings; and by Clause 2, in fixing the amount of the weekly payment, "regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." Taking those two clauses together, the true meaning was that the workman could only receive one-half of the loss sustained by him—namely, one-half of 18s. 8d. a week; that was 9s. 4d. This was the highest weekly sum that the County Court Judge could give.

Mr. F. H. Mellor, for the respondent, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the *maximum* amount of compensation allowed by Clause 1 (b) of Schedule 1 was not cut down by Clause 2.

LORD JUSTICE COLLINS agreed. There was the express provision in Clause 1 (b) of Schedule 1, and when Clause 2 was looked at different language was used, that clause saying "regard shall be had," &c. How regard was to be had, or what the effect was, it was not so easy to see. In his opinion Clause 2 did not intend to interfere with the *maximum* amount of compensation allowed by Clause 1 (b).

LORD JUSTICE ROMER concurred. All that Clause 2 meant was that the County Court Judge must bear in mind and have regard to the average weekly wages earned by the workman before the accident. But, while bearing that in mind, there was a limit placed upon the amount of compensation payable, and the only absolute limit imposed was that in Clause 1 (b)—namely, half the amount of the average weekly wages earned before the accident. There was no point in the case at all. There was no evidence that the County Court Judge did not have regard to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he was able to earn after the accident.

[Solicitors—Mellor, Day, and Smith, for the appellant; Busk and Co., for Callis and Co., Blackpool, for the respondent.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } March 16.

POWELL V. MAIN COLLIERY COMPANY (LIMITED).*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897.

The "claim for compensation" which is required by sec. 2, subs. 1, to be made within six months of the occurrence of the accident means the filing of the request for arbitration, and is not satisfied by a notice of claim being sent by the workman to his employer (Romer, L.J., dissenting).

This was an appeal from the award of the Glamorgan-shire County Court Judge under the Workmen's Compensation Act, 1897. The respondent Powell was a

workman in the employment of the appellants, the Main Colliery Company, and on December 21, 1898, he was injured by an accident arising out of and in the course of his employment. On May 2, 1899, a notice claiming compensation was sent by the respondent to the appellants. It was admitted that this was a good claim for compensation if it was sufficient merely to send notice of a claim for compensation within six months after the date of the accident. The request for arbitration to assess compensation under the Act was filed on October 4, 1899. The County Court Judge awarded the respondent 13s. 11d. a week.

Mr. Ruegg, Q.C., and Mr. A. Bertram appeared for the appellants; Mr. S. T. Evans appeared for the respondent.

The only point in this case was whether "the claim for compensation," which by section 2, subsection 1, must be made within six months from the accident, meant the filing of the request for arbitration, in the County Court, or was satisfied by a notice of claim for compensation being sent by the workman to his employers.

The COURT allowed [the appeal, LORD JUSTICE ROMER dissenting.

LORD JUSTICE A. L. SMITH said that the point had given rise to a great difference of opinion among County Court Judges, but in a case in the Court of Session in Scotland ("Bennett v. Wordie and Co.," 1, Court Sess. Cas., Court of Justiciary, 5th Series, 855) two learned Judges expressed an opinion in favour of the view which he took, the two other Judges expressing no opinion, and the Court of Appeal in Ireland took a similar view in a case which had not yet been reported. It seemed to him that the Legislature, in fixing the time within which the claim for compensation had to be made, followed the Employers' Liability Act, 1880. The difficulty arose here because the Legislature could not adopt the same phraseology in the Workmen's Compensation Act, 1897, as in the Act of 1880, as the procedure under the later Act was not by action, but by arbitration. By section 2, subsection 1, of the Act of 1897 proceedings for the recovery of compensation under the Act were not maintainable unless "the claim for compensation" was made within six months from the occurrence of the accident. Was "the claim for compensation" satisfied by a mere notice by the workman to the master that he claimed compensation? Or did it mean the initiation of proceedings which set in motion the procedure under which the workman recovered compensation? In his opinion it meant the latter. In section 1, subsection 3, the word "proceedings" meant, in his opinion, the taking of what he would call judicial proceedings. So in section 1, subsection 2 (h), it seemed to him that the words "taking proceedings" meant the initiation of proceedings before the representative committee, or before the arbitrator agreed upon by the parties, or before the County Court Judge. He saw no difficulty in stating what amounted to taking proceedings before a representative committee or before an arbitrator. The workman would send notice to the tribunal that he claimed compensation and would ask it to adjudicate upon his claim. "The claim for compensation" would be made when he required the tribunal to assess the compensation. So in the present case, which came before the County Court judge as arbitrator, "the claim for compensation" did not mean sending a letter making a claim. Section 1, subsection 4, spoke of "the time limited for taking proceedings." Those words meant the initiation of proceedings before the tribunal appointed to assess the compensation. In section 2, subsection 1, the words making "the claim for compensation" meant the bringing of the claim before the proper tribunal—the initiation of the pro-

* Reported by W. F. BARRY, Esq., Barrister-at-Law.

ceedings. Upon any other view the claim might be hung up, and the master might be made liable to pay compensation after the lapse of years. He did not agree that, if notice of a claim was sent to the master, the latter could institute proceedings to have the compensation assessed, and thus prevent the claim from being hung over his head for years. The Act, and the rules and forms, were all drawn with the view of the claim being by the workman against the master. If it was intended that the master might institute proceedings one could have expected the Act to have said so in plain terms. In his opinion, therefore, the document sent to the appellants in the present case was not "the claim for compensation" within section 2, subsection 1, and therefore the proceedings were taken too late.

LORD JUSTICE COLLINS agreed. The policy of the Legislature was to impose a limit of six months for taking proceedings under the Act. There was one clear indication what was meant by "the claim for compensation" in section 2, subsection 1, to be found in section 1, subsection 4. Those words did not merely mean the notice of an intention to invoke the aid of the proper tribunal to assess the compensation, but meant the invocation of the tribunal. It must be something which let in the jurisdiction of the tribunal.

LORD JUSTICE ROMER dissented. The only section of the Act which put a precise limit of time was section 2, subsection 1. Other sections might be referred to as throwing light upon that subsection, but section 2, subsection 1 must be referred to as the only enactment limiting proceedings of any kind. The words "the claim for compensation" were reasonably clear in themselves. There must be a specific claim for compensation, and it must be a claim under the Act. The section did not say "unless proceedings were taken for arbitration." He saw no reason for departing from the plain words of the Act. If a workman gave notice to his master that he claimed compensation, giving particulars so as to make it a clear claim for compensation under the Act, he (the Lord Justice) failed to see why that would not be a "claim for compensation" within section 2, subsection 1. Before going to arbitration there must be a difference in existence. To make a difference there must be a claim made and a denial of the claim. A claim for compensation by the workman was the essence of proceedings under the Act, and it was contemplated as itself a proceeding, and a most important proceeding. In his opinion light was thrown on the words "the time limited for taking proceedings" in section 1, subsection 4, referring to subsection 3, where the "proceedings" included something done before the arbitration began. In other words, the "proceedings" included the claim for compensation. It then became plain what was the meaning of "the time limited for taking proceedings" in subsection 4, if it was remembered that the word "proceedings" included the claim for compensation by the workman and the refusal of the claim by the master. In his opinion the County Court Judge was right.

The COURT stayed execution pending an appeal to the House of Lords.

Five other cases in the list followed the result of the above decision, and in all of them the appeals were allowed.

Court of Appeal (A. L. Smith } 1900.
and Romer, L.J.J.) } March 17.
KNOWLES AND SONS (LIMITED) V. THE CORPORATION
OF BOLTON.*

Arbitration—Award—Power to enlarge time for making award—Public Health Act, 1875—Arbitration to assess compensation.

Sec. 180 of the Public Health Act, 1875, does not restrict the power of the Court to enlarge the time for making an award.

"*In re Mackenzie*" (17 Q.B.D., 114) overruled.

"*Warburton v. Haslingden Local Board*" (48 L.J., Q.B., 451) approved.

This was an appeal from the refusal of Mr. Justice Kennedy to make an order to extend the time for making an award. The corporation of Bolton, having taken a sewer through premises belonging to Knowles and Sons (Limited), became liable to pay compensation, under section 308 of the Public Health Act, 1875, for the damage done thereby. The parties, being unable to agree as to the amount of the compensation, proceeded to arbitration under the provisions contained in sections 179 and 180 of the Public Health Act. Each party appointed an arbitrator, the corporation appointing their arbitrator last—viz., on April 12, 1899. On May 25 the arbitrators appointed a Mr. Walker umpire, and on May 31 they gave him notice that they were unable to agree upon an award. Walker appointed July 19 for proceeding with the reference, and on that day he proceeded with it accordingly, the parties being represented by their arbitrators as advocates. The corporation's arbitrator required that the umpire should have a view of the *locus in quo*, and a view was had on August 12. On September 5 the umpire made an award in favour of Knowles and Sons (Limited) for £40. On September 26 the town clerk pointed out to Knowles and Sons that the award had been made out of time, and on November 24 the corporation finally refused to pay any compensation under the award. Knowles and Sons determined to take proceedings to enforce the award, and they applied at chambers, under section 9 of the Arbitration Act, 1889, for an extension of time for making the award. The Master refused to enlarge the time on the authority of "*In re Mackenzie and Ascot Gas Company*" (17 Q.B.D., 114). Mr. Justice Kennedy affirmed the decision of the Master, but gave leave to appeal. Section 9 of the Arbitration Act, 1889, is as follows:—"The time for making an award may from time to time be enlarged by order of the Court or a Judge, whether the time for making the award has expired or not." By section 24 this Act shall apply to an arbitration under any other Act, except so far as this Act is inconsistent with such other Act. By section 180 of the Public Health Act, "with respect to arbitrations under this Act, the following regulations shall be observed:— . . . (8) If the arbitrators fail to make their award within 21 days after the day on which the last of them was appointed, or within such extended time (if any) as may have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire; (9) the time for making an award by arbitrators under this Act shall not in any case be extended beyond the period of two months from the date of the submission, and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him." Knowles and Sons appealed. In support of the appeal the following cases were cited:—"Lord v. Lee" (L.R., 3 Q.B., 404); "May v. Harcourt" (13 Q.B.D., 688); "Warburton v. Haslingden Local Board" (48 L.J., Q.B., 451); "Yeadon Local Board v. Yeadon Waterworks Company" (41 Ch.D., 52).

Mr. Danekwerts, Q.C., and Mr. Horridge appeared for Knowles and Sons (Limited), in support of the appeal; Mr. C. A. Cripps, Q.C., and Mr. Buckmaster appeared for the corporation.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The Court allowed the appeal.

LORD JUSTICE A. L. SMITH said that before 1875 it was clear that the Court had jurisdiction to enlarge the time for making an award after the time for making it had elapsed or after an award had been made. The authorities showed that it might be done at any time. It was argued, however, that by section 180 of the Public Health Act, 1875, the Court was now fettered and had not that jurisdiction which it otherwise would have had. He did not see any reference whatever to the Court in subsection 9 of that section. Both subsection 8 and subsection 9 dealt with the powers of arbitrators and umpires, and did not affect the power of the Court at all. There was no case which bound them to hold that the Court's jurisdiction to enlarge the time had been taken away. The case of "*Warburton v. Haslingden Local Board*" was in favour of what he was saying. The case of "*In re Mackenzie and Ascot Gas Company*" was to the contrary, but he did not agree with that, and he did agree with the former case. He thought there was jurisdiction to enlarge the time, and that it was a proper case for exercising their jurisdiction.

LORD JUSTICE ROMER agreed. He said the question now came up for decision before the Court of Appeal for the first time. He thought the case of "*Warburton v. Haslingden Local Board*" was to be preferred to that of "*In re Mackenzie and Ascot Gas Company*." Section 180 of the Public Health Act expressly consisted of "regulations" to be observed as to arbitrations. He thought that these were regulations as to the conduct and as to the powers of arbitrators and umpires and parties, and that they did not cut down the power of the Court at all. The connexion between subsection 9, which was said to cut down the power of the Court, and subsection 8 had been pointed out by the Court of Appeal in "*Yeadon Local Board v. Yeadon Waterworks Company*." The reasons given for the judgments in that case supported their present decision. He thought, therefore, that the Court had jurisdiction to enlarge the time beyond the two months mentioned in the subsection, and that in this case the time ought to be enlarged as asked.

[Solicitors—Rowcliffes, Rawle, and Co., agents for Fullagar and Hulton, Bolton, for Knowles and Sons (Limited); Holt, Beaver, and Co., agents for Hinnell, Bolton, for the Corporation.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams,
L.JJ.) 1900.
March 19.

STOCK V. MEAKIN.*

Local Government—Streets—Private street—Improvements—Private Street Works Act, 1892.

The apportioned expenses of private street works executed under this Act become a charge on the premises thereby affected as from the date of the completion of the works.

Decision of Kekewich, J. ([1899] 2 Ch., 496), affirmed.

This appeal against a decision of Mr. Justice Kekewich's ([1899] 2 Ch., 496) raised a question of some interest and importance under the Private Street Works Act of 1892 (55 and 56 Vict., c. 57)—viz., whether the sum finally apportioned as payable by the owner of premises fronting a street, in respect of works (such as sewers) executed in the street by the local authority, becomes a charge upon the premises as from the date of the completion of the works, or only as from

the date of the final apportionment of the expenses of the works among the various owners of premises abutting on the street. The importance of this question in the present case arose from the circumstance that the land to which the action related, which is situate at West Ham and abuts on Queen's-road, had changed hands between the date of the completion of works executed under the Act by the council of the county borough of West Ham and the date of the final apportionment of the expenses among the property owners. The works were commenced on April 4, 1898, and were completed on July 26, 1898. On October 10, 1898, the defendant, who was the then owner of the piece of land in question, entered into an agreement to sell it to the plaintiff for £1,000. The purchase was to be completed on November 11 then next, and up to that day all "outgoings" were (if necessary) to be apportioned. On November 22, 1898, the defendant, "as beneficial owner," conveyed the land to the plaintiff. On November 29, 1898, the final apportionment of expenses was made by the council, and on December 29, 1898, they gave notice to the plaintiff that his premises were liable to be charged with the sum of £130 14s. as his proportion of the expenses of the works, and that, unless this sum was paid within one month, interest at 4 per cent. would be charged. The plaintiff called on the defendant to pay this amount, and on his declining to do so the plaintiff paid it himself, and this action was brought to enforce repayment by the defendant. Besides the question as to the date from which the charge was created by the Act, which depended on the construction of the various sections of the Act, there were the further questions whether this apportioned sum was an "outgoing" which the vendor was under his contract for sale bound to discharge; whether the amount was an "encumbrance" on the property, and, if so, whether it was an "encumbrance" which after conveyance came within the vendor's covenant against encumbrances, which is, under the Conveyancing Act of 1881, implied from the use of the words "as beneficial owner" in a conveyance. Mr. Justice Kekewich held upon the construction of the Act of 1892 (as distinguished from the Public Health Act, 1875) that the apportioned sum became a charge upon the land as from the date of the completion of the works, and that consequently it was an encumbrance existing at the date of the conveyance to the plaintiff, and that the defendant was, under his implied covenant against encumbrances, bound to discharge it. The defendant appealed. The material provisions of the Private Street Works Act, 1892, and the Public Health Act, 1875, with which it is to be read, are sufficiently stated in the judgment of the Court.

Mr. Warrington, Q.C., and Mr. Vaughan Hawkins were for the defendant; Mr. P. O. Lawrence, Q.C., and Mr. P. F. Wheeler were for the plaintiff.

The appeal was heard on February 27 and March 5.

LORD JUSTICE VAUGHAN WILLIAMS delivered the judgment of the Court, dismissing the appeal. He said:—The question in this case is whether the vendor of a piece of land at West Ham is liable to indemnify the purchaser against the sum of £130 14s. claimed by the urban sanitary authority as expenses of works executed by such authority under the Private Street Works Act, 1892. The agreement for sale and purchase was made on October 10, 1898. The day fixed for the completion of the purchase was November 11, 1898, and the purchase money was paid by the plaintiff (the purchaser) and the conveyance completed on November 22, 1898. The works in question were completed on July 26, 1898. The resolution authorizing the execution of the works was dated July 27, 1897, which was prior to the acquisition of the property by the defendant, the vendor. The defendant conveyed as beneficial owner;

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

the conveyance recited that the defendant had agreed to sell to the plaintiff free from encumbrances ; and the conveyance was by a mortgagee at the request and the direction of the defendant as beneficial owner to hold the said land in fee simple freed and discharged from the claims of the said mortgagee. The notice of final apportionment was on December 29, 1898. If the charge had been a charge for expenses incurred by the local authority under the Public Health Act, 1875, there is no doubt but that such a charge would, having regard to the dates of the agreement to purchase and the conveyance on the one hand and the date of the execution of the works on the other, have been a charge against which the vendor would have had to indemnify the purchaser. The charge under the Public Health Act, 1875, however, is a charge which can only arise on failure of the owner of the land to comply with the notice of the urban authority and the execution by the urban authority of such works by reason of such default by the landowner, and is, moreover, a charge taking effect from the date of the completion of the works, whereas the charge under the " Private Street Works Act, 1892," certainly is not a charge arising on default of the landowner, and it is argued is not a charge from the date of the completion of the works. It becomes necessary, therefore, to consider from what date the charge under the Act of 1892 takes effect, and whether the fact that the charge does not arise on default of the landowner makes any difference in the obligations of the vendor towards the purchaser, and this makes it necessary to consider the terms of the material sections of the Acts of 1875 and 1892. Under section 257 of the Public Health Act, 1875, the expenses incurred by the local authority, for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable by that Act (i.e., by section 150), may be recovered from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery such expenses are made a charge on the premises in respect of which they were incurred, and it was held in "*In re Betterworth and Richer*" (37 Ch.D., 537) that the expenses became a charge upon the completion of the works, and that this was so notwithstanding the fact that the owner could not be compelled to pay until the cost had been made out and apportioned. In other words, the charge was held to be subsisting although it could not be enforced until the provision in the last paragraph but one of section 257 had been worked out—i.e., until the apportionment of the expenses had become binding by the lapse of three months after notice of apportionment without any written notice of dispute being given by the owner. This decision turned entirely on the words of sections 150 and 257, which plainly gave a charge so soon as the works had been completed and the expenses incurred by the local authority on the failure of the owner of the land to execute the works in compliance with a notice served in pursuance of the powers given by section 150. The charge which has to be considered in the present case is given by section 13 of the Private Street Act, 1892, and we have to determine if this charge, like the charge under the Public Health Act, 1875, takes effect from the time of the completion of the works. We think it does. The Act of 1892 is by section 1 to be read as one with the Public Health Acts, of which the Act of 1875 is the principal Act, and the charge created by section 13 of the Act of 1892 is to be a charge to the like extent and effect as under section 257 of the Act of 1875. It seems to us to follow, unless there is in section 13 or some other section of the Act of 1892 something clearly to the contrary, the charge under section 13 will take effect, like a charge under the Act of 1875, from the

time of the completion of the works the expenses of which are charged ; but it is said that section 13 itself makes express provision to the contrary, because it says, " any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged . . . with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the rate of 4 per cent. per annum." It is said that the effect of these words is that there is no charge until the date of the final apportionment, and therefore not from the date of the completion of the works. We cannot agree to this contention. We think that the effect of these words is, first, to provide that the amount of the charge shall be that fixed by the final apportionment or in case of objection by the determination of the objection ; and, secondly, interest is to run on the sum ultimately fixed from the date of the final apportionment. In other words that the owner of the land is not by his objection to the final apportionment to escape interest on the sum finally fixed between the date of the final apportionment and the date of the final determination of the objection. We think, therefore, that there is nothing in section 13 to prevent the charge taking effect from the completion of the works, and when the whole Act of 1892 is considered we find a great deal to lead to the conclusion that the Act means that the charge shall date from the completion of the works, and not from the final apportionment. In the first place, there is the general consideration that it is not likely that the Legislature should have intended the charge to date from the final apportionment, because the final apportionment is an event the date of which can be fixed quite arbitrarily by the officers of the local authority. Moreover, to make the charge commence with the completion of the works is to make the charge coincide with the benefit. In the next place, the whole scheme of the Act points to a charge being intended prior to the final apportionment. First, there is the provisional apportionment of the estimated expenses on the premises liable to be charged. This, subject to objections to be made within a month, fixes the premises to be charged and the proportions to be borne. All this has to be done before the works are executed. Then section 12 provides :—" When any private street works have been completed, and the expenses thereof ascertained, the surveyor shall make a final apportionment by dividing the expenses in the same proportions in which the estimated expenses were divided in the original or amended provisional apportionment (as the case may be)." These words are, in our judgment, strong to show that on the completion of the works the expenses become a charge on ascertained premises in ascertained proportions. There is no appeal against this, and the final apportionment is a mere arithmetical process for the purpose of dividing these expenses in these proportions. The final apportionment is not a condition precedent to the obligation to bear these expenses in these proportions. The obligation exists before the final apportionment is made. The final apportionment merely works out the division of these expenses in these proportions amongst the premises charged. The objections which, by Clause 2 of section 12, can be taken after final apportionment are not objections to the proportions or to the inclusion or exclusion of particular premises amongst those charged (all those objections have to be made before the works are executed), but are either objections that the proportions have not been followed or are objections to the totals of the expenses to be divided. All this statutory machinery seems to us to point to the charge taking effect from the completion of the works. The charge takes effect under the Act of 1875 before the apportion-

ment is made, and in our judgment it is intended that it shall be so under the Act of 1892. If this view is right, we have no doubt but that this charge is an outgoing which the vendor was bound by his contract to discharge. We also have no doubt but that the charge is an encumbrance claim or demand suffered by the vendor, notwithstanding the fact that the expenses were incurred without any default on his part, and that the time for payment had not arrived before the conveyance was executed; nor have we any doubt but that this charge is inconsistent with the express terms of the conveyance. We think, therefore, that this appeal should be dismissed with costs.

[Solicitors—Farrer and Co.; Geo. Brown, Son, and Vardy.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams, } 1900.
L.JJ.) March 20.

THE VESTRY OF THE PARISH OF ST. MARY, ISLINGTON,
V. THE HORNSEY URBAN DISTRICT COUNCIL.*

Metropolis—Management Acts—Metropolitan
main drainage—Persons outside metropolitan
area—Injunction.

Held, that the plaintiffs could not make a valid contract to admit buildings outside the metropolitan area in to their drainage system.

This was an appeal against a decision of Mr. Justice Kekewich's (reported in *The Times* of May 10 last). The object of the action was, in substance, to compel the defendants to disconnect some sewers in their district from a sewer belonging to the plaintiffs in the Stroud-green-road, North London, and to restrain the defendants from permitting any future connexion of drains or sewers in their district with the said Stroud-green-road sewer. In 1865 the Tottenham and Hampstead Junction Railway Company, under their statutory powers and obligations, constructed the above-mentioned sewer under part of the six-foot way of their line of railway and along the Stroud-green-road, and this sewer was connected with, and discharged into, the metropolitan sewer known as the northern high-level sewer, vested in the London County Council. The Stroud-green-road formed part of the boundary between the parish of St. Mary, Islington, and the parish or district of Hornsey. In 1868 the owners of a piece of land in the Hornsey district proceeded to develop it as a building estate, and subsequently ten roads or rows of houses were constructed thereon, sewers being made under each of those roads and connected with the plaintiffs' Stroud-green-road sewer. The plaintiffs alleged that the result of this was that after heavy rains the discharge of the additional sewage and surface water from the sewers in these roads choked up the Stroud-green-road sewer and rendered it incapable of carrying off the sewage and surface water from that part of the parish of St. Mary, Islington, which, as the plaintiffs alleged, it was constructed to drain, so that serious floodings had been caused, endangering the health and property of the inhabitants and ratepayers of that parish. This led to the present action. The defendants denied that the sewer in question was constructed for the sole benefit of the parish of St. Mary, Islington, and asserted that it was constructed partly at the expense of the owners of property in the defendants' district abutting on the Stroud-green-road, and for the benefit of the owners and occupiers thereof; that the defendants had acquired a right by prescription to drain into the sewer; and that, although the sewers in the

above-mentioned roads were vested in the defendants, under the Public Health Act, 1875, that vesting gave them no right to stop up the connexions with the Stroud-green-road sewer. Mr. Justice Kekewich dismissed the action. He said that he might assume, for the purposes of the case, that the Stroud-green-road sewer was an Islington sewer for the drainage of Islington land, and that it was constructed almost entirely on Islington land. And his Lordship thought that he ought also to assume that, if the Hornsey drainage were out of the way, the Islington drainage would be carried off by the sewer without serious inconvenience. Therefore, he held that the nuisance was caused by the addition of the Hornsey drainage to the Islington drainage. But were the Hornsey Council responsible for this? He would assume that to some extent they were. They were the owners of the sewers. But, unless they had sanctioned the use of them for the purpose of draining into the Islington sewer, the mere fact that the sewers were vested in them would not be conclusive against them. In any case, he did not see how he could compel the defendants to put an end to the connexion of their sewers with the Stroud-green-road sewer, and to do that which would be a public nuisance, by discharging the sewage on their own land. It was urged that the Court could prevent the defendants from permitting any fresh connexion of drains or sewers in their district with the Stroud-green-road sewer. No doubt the Court had jurisdiction to do that. But the evidence showed that the whole of the land under the jurisdiction of the Hornsey Council was covered with houses; the drains were completed and the connexions were made. Even if existing houses were enlarged, or small houses were pulled down and larger ones built in their place, there was no evidence that this would cause any serious increase in the amount of the drainage. He declined, therefore, to grant an injunction for this purpose. The plaintiffs appealed.

Mr. Danckwerts, Q.C., and Mr. Micklem, Q.C., were for the plaintiffs; Mr. Macmorran, Q.C., and Mr. F. Low were for the defendants.

The appeal was heard on February 22, 23, 26, and 27. The MASTER of the ROLLS delivered the considered judgment of the Court allowing the appeal. He said:—The appeal in this case raises two important questions—viz., whether the defendants are entitled to have the sewage from part of the parish of Hornsey pass down a sewer called Stroud-green sewer, some part of which, at all events, is in the parish of Islington and is vested in the plaintiffs; and secondly, whether, if this question is decided against the defendants, the plaintiffs are entitled to an injunction to prevent such passage, seeing that, if it were prevented, a very serious public nuisance would be the consequence. The learned Judge has dismissed the plaintiffs' action and they are the appellants. The material facts are as follows:—Islington and its sewers are within the metropolitan area. Hornsey adjoins Islington, and Hornsey and its sewers are without the metropolitan area. One part of Hornsey slopes down towards Islington; and the natural drainage of that part of Hornsey is towards the two parishes along which the Stroud-green sewer runs. This sewer runs ultimately into the metropolitan high level sewer. There is a dispute as to whether part of this Stroud-green sewer is in Hornsey or in Islington. The part claimed by both parishes is about 98 rods in length at the upper end—i.e., the north-west end of this sewer. The ownership of these 98 rods has been hotly contested and will have to be decided. A large portion of the costs of the action has been occasioned by this contest. The Stroud-green sewer was part of a longer sewer made by the Tottenham and Hampstead Railway

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

Company, under the provisions of an Act of Parliament passed in 1862 and called the Tottenham and Hampstead Junction Railway Act, 1862 (see sec. 59). The whole of this longer sewer, with the exception of the 98 rods in dispute, is unquestionably in Islington. The railway company, in fact, made a longer sewer than they were bound to make. They did so at the request and partly at the expense of the Islington Vestry, with the approval of the Metropolitan Board of Works, for the purpose of more effectually draining Islington, and, so far as the evidence shows, without any reference to Hornsey at all, which was then a purely agricultural parish. The Stroud-green portion of the sewer was for some distance close to the boundary of the two parishes, and the boundary there is very hard to fix. His Lordship then discussed the evidence upon the question to which parish the disputed portion of the sewer belonged, and agreed with the learned Judge below that the whole of the Stroud-green sewer (including the 98 rods in dispute) was an Islington sewer in the parish of Islington and was vested in the plaintiffs, the Islington Vestry, and he continued as follows:—The sewer became vested in the plaintiffs by the joint operation of the Metropolitan Management Act, 1855 (18 and 19 Vict., c. 120), section 68, and the Railway Act above mentioned, section 59. The Hornsey sewers are vested in the defendants by section 13 of the Public Health Act, 1875, and the next question for consideration is what rights, if any, the defendants have to send the contents of their sewers into the Stroud-green sewer, which is vested in the plaintiffs. These rights, if any, must be conferred by statute or be based on some agreement. A careful examination of the statutes leads to the negative conclusion that there is nothing in them which confers any such right apart from agreement. The statutes which have to be considered are the Public Health Act, 1875, and the Metropolitan Management Acts, 1855 and 1862. These contain sections under which drains from private houses can be made into sewers, and under which arrangements can be made with the consent of the Metropolitan Board of Works for connecting sewers in the metropolis with the main sewers, and under which arrangements can be made between several parishes all within the metropolitan area for connecting the sewers of such parishes. But we have looked in vain for any enactment which provides for or authorizes a parish beyond the metropolitan area to send its sewage into any sewer of any parish within those limits without the consent of such parish. We know as a matter of fact that in 1871 the Hornsey local authorities had to obtain a special Act of Parliament to enable them to get rid of their sewage from another part of their parish which slopes in another direction. If, then, the plaintiffs are bound to receive the sewage from Hornsey it must be by virtue of some agreement or consent which they cannot recall; and it is upon such an agreement or consent that the defendants mainly rely. It is necessary, therefore, to ascertain what agreement or consent has been entered into and its legal effect. There is no formal agreement under seal nor any formal agreement to which the Metropolitan Board of Works were parties. But there is abundant evidence of arrangements between the plaintiffs and the defendants and persons in Hornsey by which the passage of some Hornsey sewage through the plaintiffs' Stroud-green sewer has been permitted for many years. These arrangements and the conduct of the plaintiffs are strongly relied upon by the defendants as disentitling the plaintiffs from any relief in this action, and Mr. Justice Keke-wich has decided against them mainly on this ground. The appellants' counsel did not deny the facts relied upon by the defendants, but he contended that, although

the plaintiffs had permitted Hornsey sewage to pass down their sewer for many years, they had done nothing to preclude them from recalling their permission if and when the Hornsey sewage so increased in bulk as to create a nuisance in Islington. They also contended that the plaintiffs could not in point of law bind themselves and the parish of Islington to receive Hornsey sewage for ever, or, indeed, for any definite period, and that in effect all that the plaintiffs had done and all that they legally could do was to grant revocable licences to various persons now represented by the defendants to empty their sewers into the Stroud-green sewer. The inability of the plaintiffs to do more than this is said to be established by the statutory enactments and by the decision of Vice-Chancellor Hall in "*Metropolitan Board of Works v. London and North-Western Railway Company*" (14 Ch.D., 521), and affirmed on appeal (17 Ch.D., 246). The Vice-Chancellor certainly expressed a strong opinion that even the Metropolitan Board of Works could not make a valid contract to admit buildings outside the metropolitan area into their drainage system. The Court of Appeal expressed no opinion on this point, but affirmed the Vice-Chancellor's decision on the ground that no such contract had in fact been entered into. The point turns mainly on section 61 of the Metropolitan Management Act, 1862, which, however, has to be read in connexion with sections 135, 138, 140, and 250 of the Metropolitan Management Act, 1855. Having carefully studied these sections, we have come to the conclusion that the construction put upon them by Vice-Chancellor Hall is correct, and we adopt his reasoning on pages 527-9 in the report. What the Metropolitan Board of Works could not do the plaintiffs clearly cannot do. It follows that Mr. Danckwerts has, in our opinion, made good his contention that, whatever the plaintiffs may have submitted or even agreed to do, the legal effect of their conduct cannot be put higher than leave and licence to several persons to empty their sewers into the Stroud-green sewer. A grant of an easement or an enforceable agreement to grant an easement cannot be established in law even if proved in fact. A temporary permission is very different from a binding agreement or grant. This conclusion renders it necessary to examine very minutely what the plaintiffs have hitherto really assented to. The short result of the evidence is as follows:—When the Stroud-green sewer was formed Hornsey was a purely agricultural parish. A Mr. Lucas and a Mr. Wharmby and some others who owned land in Hornsey abutting on Stroud-green began to build in and after 1865, and they were allowed by the plaintiffs to make comparatively small sewers (mostly 12in. pipes) into the Stroud-green sewer on certain conditions and on making certain payments, involving in Lucas's case a payment of £670 to the railway company. In the years 1871-76 Lucas and others, who had paid various sums to the railway company with the consent of the plaintiffs towards defraying the cost of making the Stroud-green sewer and for liberty to run sewage into it, applied to the defendants to repay them these sums. The application was made on the ground that unless such repayment was made injustice would be inflicted upon the applicants by the Hornsey Drainage Act, 1871. Be the reason what it may, the defendants did in fact repay Lucas and others what they had paid for permission to connect their sewers with the Stroud-green sewer and this was done after consulting the plaintiffs and after obtaining from them an assurance that they had no objection to the acquisition by the defendants of the same rights of drainage as Lucas and the other owners had. It is plain, therefore, that whatever rights Lucas and the other landowners had acquired to send sewage into the Stroud-green sewer must be treated as transferred in equity to the defendants with the plaintiffs' consent.

In November, 1883, the defendants applied to the plaintiffs for, and obtained, leave to enlarge two of the small sewers opening into the Stroud-green sewer in consideration of the defendants' contributing to the expense of repairing the footpath on the Islington side of the Stroud-green-road. Under this arrangement two 18in. pipes were substituted for one 12in. and one 15in. pipe. These are the main facts relied upon by the defendants as precluding the plaintiffs from obtaining relief in this action. Before considering their legal bearing it is necessary to allude to the circumstances which have occasioned the present controversy. We do not understand that the plaintiffs would complain if the sewers sanctioned by them on the application of Lucas, Wharmby, and the other landowners were used for no other houses than were contemplated by them and the plaintiffs when that sanction was given. But building in Hornsey has gradually increased, and other sewers have from time to time been connected with those which the plaintiffs allowed to be made, and the quantity of sewage passing through them into the Stroud-green sewer has so increased that it can no longer carry off the sewage which comes into it. The consequence is that after a storm the sewage in it is forced back and rises through manholes and gullies and creates an intolerable nuisance in Islington. This is what the plaintiffs want to stop. This is not a question affecting the plaintiffs as private individuals. They are a public body, with public duties, and with rights and powers conferred upon them for the purpose of enabling them to discharge those duties. This must be borne in mind in considering the effect of their past conduct, when that is relied upon as estopping them from asserting a right to put an end to what they have permitted, and even encouraged and agreed to allow. If this were an information by the Attorney-General, instead of an action by the Islington Vestry, the defendants would, in our opinion, have no defence whatever to the claim for an injunction. Considering who the plaintiffs are, we cannot think that they are estopped at law or in equity from obtaining the relief they seek. In "*Fairtitle v. Gilbert*" (2 T.R., 169), some turnpike trustees who had power to mortgage their tolls but not toll houses mortgaged both by deed. They were, nevertheless, held entitled to recover the toll houses from their mortgagees, and the doctrine of estoppel was held inapplicable to the case, on the ground that the plaintiffs were a public body, with limited powers conferred by statute, and could not exceed those powers. Many other decisions to the same effect are to be found in the books, the most recent being "*The Great North West Central Railway Company v. Charlebois*" ([1889] A.C., 114), in the Privy Council, where a public company, who had entered into an agreement beyond its powers and had consented to a judgment against it in an action brought on that agreement, was nevertheless held entitled to impeach both the agreement and the judgment, and both were set aside. For similar reasons the plaintiffs cannot, in our opinion, be treated as precluded from obtaining relief on the ground of *laches* and acquiescence. This is not a case in which the Court can properly leave the plaintiffs to their legal remedies, for there are none which would be of any use to them. But, in considering the terms of the order which ought to be made, it is only right and proper to have regard to the fact that the plaintiffs have to some extent themselves brought about the present state of things. The fact that if an injunction were granted a nuisance would be a necessary consequence unless the defendants take steps to prevent it affords them no defence to the action even if it be true that they cannot prevent it without obtaining further statutory powers. It is the defendants' duty to keep the Hornsey sewage out of the plaintiffs' sewer, and the defendants cannot effectually urge their inability to perform their duty as a reason

for the Court doing nothing. Upon this point "*Attorney-General v. Council, &c., of Birmingham*" (4 K. and G., 528), and "*Attorney-General v. Colney Hatch Lunatic Asylum*" (L.R., 4 Ch., 146), are well-known authorities. At the same time, the difficulty in which an injunction may place public bodies, if compelled to close sewers under their control but in daily use, has induced the Court in many cases not to exert its jurisdiction to the utmost, where it is not absolutely essential to do so. "*Attorney-General v. Acton Local Board*" (22 Ch.D., 221), and other cases following it, and cited in the argument, are illustrations of this reluctance. Having regard to these decisions and to the conduct of the plaintiffs we think that all that the Court ought to do in this case at the present moment is to make a declaration establishing the plaintiffs' right to relief and to give the defendants reasonable time to do what is necessary to prevent the flow of the Hornsey sewage down the Stroud-green sewer to the injury of the plaintiffs, and to give the plaintiffs liberty to apply for an injunction at the end of that time. This will give the defendants time to make other arrangements, and we trust will induce the plaintiffs to assist them in their endeavours to do what is necessary to drain their own district without invading the plaintiffs' rights. Such an order will, we think, be more just than an injunction now with a stay of execution. Such an injunction, however carefully worded, might prove unnecessarily oppressive. The order of the Court, therefore, will be as follows:—Allow the appeal and reverse the judgment of the Court below, and order the defendants to pay the costs of the action and of the appeal. Declare that the Stroud-green sewer in the pleadings mentioned is throughout its whole length in the parish of Islington, and is vested in the plaintiffs, and that the defendants are not entitled to send sewage from any sewer in the parish of Hornsey into that sewer without the consent of the plaintiffs. And let the plaintiffs be at liberty to apply to the Judge to whose Court this action is attached at the end of 12 months from the date of this order for an injunction to enforce their rights as above declared.

[Solicitors—A. M. Bramall ; L. J. Tatham.]

Chan. Div. } 1900.
(Kekewich, J.) } March 20.

DALY V. EDWARDES—F. WARR AND CO. V. EDWARDES.*
Landlord and Tenant—Lease—Construction—
Covenant not to assign or part with estate or
interest—Lessee of theatre—Grant of exclu-
sive right to supply refreshments.

On February 8, 1894, the defendant, Mr. George Edwardes, being lessee from Lord Salisbury of certain premises in Cranbourne-street, granted an under-lease of the premises now known as Daly's Theatre to the plaintiff, Mr. Augustin Daly, for a term of 20 years from December 25, 1893, at a yearly rent of £5,500. Mr. Daly entered into a covenant with Mr. Edwardes not at any time during the term thereby granted to assign, demise, or otherwise part with the indenture, or any estate or interest therein, for all or any part of the said term, to any person or persons whomsoever without the licence of the lessor or his assigns first had and obtained in writing under his or their hand or hands for that purpose, but such consent should not be unreasonably withheld in the case of a respectable and responsible tenant, it being the intention that the lessee should be at liberty at all times to produce and perform by himself and company or his licensees any first-class comedy,

*Reported by F. E. ADY, Esq., Barrister-at-Law.

drama, or opera without the necessity of applying to the lessor or his assigns for his consent in that behalf, but that such licensees should not be at liberty to assign, underlet, demise, or otherwise part with their term without the licence of the lessor first had and obtained. There was a provision for re-entry if the rent was in arrear for 21 days, or on any breach of any of the covenants by the under-lessee therein contained. At the date of the under-lease Messrs. Frank Warr and Co. had the exclusive right to supply refreshments in the theatre and the exclusive privilege of advertising. Mr. Daly subsequently by several agreements granted the free and exclusive right and right to use the refreshment-rooms, bars, and smoking-rooms in the theatre to Messrs. Warr and Co. for the purpose of supplying refreshments and advertising, and finally by an agreement dated April 15, 1898, which extended the licence to the termination of the under-lease. No leave was obtained from Mr. Edwardes, as required by the covenant. By an agreement made on May 15, 1894, between Mr. Daly of the one part and Mr. Edwardes of the other part, it was agreed that Mr. Edwardes should produce and mount the plays at the back of the house at his own expense, and Mr. Daly was to provide the theatre, pay the rent, and generally be responsible for the front of the house. Mr. Daly was to pay 65 per cent. of the gross takings to Mr. Edwardes, the remaining 35 per cent. being retained by Mr. Daly. The staff and officials supplied by each were to be under his sole control. Mr. Daly and Mr. Edwardes were to bear in certain shares the expenses of advertisement and of the orchestra. Mr. Daly alleged that Mr. Edwardes was aware of the contract with Messrs. Frank Warr and Co. On September 4, 1898, Mr. Edwardes took possession of the theatre and premises on the ground that the contract with Messrs. Warr and Co. was a breach of the covenant in the under-lease of February 8, 1894. On September 6, 1898, Mr. Daly issued his writ in this action and claimed a declaration that the re-entry by Mr. Edwardes was not authorized by the under-lease; that a partnership was subsisting; delivery up of possession; and an injunction. On September 14, 1898, Messrs. Frank Warr and Co. also brought an action against Mr. Daly and Mr. Edwardes, asking as to Mr. Edwardes for a declaration that the plaintiffs were entitled to the exclusive right of supplying refreshments and advertising in the theatre; an injunction to restrain Edwardes from excluding them from the theatre; or, in the alternative, damages against Daly. On June 7, 1899, Mr. Augustin Daly died, and the actions were revived in the name of his administrator. After hearing evidence in both actions, and arguments in the first action, Mr. Justice Kekewich, on March 8 last, reserved judgment.

Mr. Warrington, Q.C., Mr. Eldon Bankes, Mr. L. S. Bristowe, and Mr. R. Newton Crane appeared for Mr. Daly; Mr. Warrington, Q.C., Mr. P. O. Lawrence, Q.C., Mr. Cave, and Mr. Herman Cohen for Mr. George Edwardes; Mr. Swinfen Eady, Q.C., and Mr. J. R. Brooke for Messrs. Warr and Co.

MR. JUSTICE KEKEWICH said,—This is a puzzle as difficult as any that it has fallen to my lot to solve. I am free to confess that in arriving at a conclusion I have not merely hesitated, but have more than once changed my mind. Notwithstanding some want of precision here and there and some conflict of evidence, there is no substantial question about the facts, and the difficulties arise on the construction of two instruments neither of which can be fairly said to be a good specimen of drafting. The two instruments are the lease by George Edwardes to Augustin Daly dated February 8, 1894, and the agreement between the said Augustin Daly and Frank Warr and Co. (Limited) of April 15, 1898. The first of these is a lease by Edwardes to Daly for a term of years of the building known as Daly's Theatre, and

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but for Clause 10 it might be described as an ordinary instrument of that character. Clause 10, however, bristles with difficulties. It falls naturally into two divisions or sections, and although it is necessary to consider both in order properly to construe the first of them, on which the main question in this action turns, it is convenient to treat them separately, and the more so because the second section is in form a proviso on, or limitation of, the first, which runs as follows:—"Not at any time during the term hereby granted to assign, demise, or otherwise part with this indenture, or any estate or interest therein for all or any part of the said term to any person or persons whomsoever without the licence of the lessor or his assigns first had and obtained in writing under his or their hand or hands for that purpose, but such consent shall not be unreasonably withheld in the case of a respectable and responsible tenant." This is a covenant by the lessee, and the question is whether it has been broken so as to bring into operation the proviso for re-entry which is expressed to take effect "if and whenever there shall be a breach of any of the covenants by the lessee hereinbefore contained." There is no occasion to refer to authorities, though it would be easy to do so to show that, in order properly to construe such a covenant, one must regard not merely the language of the covenant itself, but the relative positions of the parties to the lease, and the nature of the contract entered into by them, as evidenced by all the different parts of the instrument. The one prominent feature of this lease and the one thing above all others to be borne in mind is that it was the lease of a theatre, and intended to be used by the lessee as a theatre and for no other purpose whatever. That consideration ought to assist me and does assist me largely in determining what was intended by the words above quoted, which are otherwise, to say the least of it, enigmatical. It is conceded on all hands that by the phrase "this indenture" is not meant the instrument itself, but that it may be properly understood to comprise the subject-matter of the instrument, or in other words the demised premises. Reading the covenant thus, the lessee is distinctly prohibited from assigning the theatre, and he has not done so. He is also distinctly prohibited from demising it as a whole, and that he has not done. Nor is it suggested that he has parted with the theatre as a whole, but it is argued that he has parted with some estate or interest therein, and, if he has done that at all, it is admitted that he has parted with such estate or interest for part of the term, and the question therefore is whether his agreement with F. Warr and Co. (Limited) can be thus described. What is the proper interpretation of the phrase "part with"? I take it that the man who parts with lands, buildings, or chattels does not retain them. Parting with and retaining are self-contradictory, and cannot co-exist. If, therefore, the legitimate and necessary effect of the agreement with F. Warr and Co. is that Mr. Daly, while retaining possession of the theatre as a whole, yielded to them possession as against himself of such parts as were used and occupied by them, so that he could not be said to have retained them, he has parted with a portion of the theatre, and it would follow, in my judgment, that he parted with an interest in the demised premises. If, on the other hand, he nevertheless retained possession of the whole theatre including the parts used and occupied by F. Warr and Co., it would be impossible, in my judgment, to say that he has parted with an interest in the theatre, although he has given F. Warr and Co. some rights over a portion thereof. In this connexion I was referred to numerous authorities which at the time struck me as all more or less cognate to the matter in hand, but on reflection I cannot find any guide among them, full though they are of instruction. My difficulty in getting any direct light from the

authorities consists in this. Some deal with the exclusive possession and more with the technical phrase "rateable occupation." If I am right in the meaning put on the words "part with," we have in substance to consider what is exclusive occupation, and yet I shrink from relying on authorities which turn on the use of the word "exclusive." The other class of authorities is more dangerous and more likely to mislead. To determine what is rateable occupation one must embark on the technicalities of rating law, which notoriously has doctrines and rules of its own doubtful application to any other subject. An extreme case of that character is that in which the question arose whether a telephone company were in rateable occupation of land by reason of having a pole with wires attached erected on a house under an agreement with the householder, and really the others cited in the same connexion fall within the same category. Of these I may mention in passing "Reg. v. Inhabitants of St. Martin-in-the-Fields" (3 Q.B., 204). It has special interest here because it was concerned with a private box in a theatre, but the decision turned on the proper construction of a rating Act of Parliament. Taking, therefore, only so much of Clause 10 as has already been quoted I have to determine whether, according to the true construction thereof, and without the assistance of any particular decision, Mr. Daly has parted with any interest in the theatre for all, or any part of, the term. But Clause 10 has a second sub-division or section. It runs thus:—"It being the intention that the lessee shall be at liberty at all times to produce and perform by himself and company, or by his licensees, any first-class comedy, drama, or opera without the necessity of applying to the lessor or his assigns for his consent in that behalf, but that such licensees shall not be at liberty to assign, underlet, demise, or otherwise part with their term without the licence of the lessor first had and obtained as aforesaid." The gist of this section was in the provision that he shall be at liberty to produce and perform by his licensees, who, however, were not to assign, underlet, demise, or otherwise part with their term. It would seem from this that the parties contemplated the licence taking the form of a demise, but that is of no great moment, the chief point for remark being that it was intended that the theatre should be used for the production and performance of first-class comedy, drama, or opera, and that so long as that was done the lessor cared not whether it was done by Mr. Daly or by others claiming under him in the first degree. If he had demised or licensed to others for this purpose, he would not thereby have broken his covenant even though he had parted with the theatre for the whole term. This is, to my mind, the clear effect of the proviso standing alone, and is also, I think, the clear effect of it construed with the preceding section, though the two are not well fitted together, and the second section might, with a little alteration of language, have been put first, so as to make what now stands first read as a proviso on or limitation of it. This second section, however, is useful as indicating the intention, which, indeed, is expressly declared, of the parties that the theatre shall be used for the performance and production of first-class comedy, drama, or opera, and that so long as that was secured Mr. Daly was to be under no personal obligation to do it. Before passing to the consideration of the other instrument it is convenient here to notice the agreement between Edwardes and Daly of May 15, 1894. Some argument turned on the partnership thereby constituted between the two. Engrossed with the main question I probably misunderstood Mr. Warrington's argument on this point, for I deemed him to be contending for a partnership in the theatre, which it then seemed to me, and still seems to me, was in-

consistent with the facts. If he was contending, as I suppose he was, for a partnership in the particular business of producing a musical play, I have, as at present advised, nothing to say against it. I say no more because I checked the defendant's argument on this point, but to my thinking the point is altogether immaterial and need not be further debated. Some new complications were, of course, introduced by this agreement of May 15, 1894; but in substance and so far as the questions here in issue are concerned the obligations of the lease remained unaltered and the use of the demised premises as a theatre was maintained. By the agreement of April 15, 1898, Daly granted to F. Warr and Co. (Limited) an exclusive licence to supply refreshments in the theatre for a term at a rent and under certain conditions therein expressed. Much was made of the phrase "exclusive licence," but I am not disposed to attribute importance to it. The force of the word "exclusive" lies in the assurance to F. Warr and Co. (Limited) that they, and no other persons, or, in other words, to the exclusion of all other persons, shall have the privilege of supplying refreshments in the theatre. I do not think that it otherwise in any way controls the relations between Daly and F. Warr and Co. (Limited). I have stated that the former granted a licence to the latter, and that I think is the substance of the instrument. The word "grant" may properly be used in two methods. A man may grant to another land in fee or for a particular estate, and then the estate passes at once by force of the grant, or he may grant that another shall have such and such things, or shall be at liberty to do such and such things, in which event the grant may operate by way of covenant or licence. Where the former method is adopted it is difficult to give it merely the effect of the latter, but where the language leaves the question open to doubt there is no difficulty in so construing the instrument as to give effect to the real intention of the parties. The difficulty lies in ascertaining what that real intention is. Here Daly does not grant the theatre or any part of it, but grants the free and exclusive licence and right to use certain rooms, together with privileges which I do not read at length, but which are obviously all intended to enable F. Warr and Co. (Limited) to exercise their trade of refreshment contractors. The legal phrase "to hold the premises" is not technically apt to such a grant, but it is often, and one must be careful not to attribute overmuch weight to it used in such instruments. There is no reservation of rent, the payment of which is provided for merely by covenant on the part of the tenants, and here I may pause to observe that although they are throughout described as tenants, Mr. Daly being described as landlord, I do not think that this can properly make the instrument a demise if otherwise it ought not to be so construed. Undoubtedly in many other respects the language of the agreement contemplates a tenancy, and there is even a covenant by the landlord for quiet enjoyment in a form appropriate to a lease of a house or land. Nevertheless I cannot think that this was the intention of the parties. It has been assumed, and I am prepared to assume, that the supply of refreshments in suitable places is a necessary adjunct to a theatre; while, on the other hand, it would be the duty of the manager of a theatre to see that refreshments of proper quality are supplied in proper places. It might not be convenient for him to supply them himself. Is there any occasion to construe this agreement as doing more than what must have been in the purview of the parties to the lease—namely, enabling refreshments to be supplied without the manager undertaking the personal obligation to supply them? I think not. The agreement in substance is a contract by Daly that F. Warr and Co. (Limited) shall have the privilege of supplying refreshments in the theatre

and a contract by them that they will supply them under Daly's supervision. I note as an illustration of this the provision in the tenth clause, which gives Daly full power to discharge any servant of the tenants who shall have misconducted himself or herself to the prejudice of the good conduct of the theatre. Here, again, I have dismissed, though not without consideration, many authorities cited, including some of the classes already mentioned, but including also some on the question what is required to constitute a demise. This is an instrument of a peculiar character, suited only to a small class of buildings, and especially theatres, and I have been unable to derive much guidance from cases in which there was a discussion whether a demise was constituted even by similar language under circumstances altogether different. It is necessary shortly to advert to the proved facts. The construction of the written instrument cannot be varied by the usage of the parties, but such usage may have operated as a breach of the covenant in the lease apart from the written instrument, and it was argued that it had in fact done this. Further, if the usage was according to the written instrument, it is not, I think, unfair to regard it as a test of the meaning—that is, to see from it whether what was intended operated in fact as a breach of the covenant. Subject to one remark, the proved facts seem to me to show clearly that Daly did not part with any portion of the theatre or any interest therein. It may be that he could not without breach of his agreement with F. Warr and Co. (Limited) have gone behind the bars when the theatre was open or in any other way interfered with the conduct of their business. But, except that they were at liberty to exercise the privileges conferred upon them and to carry on their business of refreshment contractors in the appointed places according to the terms of the agreement, I think that Daly retained possession of the whole theatre and full control over the same. He was responsible for it when the theatre was closed, and it was watched by his firemen, who superintended the lighting and warming throughout the building, and for that purpose necessarily had access to all parts of it. Those who came to the several bars during the performance owed their privilege of admission to payment to Daly and were under no obligation to F. Warr and Co. (Limited), who, on the other hand, could not exclude them from the bars. But it is said that when the theatre was closed the bars were locked and Daly's servant could not enter. I have no doubt on the evidence that this to some extent at least is true, and perhaps there was some carelessness in the management of the theatre in this respect, which fortunately had no ill-effects. It seems that F. Warr and Co. found that their stores were pilfered, and with the consent of Daly's manager they locked all or some of the doors. This was done for a special purpose, not to exclude Daly or his servants, but to protect F. Warr and Co. There apparently were hours in which the bars could not be entered except by force, but this was due to want of provision on the part of Daly's manager, who could have, I conclude, obtained means of entrance and entrusted them to a responsible servant. The precise reason why better precautions were not taken has not been explained, but I think it would be going too far to say that the neglect to take these precautions made Daly part with any estate or interest in the demised premises. Except for that and for the privileges granted to F. Warr and Co., which I have already held were consistent with his possession, I think that he retained possession of the whole theatre throughout. There is no occasion to discuss in detail the ten paragraphs in which the pleader has found it necessary to explain the relief claimed by the plaintiffs. I will make a declaration adverse to forfeiture conformable to my judgment, and add any consequential relief which the circumstances

require, including, it may be assumed, an inquiry as to damages sustained by wrongful re-entry, with an order for payment, and the defendant will pay the plaintiffs' costs of action which will cover the costs of the inquiry.

The action of "F. Warr and Co. (Limited) v. Daly and Edwardes" stood over pending an appeal in the action of "Daly v. Edwardes."

[Solicitors—John C. Button and Co.; Slark, Edwards, and Co.; W. H. Herbert.]

Chan. Div. }
(Byrne, J.) }

1900.
March 20.

RE BEDDINGTON—MICHOLLS V. SAMUEL.*

Will—Bequest—Ademption—Gift within 12 months of death—Estate duty.

A legatee who has to bring into hotchpot an advance by the testator, made within a year of his death, and therefore chargeable with estate duty, is entitled to deduct the duty from the amount brought into hotchpot.

This was an originating summons by the trustees and executors of the will of the late Maurice Beddington. The testator died within a year after making certain advances by way of gift for the benefit of some of his children, who were also residuary legatees under his will. The question was now raised whether a legatee who has to bring into hotchpot an advance by the testator and to pay estate duty on the same is entitled to deduct the amount of the estate duty from the advance in ascertaining the amount to be brought into hotchpot.

Mr. Norton, Q.C., and Mr. G. S. Alexander, appeared for the plaintiffs; Mr. Levett, Q.C., and Mr. J. G. Fawcus for one of the defendants; Mr. Rowden, Q.C., and Mr. Wood Hill for the other defendants.

MR. JUSTICE BYRNE, in giving judgment, said:—In this case a question arises by reason of the death of the donor of a certain gift within the year; the consequence of which is that the gift is chargeable with duty under the Finance Act. Now, the question arises by reason of the doctrine of ademption. I have held that the child who is benefited by the gift is bound to bring into account, before sharing, the value of the benefit received by reason of the gift. The question of ademption never arises until the death of the donor. Then if it be held that the gift is to be treated as an advance, you have to ascertain the amount or value of that advance which is to be brought in. When the gift was made there was a liability which would arise in the event of the donor dying within the year. When he did die within the year, you are not troubled with any question of actuarial valuation as to the probable amount of this contingent liability, but you say, What was the value of the gift which was given to the child? It appears to me that the advance was an advance of property, which was subject to be charged with duty in a certain event. That event having happened, the value of the property so advanced was less the amount which became a charge upon it in the event which happened, and therefore the amount to be brought in is the value, after deducting this, the estate duty, which became a charge upon the property so first given.

[Solicitors—Montagu, Mileham, and Montagu.]

*Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Court of Appeal (A. L. Smith, }
Collins, and Ilmer, L.J.J.) }

1900.
March 22.

WILLIAMS V. LONDON AND NORTH-WESTERN RAILWAY COMPANY.*

Rating—Railway—Partial exemption—"Land used as a railway for public conveyance"—Liverpool Corporation Act, 1893, sec. 36.

Decision of Divisional Court (15 *The Times* L.R., 409) reversed.

This was an appeal from the judgment of a Divisional Court (Mr. Justice Day and Mr. Justice Lawrence) on a special case reported in 15 *The Times* L.R., 409; [1899] 2 Q.B., 197. The special case was stated by a magistrate for the city of Liverpool on the hearing of an information laid by the collector of rates on behalf of the Liverpool Corporation for the recovery from the London and North-Western Railway Company of the sum assessed on them in a rate made under the Liverpool Corporation Act, 1893, in respect of the Brunswick Docks Goods Station in Sefton-street. The premises in question consisted of a substantial erection comprising a covered shed open at one side. Inside the walls there were a number of railway lines comprising sidings and platforms which were used for the purpose of loading or unloading railway wagons with goods. There were also turntables, cranes, a weigh-bridge, and small offices. There was also in the enclosure some land used for carts and lorries for bringing goods to and taking them from the premises. The premises were situated a little over half a mile from the main line of the company. They were, however, connected with the main line of the company at the Wapping Goods Station and their several goods stations along the line of docks by permission having been given to the railway company by the Mersey Docks and Harbour Board to use their (the board's) dock railway, and also by the Liverpool Corporation having given permission to the railway company for a tramway to be laid across Sefton-street connecting the premises with the dock rails there. Goods were taken to the premises and brought from them to the main line of the company in railway wagons drawn by locomotives. The line of rails along Sefton-street was constructed by the Mersey Docks and Harbour Board under section 72 of the Mersey Docks Acts Consolidation Act, 1858, and was governed by that Act. The permission to lay the lines across Sefton-street was granted to the company by the corporation under section 100 of the Liverpool Improvement and Waterworks Act, 1871, and was revocable on a month's notice. There was no line of railway belonging to the railway company immediately outside the premises in question. There were eight parallel lines of rails in the shed, each being 40 yards in length, and at each end of these lines of rails there were turntables and a line of rails at right angles to the other lines, these two latter lines of rails connecting with the tramway across Sefton-street. All the lines of rails in the premises in question were used for the conveyance of any goods which the public sent by rail to or from the premises in question. The premises were constructed by the company upon land acquired by them under section 20 of the London and North-Western Railway Act, 1896, which empowered the railway company to take for the purpose of extending the stations, sidings, warehouses, coal wharves, depôts, and other accommodation of the company for mineral, goods, and cattle traffic, and for other purposes connected with their undertaking, the land thereafter described, and execute the works and exercise the powers thereafter mentioned. The rate in question in

the case was made under the Liverpool Corporation Act, 1893, in section 36, subsection (ii.) of which there was a provision, very similar to that in section 211 (1) (b), of the Public Health Act, 1875, that certain classes of property, including land used as a railway made under the powers of any Act of Parliament for public conveyance, should not be rated to such rates in any greater proportion than one-fourth part of the net annual value. The company were rated in respect of the premises above described on the full net annual value. They refused to pay the sum assessed on them, and the present proceedings were taken. Before the magistrate it was contended on behalf of the company that parts of the premises included in the rate, such, for instance, as the lines of rails, turntables, sidings, and platforms, together with the portion of the roof covering the same, were within the partial exemption created by section 36 of the Act of 1893, and that, as in the rate no exemption had been allowed, the information ought to be dismissed. It was contended for the corporation that the premises were not, nor were any parts thereof, within the terms of the partial exemption, and that the rate was duly levied and recoverable. The magistrate was of opinion that the premises were part of the railway system of the company, and that such portion thereof as consisted of railway lines, turntables, sidings, and platforms, together with the portion of the roof covering the same, came within the terms of the partial exemption as land used as a railway made under the powers of an Act of Parliament for public conveyance, and that the company should be rated in respect of such portions on one-fourth part of the net annual value thereof, and that as regards the remainder of the premises they should be assessed on the full annual value, and he dismissed the information, subject to the present case. The Divisional Court affirmed the decision of the magistrate. The corporation appealed.

Mr. Balfour Browne, Q.C., Mr. Honoratus Lloyd, and Mr. R. M. Montgomery appeared for the corporation; Mr. C. A. Russell, Q.C., and Mr. Page, Q.C., for the railway company.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether the lines of rails inside this shed or warehouse or goods station, whichever it might be called, were a "railway" within section 36, subsection (ii.), of the Liverpool Corporation Act, 1893. The land in question was acquired by the railway company under section 20 of their Act of 1896, and the shed or warehouse was built on it, and eight lines of rails, each 40 yards in length, were laid inside it, and each end of these lines of rails was bounded by a line of rails running at right angles thereto, with turntables upon them, thus connecting the rails in the shed with the tramway. The lines in the shed were connected with the line of the railway company at Wapping Station and their other goods stations along the line of docks by running over the dock railway belonging to the Mersey Docks and Harbour Board, and by a tramway across Sefton-street, which the railway company were allowed to make under a licence from the Corporation of Liverpool. This licence was revocable on one month's notice. The railway company had nothing but the licence of the corporation to enable them to have access for their wagons to and from the shed, a licence which could be terminated on one month's notice. Supposing there were no tramway, no one would say that the lines in the shed were a "railway." The connecting tramway was not a railway. The blot upon the company's case was that they had not got a line of railway at all, only bits of rails inside a shed. Section 36, subsection (ii.), of the Act of 1893 was not new legislation. It was taken in terms from section 211, subsection 1 (b), of the Public Health Act, 1875, which itself was a re-enact-

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

ment of a similar provision in the Public Health Act, 1848. The words were "lands used as a railway made under the powers of any Act of Parliament for public conveyance." The word "railway" in that section meant a railway well-known as such, and not mere disjointed bits of lines in a shed with no access to the railway company's line of railway except over the tramway mentioned. In his Lordship's opinion it was not a "railway" at all. Upon that ground he based his decision. But if he was wrong in that, in his opinion the land was not used as a railway "made under the powers of any Act of Parliament for public conveyance." Section 20 of the company's Act of 1896 only gave the company power to take a piece of land, not to make a railway there for public conveyance. He preferred, however, to rest his decision upon the first point. The appeal would therefore be allowed.

LORD JUSTICE COLLINS was of the same opinion. It was admitted that the rails connecting the station in question with the company's railway were not a "railway," but were merely a tramway. Therefore, the rails in the station were not physically connected by means of a railway line with the company's railway. Accordingly, it had to be contended on behalf of the railway company that the system of rails in the shed or station in question was a "railway." He (the Lord Justice) could not say that those lines of rails in an area 40 yards square were a "railway," much less a railway "made under the powers of any Act of Parliament for public conveyance." The company took no powers in their Act to charge for public conveyance over the lines in question, nor did the Act confer on the public any rights of public conveyance. Section 20 of the company's Act of 1896 simply gave power to the company to take the land as an accessory to the existing railway, and did not confer power to make a railway there. Therefore the works on this piece of land were not constructed under the powers of an Act of Parliament for public conveyance.

LORD JUSTICE ROMER agreed; though he felt considerable doubt upon the point.

[Solicitors—F. Venn and Co., for H. E. Clare, Liverpool, for the corporation; C. H. Mason, for the railway company.]

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } March 22.

DRIVER V. LONDON AND NORTH-WESTERN RAILWAY COMPANY.*

Railway—Ticket—Conditions—Unpunctuality of trains—Loss covered by the conditions.

This was an appeal by the plaintiff from the decision of the Divisional Court (Mr. Justice Day and Mr. Justice Lawrence) affirming the judgment of the Judge of the County Court of Bloomsbury, who gave judgment for the defendants. The case is reported in *The Times* of June 12. The plaintiff was the proprietor of a musical touring company, which was travelling in the North of England. They had finished an engagement at Prescott, and were intending to perform on February 23 at a place near Miller's Dale. To get from Prescott to Buxton, where they had to change, they had to travel by the defendants' line, and at Buxton they had to change to the Midland Railway. The stationmaster at Prescott arranged with the plaintiff that the company should be taken to Buxton in a special carriage, and on looking at the time tables the stationmaster said

that the train would be in time to catch the train there. The plaintiff accordingly took tickets for himself and his company to Buxton on the defendants' line. They left Prescott next day at 9 30 in the morning, and were due to arrive at Warrington Station at 10 27. The train for Buxton was due to leave Warrington at 10 46. The train in which the plaintiff was travelling arrived at the high-level station at Warrington at 10 41, when the special carriage had to be shunted on to the low-level station, from which the Buxton train started. Before the carriage could be shunted the 10 46 train for Buxton had gone. There was no train after that for three hours. The carriage was then shunted to a siding, where it was left for three hours. The consequence was that they did not arrive at Buxton until 5 20, too late to catch the train to Miller's Dale in time to give a performance that night. The Judge of the County Court held that under the conditions in their time table the defendants were not liable. The condition in question, to which passengers were referred on the back of the tickets, was as follows:—"Time Bills.—The published train bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. The directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss or inconvenience or injury which may arise from delays or detention. The right to stop the trains at any station on the lines, although not marked as a stopping station, is reserved." The Divisional Court affirmed the judgment of the County Court Judge, and gave leave to appeal.

Mr. F. Watt appeared for the plaintiff; Mr. Montague Shearman appeared for the defendants.

"*Le Blanche v. London and North-Western Railway Company*" (1 C.P.D., 286); "*Woodgate v. Great Western Railway Company*" (51 L.T., N.S., 826); "*McCarten v. North-Eastern Railway Company*" (54 L.J., Q.B., 441) were referred to.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that when the train in which the plaintiff and his company were travelling arrived at Warrington there were only five minutes in which to uncouple the special carriage from the train and shunt it from the high-level to the low-level station in order to attach it to the Buxton train. Apparently there was no time to perform that operation. The consequence was that the plaintiff and his company were delayed and did not reach Buxton in time to catch a train from there on the Midland Railway to Miller's Dale so as to enable them to hold their performance that night. The plaintiff thereupon sued the defendants to recover damages, and the defendants in their defence set up the condition, which it was admitted was binding on the plaintiff. The defendants by the condition said that they would not undertake that the trains would arrive at the times stated in their time tables, nor would they be accountable for any loss or inconvenience or injury arising from delays or detention. The plaintiff's loss was undoubtedly caused by the delay in arriving at Warrington and the consequent detention there. The loss so caused was covered by the condition. Assuming, though he did not mean to decide it, that the condition did not cover negligence on the part of the defendants, there was here no evidence of negligence either in the late arrival of the train at Warrington or in not shunting the carriage there in time to catch the Buxton train. The appeal must therefore be dismissed.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER concurred.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Q.B. Div. }
(Phillimore, J.) }

1900.
March 22.

CALDER V. ALEXANDER.*

Land—Action for recovery of—Title by possession
—Devisable interest—Ejectment.

This was an action of ejectment brought to recover possession of a freehold house in Berwick-upon-Tweed. The defence was that the defendant was in possession of the premises.

Mr. F. T. Duka appeared for the plaintiff, and Mr. E. Pollock and Mr. Henn Collins for the defendant.

The plaintiff's case was that one Henry Calder took possession of the premises in 1863 on the death of his father, and remained in possession until his death in 1876. By his will and codicil he devised the property to his two sisters and his niece respectively for life, and after the death of the survivor to his nephew, Henry Calder. Henry Calder, the testator, in fact had no title to the premises, the property having been left by their father to his brother David. David, however, asserted no title to the property, since the house had been built with Henry's money, and allowed the testator and the persons claiming under his will to remain in possession. On the death of Henry, the testator, the first tenant for life proved his will, and she and her sister and niece lived in the premises until the death of the last survivor, which took place in 1898. It was admitted that the defendant, who was a step-son of one of the tenants for life, lived for part of the time with them, and had remained in possession of the premises until the present time. Henry Calder the nephew, who was entitled to the reversion in fee under the will of Henry Calder, the testator, died during the lifetime of the tenants for life, intestate and a bachelor, and his father took out administration of the estate, and as heir at law conveyed the premises to his son, David Calder, the younger, the plaintiff in this action.

Mr. DUKA, on behalf of the plaintiff, contended that a person in possession of property has a devisable interest in it, and that such devisable interest, with the addition of the necessary period of holding by the devisees under his will to make up 20 years, clothed these persons with a complete statutory title which was good against all the world; that Henry, having been in possession of the premises for 13 years, and the property having been held by the tenants for life under his will since the date of his death, therefore altogether they, with the plaintiff, had, since the commencement of the adverse possession, been in possession of the property for 20 years, and a complete statutory title had in consequence been acquired. He cited the cases of "*Asher v. Whitlock*" (L.R., 1 Q.B., 1) and "*Board v. Board*" (L.R., 9 Q.B., p. 48).

On behalf of the defendant, Mr. POLLOCK contended that the possession of all the people who had owned the property was adverse to each other and consequently none of them acquired a statutory title; that no one could turn the defendant out who could not show a superior title; and that neither Henry Calder nor any one claiming under him could acquire such a title because they knew that there was a superior title vested in the elder David under his father's will, and knowing that fact they could not have intended to recognize the devise under Henry's will, but must have meant to hold adversely.

His LORDSHIP held, on the authority of "*Asher v. Whitlock*," that the possession of Henry Calder, the testator, was adverse to his brother David, and that the interest was devisable by him by will; that he

*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

had exercised his power of devising it; that his sisters had taken possession under that will and had recognized it, and that therefore a statutory title had been acquired in Henry and his devisees; that the remainderman's title accrued on the death of the last tenant for life in 1898, and the plaintiff, having established his title to the remainderman's interest in the property, was entitled to recover possession of the premises with mesne profits; and he therefore gave judgment for the plaintiff with costs.

[Solicitors—John Clear, for the plaintiff; C. Bromley, for James Gray, Berwick-on-Tweed, for the defendant.]

Q.B. Div. }
(Wright, J.) }

1900.
March 23.

IN RE WOODD—EX PARTE KING.*

Bankruptcy—Stockbroker—Defaulter—Surplus
in hands of official assignee of Stock Exchange
—Differences due to and from customers—Title
of trustee in bankruptcy.

These were two applications by the trustee in bankruptcy of one Basil Woodd, and raised important questions affecting the position of the official assignee of the Stock Exchange and the right of members of the Exchange, creditors of the bankrupt, to be paid in priority to the outside creditors of the bankrupt under these circumstances. On December 29, 1898, Basil Woodd, being then a broker on the Stock Exchange, absconded owing large outside liabilities. On December 30, 1898, he was officially declared a defaulter on the Exchange, and thereupon the official assignee of the Exchange, in accordance with the rules of the Exchange, closed all Basil Woodd's transactions on the Exchange that day (which happened to be pay day), and received and paid all sums due to or from Basil Woodd on that day, with the result that a surplus of about £650 remained in the hands of the official assignee. Amongst the sums so received by the official assignee was a sum of £1,262 15s. 2d. due by Messrs. Driver and Co., jobbers on the Exchange, to Basil Woodd; and a sum of £117 15s. 2d. representing cheques sent by outside clients of Basil Woodd to him on December 30 to pay for certain transactions on the Exchange. In January, 1899, Basil Woodd was adjudicated a bankrupt, and under the bankruptcy laws the title of his trustee in bankruptcy related back to the previous December 29. The trustee now claimed payment of the £117 15s. 2d. from the official assignee, and of the £1,262 15s. 2d. from the official assignee and also from Driver and Co., on the ground that these two sums were mere book debts of the bankrupt and vested in his trustee in bankruptcy for the benefit of the general body of his creditors. The official assignee was willing to hand over the surplus of £650, but resisted the payment of the two sums in question and relied on the rules and custom of the Stock Exchange. The other material facts are fully stated in the considered judgment of the Court given below.

Mr. H. Reed, Q.C., and Mr. Muir Mackenzie appeared for the trustee in bankruptcy; Mr. Rufus Isaacs, Q.C., Mr. Danckwerts, Q.C., and Mr. Vaughan Williams appeared for the official assignee and also for Driver and Co.

MR. JUSTICE WRIGHT.—The bankrupt Woodd was a broker on the London Stock Exchange. He committed an act of bankruptcy on December 29, 1898, and on the following day he was declared a defaulter on the Exchange. A receiving order was made on January 3, 1899, on a creditor's petition founded on the act of

*Reported by H. L. FRASER, Esq., Barrister-at-Law.

bankruptcy of December 29. At the date of the act of bankruptcy certain outside clients of Woodd's owed to him, or through him to jobbers on the Exchange, certain moneys; and, on the other hand, other outside clients of his had become entitled to be paid other moneys by him, or through him by jobbers on the Exchange. On his becoming a defaulter the official assignee of the Stock Exchange, in accordance with the rules and practice of that institution, collected the moneys of both kinds for distribution in the Stock Exchange liquidation; and the question is whether upon bankruptcy supervening the bankrupt's trustee in bankruptcy has become entitled to both or either of those sums, or any and what portion of them. It is stated and not denied that the official assignee when he collected the moneys knew of the act of bankruptcy. I will take first the sum of £1,262 15s. 2d., which has been paid to the official assignee at his request by Messrs. Driver and Co., jobbers on the Stock Exchange, and in respect of which the bankrupt's trustee asks for orders against both the official assignee and Messrs. Driver and Co. Here these jobbers had differences to pay to or through the bankrupt. The first item in this account relates to transactions for one Hutton, an outside client of Woodd's, who on Hutton's instructions had bought for him certain quantities of stocks from Driver and Co. and had sold for him identical quantities of the same stocks to Driver and Co. or another jobber named Miles. One of these transactions was a purchase of 250 Denver stock from Driver and Co. and a sale of the same quantity of the same stock to Miles, with the result that a difference of £134 7s. 6d. became payable by Miles to the bankrupt for Hutton. Other similar transactions made up the total amount to be received for Hutton by Woodd to £286 8s. 9d. Upon Woodd's default the official assignee of the Stock Exchange made up accounts in the usual way between Driver and Co. and Woodd, and between Miles and Woodd. In the account so made up as between Driver and Co. and Woodd the provisional, or "making up," price, which is always adopted as the common denominator for convenience of brokers and jobbers in the circulation and adjustment of the "tickets," happened to be considerably higher than the actual prices at which Hutton bought or sold, and the effect of this was that, in the provisional account made up as between Driver and Co. and Woodd, Driver, and Co. had to account provisionally to Woodd for about £137 more than Woodd had to pay Hutton. This £137 would not, in the ordinary course of things, have belonged to Woodd at all as a consequence of these transactions. If he had received it he would have held it to be accounted for to the persons entitled according to the actual prices at which bargains had been made, who might be strangers to any contracts of Woodd's, or of Hutton's, or of Miles'. Pending the private settlements between all the parties to these or to the intermediate contracts, Woodd would have held the £137 provisionally, but only provisionally, for Miles. This sum seems to me to be a purely artificial fund temporarily created for a special and temporary purpose, and not shown to be in any sense the property of the bankrupt or of any of his clients, and the principle of the case of "*In re Plumby*" ([1880] 13 Ch.D., 667) seems to me to be applicable *a fortiori*, and the trustee's claim fails as to this. If it should turn out that the bankrupt was entitled to receive any portion of this amount from other jobbers on the settlement of his accounts with them respectively the trustee's claim will be against them. The remainder of the £1,262 15s. 2d. is partly made up of the £286 8s. 9d. due to Hutton. This amount the trustee has received under a judgment of Mr. Justice Phillimore's and no further order need be made as to it. There remains £818 15s. supposed to have

become due to one Gunnis, an outside client of Woodd's, upon transactions similar to those in Hutton's case, but which has not yet been claimed by Gunnis from the official assignee or, as I understand, from Driver and Co. I am of opinion that this sum, if it had come to Woodd's hands, would not have been held by him in a fiduciary capacity for Gunnis or subject to any charge in favour of Gunnis. As between Woodd and Driver and Co., Woodd was a mere creditor of Driver and Co. for the balance of differences on a number of transactions which were not meant on either side to be carried out in any other way than by cancellation *pro tanto* of one bargain by another made with the same or a different jobber, and the ultimate payment by one or other of them of the difference only, as between themselves they are principals in fact as well as by the rules and practice of the Stock Exchange, and the money receivable by Woodd from a particular jobber would not in fact or by the rules of the Stock Exchange be appropriated by that jobber for the benefit of any particular client of Woodd's. As between Gunnis and Woodd, again, Gunnis never placed in Woodd's hands any shares so as to be entitled specifically to the proceeds of them, nor any money so as to be specifically entitled to any shares to be bought with it. He must be taken to have agreed that the differences should be settled in the way usual on the Stock Exchange on speculative transactions, and to have agreed to take payment, not out of a specific fund resulting from a particular transaction with a particular jobber for the sale of a particular parcel of stock, but out of a balance resulting from the aggregate of his transactions through Woodd with various jobbers for the end December account. He must be taken therefore to have authorized Woodd to receive and pay money for him, and to set off losses to one jobber against gains from another, and to have agreed to be merely a creditor of Woodd for the general balance, if any, in his own favour, and not even a creditor for the gain upon a particular bargain, if on the whole account the balance should be against him. This view of the transactions in fact and in law has already been taken by Phillimore, J., in relation to this very matter in "*King v. Hutton*" ([1899] 2 Q.B., 555); and it seems to me that in the case of "*May and Hart v. Angeli*" in the House of Lords, which was there decided in August, 1898, but is said not to be reported except in 14 *The Times* L.R., 551, a substantially similar view was adopted in similar transactions. Further, even if it could be held that the money due from Driver and Co. would, on reaching the bankrupt's hands, have been subject to a charge in favour of Gunnis, to the extent of his claim, it does not follow that the contention of the official assignee ought to prevail. In transactions of this kind, Driver and Co. could not have discharged themselves as against Woodd, nor discharged Woodd as against Gunnis, by paying to Gunnis a sum to which, as between Gunnis and Woodd, Gunnis might have no title and could not, by the course of business, have any title until the accounts were settled. The trustee therefore is entitled to the fund in the first instance, and it is he who must give effect to any charge which may be found to attach to it. The question remains against whom should the order be made for the repayment of the £818 15s. Driver and Co. no doubt failed to discharge themselves by paying the official assignee; but the trustee has claimed from the official assignee the money so paid, and has received part of it—namely, the £286 8s. 9d., and has, so far, adopted and approved the payment to the official assignee, and I think ought to look to him for the balance. At any rate, it is the practice of this Court to look in the first instance to the person into whose hands the fund is traced, unless he has paid it away in ignorance of the bankruptcy; and if the money can properly be got from

the official assignee, Driver and Co. ought not to be made to pay it again. I think it can be recovered from the official assignee. Under section 50 of the Bankruptcy Act, 1883, the bankrupt's right to recover it from Driver and Co. is to be deemed to have been duly assigned to the trustee, who, by the same section, has the rights of a receiver appointed by the High Court, and the official assignee cannot as against the trustee hold the fund produced by the statutory assignment. Possibly also within the meaning of subsection (8) of the same section he might be treated as holding the money as agent for the bankrupt, and therefore for the trustee. I think there must be an order against the official assignee for the £818 15s. As regards Driver and Co., the application may stand over, with liberty to the trustee to apply further. I take now the claim to the £117 15s. 2d., which is made up of sums due to Woodd, or to jobbers, instead of from them. The largest of the items making up this amount is a sum of £82 14s. 2d., which was sent by cheque to Woodd's order on December 30, 1898, by one Chapman, as the result of the following transactions. Chapman was an outside client of Woodd's, and he instructed Woodd at the mid-December account to carry over for him certain stock, and Woodd accordingly, by a contract with a jobber named Brandauer, carried the stock over, and Chapman became liable to pay on December 30 £7,991 9s. 8d. On December 20 Chapman instructed Woodd to sell for him the same amount of the same stock, and Woodd accordingly sold to a jobber named Miles, and thereupon Chapman became entitled to receive from Miles on December 30 £7,849 19s., or £111 10s. 8d. less than he had to pay to Brandauer. The account sent to him by Woodd debited him with this loss, but credited him with £58 16s. 6d., the profit on a previous speculation, leaving the balance due from Chapman of £82 14s. 2d., for which the cheque was sent on December 30. On Woodd's default on that day the official assignee of the Stock Exchange obtained endorsement and delivery of the cheque from Woodd's authorized clerk, and asserts the right to treat it as money belonging to Brandauer and apply it under those rules in discharge of the claims of Brandauer and other members of the Stock Exchange. The other item in dispute is a sum of £29 10s., paid by Kirkland to Woodd for differences on bargains with a jobber named Foot. In these cases the same considerations are applicable as in the case of Gunnis. The £82 14s. 2d. was not paid by Chapman as part of £7,991 9s. 8d., but as a mere difference, not specifically for Brandauer, but for whoever might be found concerned on the settlement of accounts. Chapman could not in such a transaction have discharged himself as against Woodd by paying Brandauer, for the contract between Chapman and Woodd was that Chapman should be liable to Woodd for the balance of differences. Nor by the contract between Brandauer and Woodd could Brandauer be entitled to anything unless, upon the settlement as between them, the differences should be found to be in favour of Brandauer. Chapman and Kirkland discharged themselves by paying Woodd in the ordinary course of business and without notice of any act of bankruptcy, and the official assignee must hand over the proceeds of the cheques which he intercepted.

[Solicitors—Ellis, Bickersteth, and Co.; Travers Smith, Braithwaite, and Robinson.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams,
L.JJ.) 1900.
March 26.

THOMSON V. LORD CLANMORRIS AND OTHERS.*
Limitations, Statute of—3 and 4 Will. IV., c. 42.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

Actions against directors under the Directors' Liability Act, 1890, are not within the Statute of Limitations, 3 and 4 Will. IV., c. 42.

Decision of Kekewich, J. (15 *The Times* L.R., 502), affirmed.

This was an appeal against a decision of Mr. Justice Kekewich's (reported in *The Times* of July 28 last, and in 15 *The Times* L.R., p. 502). The case arose under the Directors' Liability Act, 1890, which renders directors and promoters of a company liable for untrue statements in the prospectus. The action was brought by Mr. Joseph Thomson, a shareholder in the British Goldfields of West Africa (Limited), a company now in liquidation, against Lord Clanmorris, Colonel A. Bravo, and Messrs. B. C. Hargreaves, J. K. D. Mackenzie, and J. W. Wilson, the directors of the company, and Sir Alfred Kirby, its promoter, and it claimed compensation under the Directors' Liability Act, 1890, and damages, on the ground of alleged misrepresentations in the prospectus. On August 22, 1895, the defendants issued a prospectus, with a map, inviting applications for shares. It stated, *inter alia*—(a) that the company had been formed to acquire and work valuable concessions for gold, timber, &c., in the district of Appolonia, in the Gold Coast Colony, of about 7,000 square miles in extent. This was the misstatement mainly relied upon and that on which Mr. Justice Kekewich, to a great extent, based his decision. The plaintiff said that on the faith of the statements he, on August 28, 1895, applied for 100 shares in the company and paid £12 10s., being 2s. 6d. per share, on application, in accordance with the terms of the prospectus, and that on August 29 100 shares were allotted to him, he paying the further sum of £37 10s. due on allotment. He eventually paid for his shares in full, his last call of £25 being paid to the liquidator in November, 1898. With regard to the statements in the prospectus, he alleged, as to (a), that the concessions were not valuable, that only a portion of them was in Appolonia, and that instead of being 7,000 square miles in extent they were only about 700. On January 12, 1898, an order was made to wind up the company. The plaintiff said that the alleged misrepresentations were made by the defendants recklessly and without knowing or caring whether the same were true or false, and that they had no reasonable ground for believing the statements to be true. On December 9, 1898, the plaintiff issued the writ in this action, claiming the relief above stated. The defendants, the directors, denied the plaintiff's allegations and submitted that the statement of claim disclosed no cause of action against them, that it did not allege any fraud, and that in the absence of fraud the plaintiff was not entitled to the relief claimed. They also contended that in respect of each of the statements in the prospectus they had complied with the requirements of section 3 of the Directors' Liability Act, 1890, so as to absolve them from liability. They also insisted that the action had not been commenced within two years after the plaintiff's cause of action (if any) arose, and therefore the claim was barred by the statute 3 and 4 William IV., c. 42, section 3. Sir Alfred Kirby did not appear. Section 3 of the Act of William IV. provides (*inter alia*) that "all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force shall be commenced and sued within the time and limitation hereinafter expressed and not after"—that is, "within two years after the cause of such actions or suits, but not after." By section 3 of the Act of 1890, "every person who is a director of the company at the time of the issue" of a prospectus inviting persons to subscribe for shares "shall be liable to pay compensa-

tion to all persons who shall subscribe for any shares . . . on the faith of such prospectus . . . for the loss or damage they may have sustained by reason of any untrue statement in the prospectus," unless it is proved (*inter alia*) "that he had reasonable ground to believe, and did up to the time of the allotment of the shares believe, that the statement was true." Mr. Justice Kekewich held that section 3 of the Act of William IV. did not apply to such an action, and that it was commenced in time. He also held that the statements in the prospectus were untrue in fact, and that the defendants had not reasonable ground for believing them to be true. His Lordship accordingly gave judgment for the plaintiff for £100 with costs. The defendant Wilson appealed.

Mr. Lawson Walton, Q.C., and Mr. T. Willes Chitty were for the appellant; Mr. Renshaw, Q.C., and Mr. George Henderson were for the plaintiff.

The question as to the application of section 3 of the Act of William IV. was first argued.

The COURT dismissed the appeal on this point.

The MASTER of the ROLLS said that the point was a new one to all the members of the Court. But, in construing section 3 of the Act of William IV. (as in construing any other statute), regard must be had, not only to the words used, but to the reasons which led to the passing of the Act—the mischief which it was intended to cure. There were certain classes of action as to which there was then no defined period of limitation. Those actions were not within any of the then existing Statutes of Limitation. Among others were "actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force"—i.e., sums of money payable by way of penalty or punishment, not by way of compensation to the person injured, punishment being the object. In other words, not actions for damages assessed with the view of compensating the person injured, but what were called "penal actions." Taking that as a guide, it was obvious that an action under the Directors' Liability Act, 1890, did not come within section 3 of the Act of 3 and 4 William IV., though there might be some difficulty in the words of the section unless attention was paid to the history of the enactment. The Act of 1890 did not impose a penalty; it imposed on specified persons a liability to make compensation for a loss sustained. Whether you looked at the words of section 3 of the Act of William IV., or at its history, or at the good sense of the matter, an action under the Act of 1890 was not within that section. And if the two years' limitation was got rid of it was not necessary to decide what was the precise period of limitation. Whether it was six years or 20 years the writ in this action was issued in ample time. His Lordship's impression was that the period was six years. And as the Court had come to the conclusion that, whichever Statute of Limitations applied, the present case was not touched by it, it was not really necessary to deal with the question when the cause of action arose. But, in his Lordship's view, it arose when the shares were subscribed for. But the Court had only to decide whether this present action was barred, and in his Lordship's opinion it was not.

LORD JUSTICE RIGBY agreed that section 3 of the Act of William IV. did not apply to this action.

LORD JUSTICE VAUGHAN WILLIAMS said that the Act of 1890 really gave a new "action on the case." It created a new negative duty. It imposed on those who prepared or issued a prospectus of a company a new statutory duty of accuracy—a duty to abstain from making untrue statements—and it gave a new action on the case to the persons who were injured by the breach of that statutory duty. The case was therefore provided for by the Statute of Limitations, 21 Jac. I., cap. 16, and the period of limitation was

six years. His Lordship also agreed that the statute ran from the date of the subscription for the shares, not from the commission of the wrongful act. There could not be any cause of action until the plaintiffs had subscribed for shares, and it seemed to his Lordship that it would be untrue to say that the whole loss could not be assessed the moment the subscription had been made.

The appeal was then heard upon the merits.

Mr. WILLES CHITTY was heard on behalf of the appellant.

Mr. Renshaw and Mr. George Henderson, for the plaintiff, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the question was whether Mr. Wilson had reasonable grounds for believing that the statement in the prospectus that the property was 7,000 square miles in extent was true. The evidence showed that his grounds of belief were at the best unsatisfactory. His Lordship was sorry for Mr. Wilson, but he had unfortunately made himself responsible for the prospectus, and his Lordship could not see that he had reasonable grounds for his belief.

LORD JUSTICE RIGBY concurred.

LORD JUSTICE VAUGHAN WILLIAMS said that he was very sorry for Mr. Wilson. There could be but one answer to the question whether he had reasonable grounds for his belief. But his Lordship could not help feeling sorry that he was obliged to decide against Mr. Wilson, because it involved the inclusion of a man who had been a victim and had been robbed with the robbers.

Mr. CHITTY then asked for a stay of proceedings under the judgment with a view to an appeal to the House of Lords.

The COURT granted a stay for a month to enable the defendant to consider whether he would appeal. If he should decide to appeal a further stay would be granted. The costs must be paid on the usual undertaking of the solicitor to refund in case the appeal should succeed.

[Solicitors—H. Toomer; Morten, Cutler, and Co.]

Court of Appeal (A. L. Smith, J.
Collins, and Romer, L.J.J.)

1900.
March 26.

WELLAND V. GREAT WESTERN RAILWAY COMPANY.*

Master and Servant—Master's liability to servant—Workmen's Compensation Rules, 1898, Rule 33, subsec. 3—Costs—Discretion of arbitrator.

This was a matter arising out of an arbitration under the Workmen's Compensation Act, 1897, in which the applicant, a young man in the employment of the Great Western Railway Company, sought compensation for personal injury accidentally sustained by him in the course of his employment. The company admitted liability under the Act, and offered the applicant a weekly payment of 7s. 6d.; but this offer was not accepted. The case came on for hearing before the Judge of the County Court of Devonshire, who said that the applicant ought to have accepted the offer, and refused to make an award. The applicant thereupon appealed to the Court of Appeal, who made an order on February 5, remitting the case to the County Court Judge to further proceed thereon, and further ordering that the respondents should pay to the applicant his costs of the former hearing before the County Court Judge. On February 24 the County Court Judge made an award in favour of the applicant for a weekly pay-

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

ment of 7s. 6d., and he ordered the respondents to pay the applicant's costs, which he fixed at the sum of £5. On March 12 a further application was made to this Court on behalf of the applicant, on which the Court made an order calling upon the County Court Judge to show cause why he should not give directions for taxation of the costs between the applicant and the respondents in pursuance of the order of February 5, or make such award or give directions as might be necessary to give effect to the said order.

Mr. J. W. ST. L. LESLIE (Mr. Cripps, Q.C., with him) now appeared for the respondents, the railway company, and said that the registrar of the County Court was present to represent the County Court Judge. He contended that the County Court Judge had made an award in compliance with the order of this Court. He had acted within his discretion in fixing the costs at £5. By Rule 33, subsection 3, of the Workmen's Compensation Rules, 1898, "The Judge or arbitrator, in dealing with the question of costs, may take into consideration any offer of compensation proved to have been made on behalf of the employer." Here the costs had been unduly inflated, the applicant's solicitor having carried in a bill for £41. Further, the applicant had adopted a wrong course in taking these proceedings in this Court. This was really an application for an order in the nature of a *mandamus*, and it ought to have been made in the High Court. By section 131 of the County Courts Act, 1888, "No writ of *mandamus* shall issue to a Judge or an officer of the Court for refusing to do any act relating to the duties of his office, but any party requiring such act to be done may apply to the High Court, upon an affidavit of the facts, for an order or summons calling upon such Judge or officer of the Court, and also the party to be affected by such act, to show cause why such act should not be done."

Mr. LOOSEMORE appeared for the applicant, and contended that by section 6 of Schedule II. to the Act, the applicant was entitled to have his costs taxed in manner prescribed by the rules. Here the County Court Judge had not directed the costs to be taxed at all.

The COURT discharged the order to show cause.

LORD JUSTICE A. L. SMITH said he thought the application ought to be dismissed on two grounds. The applicant was seeking an order in the nature of a *mandamus* to the County Court Judge to do his duty, and he ought to have gone to the High Court for that. In his opinion this Court had no jurisdiction to entertain the matter. Further, he thought the County Court Judge had done his duty. Rule 33, subsection 3, of the Workmen's Compensation Rules had not been called to the attention of the Court when this case was last before them. If it had been the Court would not have granted the rule to show cause.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER concurred.

Court of Appeal (A. L. Smith, } 1900.
Collins, and Romer, L.J.J.) } March 27.

PAYNE V. HOGG.*

Prohibition—Jurisdiction—Inferior Court—Salford Hundred Court of Record Act, 1868 (31 and 32 Vict., c. cxxx.), sec. 7—Construction.

This was an appeal by the plaintiff from an order of the Divisional Court (Mr. Justice Channell and Mr. Justice Bucknill) granting a writ of prohibition to the High Steward and Bailiff of the Salford Hundred Court of Record and to the plaintiff to restrain them from further proceeding on a judgment obtained in that Court. The action was brought in the Salford Hundred

Court of Record to recover £16 0s. 9d. as money due on a promissory note made by the defendant at Burton, outside the jurisdiction of the Court, and payable to the plaintiff at Manchester, within the jurisdiction of the Court. The defendant did not appear in the action, and judgment was signed upon default and execution was issued. The defendant thereupon applied for a writ of prohibition as above, which Mr. Justice Cozens-Hardy, sitting as the vacation Judge at chambers, granted. The Divisional Court affirmed this order, upon the ground that section 7 of the Salford Hundred Court of Record Act, 1868 (31 and 32 Vict., c. cxxx.), only applied to cases where a defendant had delivered a defence and had not pleaded to the jurisdiction, and that therefore a defendant who had not appeared and had on that account not been in a position to plead to the jurisdiction was entitled to apply for a writ of prohibition on the ground of want of jurisdiction. The plaintiff appealed. Section 6 of the Salford Hundred Court of Record Act, 1868, gave the Court jurisdiction in certain cases—namely, where the claim or the value of the subject-matter in dispute did not exceed £50—and contained a proviso that if it should be made to appear upon oath that the claim exceeded the jurisdiction of the Court the Judge or the registrar should order all proceedings to be stayed. By section 7, "Save and except as aforesaid, no defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes."

Mr. C. A. RUSSELL, Q.C., and Mr. WALTER R. WARREN, for the plaintiff, contended that the "cause of action" arose in the Salford Hundred Court. This point was not argued in the Divisional Court, as that Court was bound by the decision in "*Whitehead v. Butt*" (7 *The Times* L.R., 609), assuming to follow "*Cooke v. Gill*" (L.R., 8 C.P., 107), and "*Read v. Brown*" (22 Q.B.D., 128) to hold that the whole cause of action must arise within the jurisdiction. That decision was wrong. The words "cause of action" in the Act did not mean the whole cause of action. In section 18 of the Common Law Procedure Act, 1852 (15 and 16 Vict., c. 76), the words were "cause of action," and the Court had held them to mean the act on the part of the defendant which gave the plaintiff his cause of complaint—"*Jackson v. Spittall*" (L.R., 5 C.P., 542); "*Vaughan v. Weldon*" (L.R., 10 C.P., 47). That act in the present case was the non-payment of the note at Manchester. The whole cause of action, therefore, need not arise within the jurisdiction. Secondly, if that contention was wrong, section 7 of the Salford Hundred Court of Record Act, 1868, gave the Court jurisdiction where there was no plea to the jurisdiction, and prevented the defendant from applying for a writ of prohibition. A defendant, where the claim did not exceed £50, must always plead to the jurisdiction, and he could not be in any better position by not entering an appearance than if he had appeared and put in a defence on the merits. The last clause of section 7 gave the Court jurisdiction "for all purposes" if the want of jurisdiction was not pleaded. "*Chadwick v. Ball*" (14 Q.B.D., 855) was in favour of this view. They also contended that the Court had a discretion to refuse a prohibition, and that in the circumstances of the present case a writ of prohibition should be refused.

Mr. PICKFORD, Q.C., and Mr. LE RICHE, for the defendant, were not called upon on the first point. Upon the second point they contended that the meaning of section 7 of the Act of 1868 was that until the proper time for pleading arrived the Court had no jurisdiction. When the time for pleading arrived the omission to

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

plead to the jurisdiction extended the jurisdiction of the Court and gave the Court jurisdiction. "*Chadwick v. Ball*" only decided that a defendant could not first take his chance in the Court and then, having lost, apply for a writ of prohibition. The decision of the Divisional Court was therefore right. The expense of objecting to the jurisdiction by plea was considerable, and if the objection was well founded the Court had no jurisdiction to give costs. This might be made an engine of oppression, as in a small case a defendant would prefer to pay rather than object to the jurisdiction. No reason had been shown why the Court in its discretion should refuse to grant a writ of prohibition.

The Court allowed the appeal.

LORD JUSTICE A. L. SMITH said that upon the face of the writ of summons in the action there was an intimation that the defendant had to enter an appearance within eight days after service thereof, and that in default of appearance judgment might be signed in the defendant's absence. The defendant did not enter an appearance, and judgment was signed in default, and execution was issued on the judgment. The defendant then applied for a prohibition. On the face of the writ of summons everything appeared in order. The first point taken was as to the meaning of "the cause of action" in the Salford Hundred Court of Record Act, 1868. In his opinion it was clear that it meant all those matters which together made up the entire cause of action, and those matters must arise within the limited area of the jurisdiction of the Court. In the present case one essential element in the cause of action—namely, the signing of the promissory note, took place at Burton outside the jurisdiction of the Court. Therefore, apart from section 7 of the Salford Court Act, 1868, that Court had no jurisdiction to entertain this action. The next question was whether the defendant could now set up the objection to the jurisdiction of the Court. The Salford Court was a Court of limited jurisdiction. It was admitted that, if the Court proceeded to try a case dealing with a sum exceeding the amount as to which it had jurisdiction, prohibition would lie. Here the claim was for less than £50. By section 7 of the Salford Court Act, 1868, "no defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes." The Divisional Court had by their decision added, after the words "by special plea," the words "when the time for pleading came." He (the Lord Justice) could see no reason for adding those words. If the defendant wanted in the present case to object to the jurisdiction, she ought to have appeared and pleaded it. The very point was decided in the Court of Appeal in "*Chadwick v. Ball*." In the absence of a special plea, the Court was to have jurisdiction for all purposes. It seemed to him that the section contained an absolute prohibition against raising the objection to the jurisdiction except by special plea. The words conferred jurisdiction on the Court unless a special plea was put in. Until the defendant came in and showed that the cause of action arose out of the jurisdiction of the Court, all being right on the face of the record, the Court could proceed and give judgment against her. With regard to the question of the exercise of discretion by the Court in granting a writ of prohibition, if it were necessary to consider that point, he would not be inclined to grant a writ of prohibition in the circumstances of this case. The appeal must therefore be allowed.

LORD JUSTICE COLLINS agreed. The words "the cause of action" meant the whole cause of action, as explained in "*Cooke v. Gill*," and did not bear the

same meaning as the Court in "*Jackson v. Spittall*" placed upon the special words "a cause of action" in section 18 of the Common Law Procedure Act, 1852. With regard to the second point in the case—namely, the construction of section 7 of the Salford Court Act, 1868, he had felt some misgiving, but upon the whole he came to the conclusion that the case was covered by the decision of the Court of Appeal in "*Chadwick v. Ball*." There had been two alternative views—one was that section 7 was merely a rule of pleading in the Salford Court, and did not enlarge the jurisdiction of the Court, but merely defined the mode in which the objection to the jurisdiction could be taken in the Court itself. That was the view taken in "*Oram v. Brearey*" (2 Ex. D., 346). The other view was that it was a section enlarging the jurisdiction of the Court, and this view was adopted by the Court of Appeal in "*Chadwick v. Ball*." If they loyally accepted the decision of this Court in "*Chadwick v. Ball*" they must hold that section 7 conferred jurisdiction on the Salford Court. It was said that it was a curious kind of jurisdiction which depended upon a subsequent event—namely, whether a special plea to the jurisdiction was put on the record. He (the Lord Justice) could see no great difficulty in holding that the Salford Court had what the learned counsel for the plaintiff called a defeasible jurisdiction in cases where the claim or the value of the subject-matter in dispute did not exceed £50, a jurisdiction which could be ousted only by a special plea being put upon the record. Whether the Judges of the Court of Appeal in "*Chadwick v. Ball*" had before their minds all the consequences of their decision he did not know, and from what he knew of these local Courts he should have had some misgiving in holding that they had a practically unlimited territorial jurisdiction, leaving it to the defendant to set up the want of jurisdiction by plea. That, however, was a matter for the Legislature. The Court of Appeal had so decided, and he thought that their decision was in accordance with the natural meaning of the words of the section. He agreed also that if the Court had to exercise its discretion in this case the writ of prohibition should in the circumstances be refused.

LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—W. T. Harvey, for T. E. Jones, Manchester, for the plaintiff; Sims and Syms, for W. Burton, Manchester, for the defendant.]

Chan. Div. } 1900.
(Farwell, J.) } March 27.

MANCHESTER BREWERY COMPANY (LIMITED) V. COOMBS.*
Landlord and Tenant—Lessee's covenants—
Brewery company—Covenant not to buy beer elsewhere—Assignees of landlord—Liability of tenant to observe covenant.

This action was before the Court on March 16 and 17. The plaintiffs sought an injunction to restrain the defendant, John William Gundry Coombs, from committing breaches of a certain covenant, and the case raised important questions as to the admissibility of evidence, the nature of the covenant, and the effect of an agreement for a lease which had not been executed by the lessor. At the conclusion of the hearing his Lordship reserved judgment.

Mr. Carson, Q.C., Mr. Hughes, Q.C., and Mr. O. Leigh Clare appeared for the plaintiffs; Mr. Younger, Q.C., and Mr. G. Dodson for the defendant.

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

The facts and arguments are sufficiently set out in the following judgment, which MR. JUSTICE FARWELL delivered:—The plaintiffs in this action seek for an injunction to restrain the defendant from committing any breach of a covenant to buy beer, &c., from them. The defence is (1) an allegation that the plaintiffs supply bad beer; (2) that the covenant in question is personal to the original landlord—i.e., that the tenant was only bound to take beer brewed in his brewery, either by him or his successors in the business; and (3) that the plaintiffs cannot maintain any action on the covenant in question, because the original landlord, through whom they claim as assigns, did not execute the agreement. I find the facts to be as follows:—On December 10, 1892, the defendant executed under seal an agreement with Broadbents (Limited), therein called the landlords, to take the Midland Hotel as tenant from year to year from December 25, 1892, at the yearly rent of £400, and covenanted with the landlords (*inter alia*) that he would at all times during the tenancy purchase of Broadbents (Limited), or their successors in business, all beer, ale, porter, stout, mineral waters, and cigars sold or consumed either on or off the premises, and would not at any time, directly or indirectly, sell and dispose of on the premises any beer, &c., other than such as should have been so *bona fide* purchased. This document was executed by the defendant alone, and he occupied the premises under that agreement as tenant to Broadbents until the latter sold the premises to the plaintiff company last year. There is nothing on the face of the agreement to show that Broadbents were brewers, nor are there any words extending the phrase “the landlords” to the successors and assigns of Broadbents. Broadbents were, in fact, brewers, and on March 29, 1899, they entered into an agreement to sell to the plaintiffs their brewery and the various tied houses, including the Midland Hotel, and the goodwill of their business, and “all other the property, assets, and effects (except money and securities for money) belonging to the vendors and used by them in connexion with the said business.” Neither the agreement nor the conveyance executed in pursuance thereof contained any reference to the defendant’s tenancy, but the purchase and sale were necessarily subject thereto. The agreement for sale also included the goodwill, trade name, and trade-marks of Broadbents. By two deeds, each dated June 24, 1899, the property comprised in the contract was conveyed to the plaintiffs, but there was no express conveyance of the goodwill, or of the benefit of any tied house covenants. On June 28, 1899, the plaintiffs sent by post a notice in writing to the defendant that they had taken over the business of Broadbents. This notice did not in fact reach the defendant until the end of July, when he acknowledges the receipt and says, “This is the first official notice I have received of the change in landlords.” At this time the defendant was indebted to Broadbents in a considerable sum for goods supplied and also for rent. Since June, 1899, Broadbents have not carried on business. The plaintiffs carried on the brewery formerly carried on by Broadbents until Christmas at Broadbents’ brewery, and since then at their own brewery situate about two miles off, and have collected Broadbents’ book debts for them. The defendant was pressed for money in August, 1899, and had various interviews with Mr. Smith, the plaintiffs’ manager, on the subject both of his account and of the rent due from him, and negotiations took place with a view to the defendant’s going out of the house. The defendant took from the plaintiffs on an average 20 barrels of beer a month. He continued to order as before and made some payments on account, but on October 9 the plaintiffs refused to send him any more goods until he made a good payment. On November 15

the plaintiffs put in a distress for rent, which was paid out shortly afterwards, as the defendant says, under protest. On November 13, the day on which the negotiations had come to a final end, the defendant for the first time complained of the quality of the beer supplied to him by the plaintiffs. There is a conflict of testimony as to this between Mr. Smith and the defendant. I do not desire to say more than is absolutely necessary about the defendant’s evidence, but I am bound to observe that he is, in my judgment, entirely untrustworthy, and I accept Mr. Smith’s evidence and reject the defendant’s. The complaint made in the letter of November 13 is this:—“I have compared with last year and the previous one, and find I have been losing £25 a week through the unsatisfactory character of your beers and the unsettled state of the business, as I cannot take full advantage of dinner parties, beds, and general orders, not knowing whether I can execute them or not.” The defendant in fact returned three barrels, and three barrels only, as bad. This was in October, but in an affidavit sworn by him in the Queen’s Bench Division for the purpose of getting leave to defend an action for his account he swore, “I find from my books that during the six months from July last to date (i.e., February 2, 1900) there has been thrown away as utterly unsaleable, sour, or undrinkable an average of upwards of 20 gallons of beer and porter per day. This has been thrown down the sink by my manageress, barmaids, cellarmen, and myself. I have personally served in the bar upon many occasions during that period, and I have on some days thrown away myself in one day as much as 60 gallons of beer.” The defendant was cross-examined as to this, and attempted to support it. He was driven to admit that he had no books which would show any beer thrown away, that the amount alleged to have been thrown away would amount to 17 barrels a month, and that he only took 20 barrels a month altogether. He attempted to make out his loss from his books as £59 a month in lieu of £25 mentioned in his letter already referred to, and the £25 to £30 mentioned in his affidavit sworn only last month, and the only books produced were of such a character as to be quite useless. The only other witnesses in support of the badness of the beer were the defendant’s nephew and niece and five customers. The nephew and niece were not satisfactory witnesses, and I certainly could not find in the defendant’s favour on their evidence, and of the five customers, four speak only to tasting the beer towards the end of July or beginning of August, and the last customer, who did try the beer on other occasions, went on drinking it from July to November. Mr. Younger admitted that it is by no means unusual for a brew to be a failure now and then, and it is no uncommon occurrence for beer to turn sour in hot or thundery weather. Such accidents as these do not amount to a default in supplying good beer sufficient to justify a total repudiation of a covenant to take beer from the brewers in question. It is idle to suppose that if a man was really throwing away 17-20ths of the beer supplied by his landlord and was suffering in the way that the defendant and his niece ask me to believe that they suffered, he would return three barrels only out of 100 or so, would make no complaint, would go on pressing to have more beer sent him, and would at last write a letter in the mild terms of that of November 13. I find that there has been no breach by the plaintiffs of their obligation to supply good beer. Two questions arose on the admissibility of part of the evidence tendered. The plaintiffs tendered evidence to show that they had supplied other tied houses on the same days as they supplied the defendant with beer from the same brew. Mr. Younger objected to its admissibility on the authority of “*Holcombe v. Hewson*” (2 Camp., 391, and 11

Rev. Rep., 746). If the plaintiffs had proved that the beer supplied was from the same brew, I should have held that the evidence was admissible. The evidence of those who drink the beer must, of course, be admitted to show that it was, in their opinion, bad or good; and I can see no reason why the evidence of the man who has to pay for and sell the beer should not also be admissible, if the identity of the liquor is established. But the plaintiffs failed to prove the identity of the brew, and the evidence, therefore, comes to nothing more than this—that the plaintiffs at the same time that they were supplying the defendant supplied good beer to other persons. In my opinion this is inadmissible for the reasons given in “*Holcombe v. Hewson*.” The second point was this. Mr. Carson objected to the question put to the defendant, “Have you received complaints from customers?” According to my recollection this question has always been allowed in actions of this nature, and I think for this reason. Counsel can certainly ask as to facts—Did the customer order beer? Did he taste it? Did he finish it? What did he do with it? If the matter is left there with the answer that he tasted and left it or threw it away, the Judge cannot avoid drawing an inference, and the cross-examining counsel is driven to ask for some explanation. It is simpler, therefore, to allow the statement of the customer of the reason for his conduct to be given in chief. But it comes to very little, and in the present case to nothing; for the defendant has called customers, and I give his advisers credit for having selected those who could testify most strongly in the defendant’s favour, and I have already disposed of their evidence. The defence on the facts having failed, the defendant relies on two points of law. He contends that the agreement is a personal contract and is confined to beer and ale brewed at the particular brewery either by Broadbents or their successors, and he relies on the fact that there are no words referring to assigns in the covenant. The covenant is to purchase from the landlords trading as Broadbents (Limited) and their successors in business all beer, ale, porter, stout, mineral waters, and cigars. True it is that Broadbents were brewers, but they were not manufacturers of mineral waters or cigars; there is nothing on the face of the agreement to show that they were brewers, and, even if there were, there is nothing to show that the beer, &c., to be taken by the defendant was beer to be brewed by them. In fact, part of the beer supplied to the defendant under the agreement at his request has been Bass. The question is one of construction—see “*Clegg v. Hands*” (44 Ch.D., 503, at p. 520) and “*White v. The Southend Hotel Company*” ([1897] 1 Ch., 767). In the case of “*Doe v. Reid*” (10 B. and C., 849; 34 Rev. Rep., 584), relied on by the defendant, the form of covenant showed that the beer to be taken was beer to be brewed by the covenantees—see p. 851—and the observation of Mr. Justice Bayley, at p. 857, must be taken *propter subjectam materiam*, and not as an enunciation of a general rule. “*The Birmingham Brewery v. Jameson*” (67 L.J., Ch. 403), the other case relied on by the defendant, is really in the plaintiffs’ favour, for the Master of the Rolls expressly says that the difficulty in that case was created by the severance of the business from the reversion, and that when the business and the reversion remain together there is no difficulty. In the case before me the plaintiffs are undoubtedly the successors in business of Broadbents (Limited), and as such are within the very words of the covenant. The defendant, in fact, contracted to deal with the persons who purchase the business from Broadbents, not from persons who brew beer at the same brewery as Broadbents. On this point, therefore, the defendant also fails. The last point taken by Mr. Younger rests on the fact that the

agreement of December 10, 1892, was not executed by the landlord. Having regard to the construction that I have put on the covenant, it could not be contended that it is not of such a nature as to run with the land. But it is said that in order to arrive at the conclusion that it does run with the land, the Court must first find that an estate has been duly created at law in the land with which the covenant can run, or, in other words, that there must be privity of estate between lessor and lessee, and that such estate can only be created by deed duly executed by the lessor, and that this is borne out by the statute of Henry VIII., which applies only to leases by deed. This is undoubtedly sound—*e.g.*, it has been held that a lease by mortgagor and mortgagee in which the covenants to repair were with the mortgagor and his assigns did not enable an assign of the mortgagee to maintain an action on the covenant. (“*Webb v. Russell*,” 3 Term Rep., 393; 1 Rev. Rep., 725.) Lord Kenyon says:—“It is not sufficient that a covenant is concerning the land, but in order to make it run with the land there must be a privity of estate between the covenanting parties. But here the mortgagor had no interest in the land of which a Court of law could take notice, though he had an equity of redemption, an interest of which a Court of equity could take notice.” And in “*Standen v. Christmas*” (10 Q.B., 135) it was held that the 32nd of Henry VIII. applied to leases by deed only, and that when the lease was not under seal the assignee of the reversion could not maintain assumpsit on the contract against the lessee for failure to repair. The reason is obvious. If the contract was regarded as personal, the right to sue on it was not assignable at law, and as it was not by deed there was no estate in which the right to sue could be inherent. The law is stated with great lucidity by Chief Justice Wilde in “*Bickford v. Purvis*” (5 C.B., at p. 929). [His Lordship read the passage.] If, therefore, the plaintiffs had been suing in covenant or in assumpsit on contract before the Judicature Acts, I think they would have failed. But it by no means follows that the plaintiffs would have failed in every form of action, even before the Judicature Acts; still less that they must fail now. Before the Judicature Acts, the plaintiffs might have succeeded if they had sued on the new contract implied from the conduct of the tenant and the assignee of the landlord, instead of suing on the original contract between the tenant and the landlord. I take the law as stated by Mr. Justice Willes in “*Cornish v. Stubbs*” (L.R., 5 C.P., at pp. 338-9). [His Lordship read the passage.] In this case the defendant on receiving the notice of June 28, 1899, writes on July 29:—“This is the first official notice I have received of the change in landlords”; from early in August the defendant carried on negotiations for three months or so with respect to the terms on which he should give up his tenancy; between August and November the plaintiffs’ manager applied to him repeatedly for rent; on November 18 the defendant writes, “If it is a question of your rent, you can have it when you want,” and when a distress for rent was put in on November 15 the defendant paid it out; and although he says it was under protest, this comes to nothing, for he was clearly liable, and he has recognized his liability by not bringing any action for illegal distress. I find, therefore, as a fact, that the defendant agreed that the plaintiffs should occupy the position of landlord to him in the same way that Broadbents had done. There is, however, another point which is fatal to the defendant. The defendant holds under an agreement for a lease from Broadbents, under which he has been in possession and paid rent for several years. The whole contract has been performed up to the present time, except that the legal estate has not been actually demised. The defendant would have no

defence to an action for specific performance, the sole object of which would be to compel him to accept the legal estate. If Broadbents had not parted with the legal estate, I see no reason why they should not now execute the deed, in order to complete the transaction. The present plaintiffs are the assigns of the benefit of the agreement, both by implication from the conveyance of the land subject to the lease and by the express words of clause 26 of the agreement of March 29, 1899. The plaintiffs could, therefore, obtain specific performance in this Court of the contract so far as it is incomplete. In saying this I do not forget that this is a yearly tenancy only, and that Vice-Chancellor Wood in "*Clayton v. Illingworth*" (10 Hare, 451) refused to grant specific performance of a tenancy from year to year; but the reasons given by the Vice-Chancellor are inapplicable to the present case. He said there was nothing to show in that case that there was to be any lease under seal at all; here the tenant executes under seal. He said that equity interposes to grant specific performance in cases where the legal remedy is adequate, and that there was nothing in the case before him to show why the remedy at law would not be adequate. Here the defendant's whole contention rests on the ground that the plaintiffs have no legal remedy, and the grant of specific performance is necessary to give him his full rights. It is well settled that the assign of one of the parties to a contract can obtain specific performance of that contract against the other contracting party, and although it is usually necessary in such an action to make the assignor a party, I do not think that it is essential in a case like the present, where the sub-contract is no longer *in fieri*, and there are no equities between the parties to the original contract and no suggestion of any reason for making the original contractor a party. The managing director of Broadbents was called as a witness, and no question was put to him suggesting any reason for Broadbents being made parties. Holding, therefore, as I do, that the plaintiffs could obtain specific performance against the defendant, I find it laid down by the Court of Appeal that since the Judicature Act there are not in such a case as this two estates as there were formerly, one at common law by reason of the payment of the rent, and another in equity under the agreement. But the tenant holds under the same terms, and has the same rights and liabilities as if a lease had been granted—"*Walsh v. Lonsdale*" (21 Ch.D., 9), approved by Lord Justice Cotton in "*Lowther v. Heaven*" (41 Ch.D., at p. 264), and explained by Lord Esher in "*Swain v. Ayres*" (21 Q.B.D., 292-3), and "*Foster v. Reeves*" ([1892] 2 Q.B., 255). Although it has been suggested that the decision in "*Walsh v. Lonsdale*" takes away all difference between the legal and the equitable estate, it, of course, does nothing of the sort, and the limits of its applicability are really somewhat narrow. It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates. It involves two questions:—(1) Is there a contract of which specific performance can be obtained? (2) If yes, will the title acquired by such specific performance justify at law the act complained of, or support at law the action in question? It is to be treated as though before the Judicature Act there had been, first, a suit in equity for specific performance, and then an action at law between the same parties, and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same Court, and at the same time as the subsequent legal question falls to be determined. Thus, in "*Walsh v. Lonsdale*" the landlord under an agreement for a lease for a term of seven

years distrained. Distress is a legal remedy and depends on the existence at law of the relation of landlord and tenant, but the agreement between the same parties if specifically enforced created that relationship. It was clear that such an agreement would be enforced in the same Court and between the same parties; the act of distress was therefore held to be lawful. So in the present case I have already stated that specific performance can be granted between these parties in the suit. I must treat it, therefore, as granted, and I then find that the result justifies this action. It is not necessary to call in aid this doctrine in matters that are purely equitable. Its existence is due entirely to the divergence of legal and equitable rights between the same parties, nor does it affect the rights of third persons. Thus a contract by a landowner to sell the fee simple of land in possession to A would not enable A to maintain an action of ejectment or trespass against a third person, because such actions are purely legal actions, requiring the legal estate and possession respectively to support them, and the contract relied on is not made with the defendant. The case of "*Friary Holroyd v. Singleton*" ([1899] 1 Ch., 88, and 2 Ch., 261) turned on the construction of the word "assigns." In that case the plaintiffs had a contract to buy from the lessor a publichouse subject to a lease which contained a covenant to sell the freehold at a certain price, on six months' notice being given by the lessor, his executors, administrators, or assigns. The only notice given was given by the plaintiffs, and it was held that they were not assigns within the meaning of the clause. "*Walsh v. Lonsdale*" was cited, but Lord Justice Romer held that it had no application. The real point was that the notice was given by the wrong person, that such notice was a condition precedent, and the objection would have been just as fatal if the action had been brought in the name of the original landlord. The reversal in the Court of Appeal turned on a question of fact only. I hold, therefore, on this point that the plaintiffs, being clearly entitled in this Court against the defendant to a specific performance of the agreement under which the defendant has been for years and still is in possession of the land, can sue him on the covenants in the same manner as they could have done if Broadbents had actually executed the original lease. There are two other points to which I will refer, although I do not propose to rest my decision upon either of them. It is said that section 10 of the Conveyancing Act enables the plaintiffs to sue. Unless they can do so on the ground last stated (as to which I would refer to "*Swain v. Ayres*," 20 Q.B.D., at 292-3), I should feel some difficulty in so holding. The word "lease" in section 14 has been held not to include an agreement for a lease, and section 18, subsection 17, expressly contrasts lease and agreement for a lease. There are considerable difficulties in construing the section, and I express no final opinion upon it. The last point is this. The covenants in the original agreement by the defendant were personal contracts binding on him, on which he could have been sued at law in the name of Broadbents (Limited) after the assignment to the plaintiffs (see "*Bickford v. Purvis*," *supra*). Since the Judicature Act the right to sue on those covenants is a chose in action within section 25, subsection 6. The term "chose in action" in that section has been said in the Privy Council, "*King v. Victoria Insurance Company*" ([1896] A.C., at p. 254) to include all "rights the assignment of which a Court of law or equity would before the Act have considered lawful." I adopt this definition, and I hold that the benefit of these covenants could undoubtedly have been assigned in equity before the Act. The plaintiffs could, therefore, sue in respect of these covenants, if there had been an absolute assignment thereof to them in writing

signed by the assignor, of which express notice in writing had been given to the defendant. I express no further opinion on this as it has not been argued and it may be that no sufficient notice has been given. The result is that I grant the injunction as asked, and order the defendant to pay the costs of the action.

[Solicitors—Chester and Co., for Farrer and Co., Manchester, for the plaintiffs; Pritchard, Englefield, and Co., for Mann and Rooke, Manchester, for the defendant.]

Court of Appeal (A. L. Smith,) 1900.
Collins, and Romer, L.JJ.) March 28.

CAVANAGH V. GEORGE WHITECHURCH (LIMITED).
Company—Shares—Transfer of shares—Estoppel
—Certificated transfers.

This was an application by the defendants for judgment for a new trial in an action tried before Mr. Justice Bigham and a special jury, reported in *The Times* of December 11. The plaintiff claimed damages from the defendant company for refusing to register him as the holder of certain shares in that company, and also an injunction to restrain them from registering any one else as the holder thereof; and, alternatively, damages for misrepresenting that one Anthony Raymond was the registered holder of the shares in question. The plaintiff was a leather and hide merchant, carrying on his business at Havre and Paris. In the course of his business he had had relations with a firm of Lavington Evans, tanners, who had two establishments, one at Sittingbourne and the other at Longjumeau, near Paris. The result of these dealings was that Lavington Evans became indebted to the plaintiff in a sum of £13,748. On November 6, 1897, the business carried on by Lavington Evans in France was turned into a limited company called the *Innox Tannery Company (Limited)*. One Anthony Raymond became the managing director of this company, having been largely connected in promoting its incorporation. This company assumed the liabilities of Lavington Evans, including the debt due to the plaintiff, and the payment of that debt was also guaranteed by Raymond. The business done formerly between the plaintiff and Lavington Evans was continued between the plaintiff and the *Innox Tannery Company*. The plaintiff sold raw hides to the *Innox Company*, who tanned the hides and consigned them to the defendants for sale on commission. The defendants on receipt of the goods used to make an advance of 80 per cent. of their value, the balance being remitted on sale of the goods. In April, 1899, the plaintiff began to press the *Innox Company* for payment, and an arrangement was made by which the plaintiff was to take bills of £500, accepted by the *Innox Company* and endorsed by Raymond, the first to fall due on May 11, 1899, and others at intervals of a week. The first bill was dishonoured, whereupon the plaintiff came to London and instructed his solicitors, Messrs. Smith and Hudson, to press for payment. The difficulties of the *Innox Company* concerned the defendants as well as the plaintiff, and, accordingly, an arrangement was proposed on May 19 by which the debt due to the plaintiff should be secured. The proposal was that Raymond, who had also been concerned in promoting the defendant company, should transfer to the plaintiff 1,100 preference and 9,250 ordinary shares standing in his name in the books of the defendant company, that the defendants, instead of paying to the *Innox Company* as heretofore 80 per cent. of the value of all goods consigned to them by that company, should pay 40 per cent. to the *Innox Company* and 40 per cent. to the

plaintiff. If this was completed the plaintiff told Raymond he would be satisfied and would not proceed against the *Innox Company*. The plaintiff at the same time obtained from Raymond an order entitling him to receive back from the *Innox Company* a parcel of hides which he had sold to them but for which he had not received payment. On May 21, 1899, Whit Sunday, he went with his agent and his solicitor, Mr. Smith, to the factory of the *Innox Company* to claim these goods. On arriving there he learned that there had been a great pressure of work in tanning and loading hides since 5 o'clock that morning. Thinking that he had been tricked, he consulted lawyers in Paris and obtained from a Court of law an "opposition" and a "saisie" upon the goods and property of the *Innox Company* and the defendants. The effect of these proceedings was to place an embargo on the goods of the *Innox Company*, so that they could not deliver any goods to the defendants, and to put a stop order on any money in the hands of the defendants, preventing them from making any payments to the *Innox Company*. The *Innox Company*, the defendants, and Raymond were all anxious that the plaintiff should withdraw these proceedings, and on May 27, 1899, it was agreed that Raymond should send transfers with certificates for the shares above mentioned. The certificates and transfers were to be handed to the plaintiff by the 30th, upon receipt of which he was ready to sign an agreement providing for payment of the money due to him and for the withdrawal of the "opposition" and the "saisie." The certificates were not forthcoming, and the plaintiff, with his solicitor, went on the morning of the 30th to the offices of Messrs. Sewell and Maughan, Raymond's solicitors in Paris. Meantime a letter dated May 29 had come from Mr. Wells, the secretary of *Whitechurch (Limited)*, in London, to Mr. George *Whitechurch* in Paris in these terms:—"Dear *Whitechurch*,—I have sent power of attorney to Sewell and Maughan, also certified transfers of preference and ordinary shares, which ought to make them quite safe. I had to get these from my family and intimate friends who held them. On receiving back the transfers signed by Cavanagh, I will have the fresh certificates prepared and sent for signature. I have had my work cut out to get these together. . . ." This letter was answered by a letter from Mr. George *Whitechurch*, expressing his surprise that Wells should have issued these certificated transfers, and directing him not to do so in future without giving notice to the directors in Paris. When the plaintiff and his solicitor arrived on the morning of May 30 at the offices of Messrs. Sewell and Maughan, Mr. Maughan there produced certificated transfers for 1,100 preference and 9,250 ordinary shares in the defendant company. These certificated transfers were transfers of shares from Raymond as transferor to the plaintiff as transferee in the ordinary form, except that in the left-hand margin of the transfer deed were written the words (taking one transfer for example) "Coupon"—that was, certificate—"for 1,100 preference shares in the company's office, by George *Whitechurch (Limited)*, Richard G. Wells, secretary." The plaintiff, with his solicitor, on seeing the certificated transfers left Messrs. Sewell and Maughan, and then went on to the office of Mr. George *Whitechurch*, the chairman and managing director of the defendant company, and told him that Mr. Maughan had received certificated transfers, but not certificates of the shares. There was some conflict of evidence as to what Mr. *Whitechurch* said in reply. According to the plaintiff's evidence, Mr. *Whitechurch* said he was glad of the settlement; that if the certificated transfers were there he would sign the agreement, and the certificates of the shares would follow as a matter of course.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

According to the defendants' evidence, he said the certificated transfers were of no use unless the certificates themselves were lodged with the company. On the following day, May 31, the plaintiff, his solicitor, M. Petit, a French advocate, M. Le Fort, the plaintiff's agent, Mr. George Whitechurch, Mr. Maughan, and Mr. Hammersley, holding a power of attorney for Raymond and being himself manager of the Innox Company's factory at Longjumeau, met together at the office of M. Le Fort. Mr. Maughan produced the certificated transfers. Mr. George Whitechurch looked at them, and, according to the plaintiff's witnesses, said they were all in order, and they should be sent to London and new certificates would be sent in return; according to the defendants' witnesses, he repeated what he had said on the day before—namely, that the certificated transfers were of no use unless the certificates themselves were lodged at the office of the defendant company in London. It was common ground that an agreement in writing was then read by M. Petit and signed by Mr. George Whitechurch, "bon pour encaissement G. Whitechurch (Limited). George Whitechurch." It was also signed by Mr. Hammersley and subsequently also by Raymond. By clause 1 of this agreement the debt due to the plaintiff was agreed at £13,748; clause 2 contained a statement of goods to be supplied by the Innox Company to the defendants, for which goods the defendants were to pay 80 per cent. of the value, 40 per cent. to the plaintiff and 40 per cent. to the Innox Company. By clause 3 the balance of the plaintiff's debt was to be secured by handing to him certificates for 1,100 preference shares and 9,250 ordinary shares in the defendant company. On the signing of this agreement the plaintiff withdrew the "opposition" and "saisie," and the certificated transfers of the shares were sent to the secretary of the defendant company in London. Since this agreement a sum of £1,600 had been paid off the debt, and hides to the value of £2,500 had been returned to the plaintiff, but the certificates which he expected in return for the transfers never came. Wells, the secretary to the defendant company, was also clerk to Raymond. In May, 1899, Raymond had no shares standing in his name. It was agreed that the value of the shares at that date should be taken at 15s. each. The transfer file of the defendant company showed a large number of transfers certificated by Wells and others acting for him. The old certificates with new ones were regularly sent by Wells to Paris, where the seal of the company was affixed to the new certificates, the transfers themselves being kept by the secretary in London. The questions left to the jury and the answers thereto were as follows:—1. Did the defendant company represent to the plaintiff that they held the certificates relating to the shares numbered in the transfers, and did they represent that the certificates so held were in the name of Raymond? Answer.—Wells did so represent. Whitechurch allowed the plaintiff to think it was all right in order to induce the plaintiff to withdraw the "opposition." 2. Did Wells make the representation honestly though carelessly? Answer.—No. 3. Did he do it fraudulently? Answer.—Yes. 4. Was it done in the supposed interest of the defendant company for the benefit of both Raymond and the defendants? Was the representation made in order to induce the plaintiff to alter his position to his detriment? Answer.—Yes. 5. Did he in consequence alter his position to his detriment? Answer.—Yes. Mr. Justice Bigham, upon these findings, gave judgment for the plaintiff for £8,325 damages, the value of the shares being 15s. each.

Mr. Lawson Walton, Q.C., Mr. Swinfen Eady, Q.C., and Mr. R. G. Glenn appeared for the defendants; Mr. Rufus Isaacs, Q.C., and Mr. L. Ryland appeared for the plaintiff.

The COURT, having taken time to consider, dismissed the application.

LORD JUSTICE COLLINS said that the judgment of Lord Justice A. L. Smith, who was absent through indisposition, would be read by Lord Justice Romer.

LORD JUSTICE ROMER then read an elaborate judgment written by Lord Justice A. L. Smith, in which he said that the application was to enter judgment for the defendants upon the ground that there was no evidence to support the verdict for the plaintiff, and alternatively for a new trial upon the ground that the verdict was against the weight of the evidence, and that the damages were excessive. The action was brought by the plaintiff against the defendants for refusing to place him upon the register of shareholders of the defendant company. His Lordship then stated the facts, and with reference to the interviews of May 30 and 31, 1899, between the plaintiff and Mr. George Whitechurch, the chairman and managing director of the defendant company, after the two certificated transfers of the shares had been produced to the plaintiff by Raymond's solicitor, he said that there were two separate and distinct estoppels set up by the plaintiff. He agreed with Mr. Justice Bigham that Mr. Whitechurch knew, when he made the representations alleged on May 30 and 31, that Raymond's shares were being given to the plaintiff to induce him, if possible, to take off the "opposition." Those two estoppels were founded upon the well-known rules as to estoppel laid down in "Carr v. London and North-Western Railway Company" (L.R., 10 C.P., at p. 317), which were as follows:—(a) "If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts." (b) "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented." Either of those rules was sufficient to support the plaintiff's first estoppel, which was founded upon an estoppel arising out of representations made by Mr. George Whitechurch, assuming that there was evidence to support the finding which the jury had come to thereon. As to the first estoppel, the learned Judge had left the questions clearly to the jury, and he also left to the jury questions upon the second cause of action—namely, that founded upon the representation made by the defendants' secretary by his endorsement upon the margin of the transfers. The Lord Justice then dealt elaborately with what passed at the interviews with Mr. George Whitechurch on May 30 and 31, in regard to which there was a conflict of evidence, and said that it was for the jury to say whether the plaintiff's or Mr. Whitechurch's evidence was correct upon this point. The jury adopted that of the plaintiff, for they found that Mr. Whitechurch allowed the plaintiff to think it was all right (that was, the certificated transfers) in order to induce the plaintiff to withdraw the "opposition," and that the plaintiff in consequence did alter his position to his detriment. There was ample evidence to justify the jury in finding as they did, and the case fell within either of the rules in "Carr v. London and North-Western Railway Company" above set forth. In his Lordship's opinion the plaintiff had made out a case, as the jury believed his evidence, that a representation was made by Mr. Whitechurch to him—stated shortly—that the certificated transfers were as good as transfers

plus certificates, in order to induce the plaintiff to act thereon to his detriment, which he did. It was argued that Mr. Whitechurch had no authority to make the representation. In his Lordship's opinion Mr. Whitechurch, in getting the withdrawal of the "opposition" which brought the business of the company to a deadlock, was acting within the powers conferred upon him as managing director by the articles of association of the company. With regard to the damages, the plaintiff was entitled to have had the shares numbered in the two certificated transfers registered, and to be placed upon the register as the holder of those shares. They were worth 15s. each, which amounted to £8,325. In the circumstances of the case the damages were rightly given. It seemed to him that the estoppel proved against Mr. George Whitechurch was amply sufficient to support the plaintiff's case, and he did not propose to deal with the estoppel created by the untrue certificates given by the defendant company's secretary. It was sufficient to state that he agreed with the remarks of Lord Justice Collins upon this point. The application must therefore be dismissed, with costs.

LORD JUSTICE COLLINS read a judgment to the same effect, in which he said that as regards the alleged estoppel based on the representation of Wells, the secretary of the defendant company, in certifying the transfers from Raymond to the plaintiff, the extent of the estoppel would depend upon what was in the circumstances the fair business inference to be drawn from the certification of the transfers. The jury had found that by certification the secretary represented that he held certificates relating to those specific shares and that those shares were in the name of Raymond. The defendants contended that nevertheless they were at liberty to assert that Raymond had no title to the shares which he purported to transfer, and that consequently they could not be made to pay damages for not registering the plaintiff. They relied upon "*Bishop v. Balkis Consolidated Company*" (25 Q.B.D., 512). In his opinion that case did not support the contention. In the present case, if the fact which the defendants were estopped from denying was taken together with the facts as they were, a complete right to call for registration was established in the plaintiff. There was only one set of transfers in the case, and they were perfectly genuine and purported to transfer shares which the company had to admit were registered in the name of the transferor when the transfers were certified. Therefore the links in the chain of title were complete. In his opinion the same result was reached through what the jury had found to be the facts with regard to the representations made by Whitechurch himself. His Lordship had so far considered the case apart from fraud in Wells. But if the finding of the jury stood on this part of the case, it could not be contended that his fraud was such as to relieve the company from responsibility, either by estoppel or otherwise, for his representations. The jury had found that he made the representations fraudulently and in the supposed interest of the defendant company for the benefit of both Raymond and the defendant company. In his opinion there was evidence fit for the consideration of the jury upon this point.

LORD JUSTICE ROMER said that he had read the judgments already delivered and he entirely agreed with them.

Q.B. Div. (Lord Russell of Killowen,) 1900.
C.J., Grantham and Phillimore, JJ.) March 28.

THE QUEEN V. GRAY.*

Contempt of Court—Newspaper article—
"Scandalizing" the Court—Scurrilous abuse
of a Judge at Assizes.

Judgment in this case was delivered.

The Attorney-General (Sir Richard Webster, Q.C.) and Mr. H. Sutton appeared for the Public Prosecutor; and Mr. Hugo Young, Q.C., and Mr. Tangye for the defendant; Mr. Arthur A'Beckett held a watching brief for the committee of the London district of the Institute of Journalists.

THE LORD CHIEF JUSTICE said,—In this matter the Attorney-General, on Friday last, moved for a rule calling on Thomas Lancaster to show cause why he should not be committed for contempt of Court by reason of a certain article printed and published by him in a newspaper on March 16. It then appeared that Thomas Lancaster was the printer of the newspaper and the secretary and manager of a company who carried it on. Yesterday the Attorney-General informed the Court—and referred to an affidavit as evidence—that Thomas Lancaster was abroad when the article was published and it appears that he is still abroad. It was announced at the same time that Howard Alexander Gray was the editor of the newspaper and that he was the writer of the article and responsible for its publication. Howard Alexander Gray appears here in person and is represented by counsel and submits himself to the jurisdiction of the Court. The Court is therefore seized of the case against him. The facts are these:—A man named Wells was indicted for uttering and publishing indecent words and for publishing an indecent book. The case came before Mr. Justice Darling, sitting as a Court of *oyer and terminer*. The learned Judge thought fit to refer to the nature of the trial, and to the fact that the evidence was likely to be of an indecent character and unfit for publication. He thought fit to warn the Press against the publication of indecent details. In doing so, he took care not to prejudice the matter to be tried, for he pointed out that though necessarily indecent matter would be put in evidence it did not follow that the publication of it under the circumstances constituted a criminal offence. He proceeded to point out that there were means for punishing persons who did publish indecent matter. I do not think, for a moment, that the learned Judge intended to insult the Press. The warning may have been unnecessary. The learned Judge was probably unaware of the fact that no indecent matter was published in the reports of the proceedings which took place before the trial. I think he probably had in mind the popular impression—which is an erroneous impression—that newspapers enjoy the privilege of publishing with impunity anything which takes place in a law Court. On the evening of March 16 the article complained of was published. It was read by the Attorney-General (see *The Times* of March 31), and I will not now read it again. Of its character there can be no question. No one has described it in terms of stronger condemnation than Howard Alexander Gray himself, who in his affidavit admits that the terms of the article were "intemperate, improper, ungentlemanly, and void of respect due to his lordship's person and office." The article is in terms of scurrilous abuse of a Judge in his character as a Judge, scurrilous abuse in reference to the conduct of the Judge while sitting under the Queen's commission, scurrilous abuse published in a newspaper circulating in the town where the Judge was at the time sitting under the Queen's commission. It cannot be doubted that the article constitutes a contempt of Court, but as these applications are unusual, we think it right to explain more fully what does constitute a contempt of Court and to indicate the means of punishing the offence. The jurisdiction in contempt exists in the interest of the public as a safeguard of the due administration of justice. Any act done or writing published which is calculated to bring the Court or the Judge of a Court into contempt or to lower his authority is a contempt of Court. Further, any act done or writing published which is

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The first is that which is referred to by Lord Hardwicke as "scandalizing" a Judge. These propositions are subject to the important qualification that Judges and Courts are open to criticism, and if reasonable arguments and expostulations are offered against any judicial act as being contrary to the law or the public good, no Court would or could treat that as a contempt of Court. But it must be remembered that in this matter the liberty of the Press is no greater than the liberty of every subject of the Queen. No one could say that the criticism contained in this article was justifiable or was not a contempt of Court, and we must therefore deal with it as such. The jurisdiction by virtue of which we are now acting is not a newfangled jurisdiction. It is a jurisdiction as old as the common law, of which it is a part. Its history and the purpose for which it exists is treated of by Chief Justice Wilmet, then Mr. Justice Wilmot, in his "Opinions and Judgments" at page 243. The jurisdiction is one that must be exercised with great care and only in cases where the contempt of Court is clear and beyond reasonable doubt. If this is not the case we ought to leave the Attorney-General to proceed by means of a criminal information. If it had not been for the conduct of Howard Alexander Gray since the publication of the article, and if it had not been for the affidavit made by him which is before the Court, we should have thought it necessary to send Howard Alexander Gray to prison for a not inconsiderable period. But he has frankly acknowledged his responsibility, and, more, he has expressed regret for what he has done. In his affidavit he refers to the fact that other newspapers have made comments upon the same incident. I will only say as to those comments that, so far as they have been adverted to at all, they were obviously comments of a very different character. The Attorney-General has not thought fit to take action with regard to them, and they are not before us. His Lordship, having read portions of the defendant's affidavit, concluded,—Howard Alexander Gray, the judgment of the Court is that you pay a fine of £100 and further that you pay £25 in respect of the costs of these proceedings, and that you be detained, if necessary, and, if necessary, lodged in Holloway gaol, until these sums are paid.

Mr. YOUNG.—Will your Lordship allow till 4 o'clock this afternoon for payment to be made?

The LORD CHIEF JUSTICE.—Mr. Mellor will see to that.

[Solicitors—The Solicitor to the Treasury, for the Public Prosecutor: Pepper, Tangye, and Co., for Pepper, Tangye, and Winterton, for the defendant.]

Prob., Divorce, and Adm. Div. } 1900.
(Gorell Barnes, J.) } March 28.

THE STELLA.*

Railway Company—Passenger's luggage—Liability—Holder of free pass—Conditions of carriage.

Judgment was given in this motion, which came before the Court by way of appeal from a decision of the Registrar's. The motion was heard on the 19th inst., when judgment was reserved. The case arose out of the loss of the *Stella*, which belonged to the London and South-Western Railway Company, and which, on March 30, 1899, whilst on a voyage from Southampton to Guernsey and Jersey with a small

quantity of cargo and about 174 passengers, ran on to the Black Rock, near the Casquets, and sank. Her master, 18 of her crew, and 86 passengers were drowned. Many of the passengers who were saved suffered damage to themselves and to their property, and all the goods, merchandise, and other things on board were lost. Among the passengers were a Mr. Joshua Le Mare and his wife. Mr. Le Mare was an official in the employ of the London and North-Western Railway Company, and as such had obtained for himself and his wife from the London and South-Western Railway Company a free pass for the journey from London to Jersey. Mr. Le Mare was drowned in the wreck, and, though Mrs. Le Mare was saved, both her own and her husband's luggage was lost. On July 24, 1899, Mr. Justice Bucknill made a decree limiting the liability of the London and South-Western Railway Company in respect of all claims made or to be made against them arising out of damage or loss to goods and merchandise on board the *Stella* and also in respect of claims made by the legal personal representatives of the persons who lost their lives by reason of the loss of the said ship, and also in respect of claims arising out of any loss of life or personal injury occasioned thereby, upon payment into Court by the railway company of the sum of £15,404 8s., together with interest from March 30 until payment (such sum being £15 per ton for each ton of the gross tonnage of the *Stella*), under section 503 of the Merchant Shipping Act, 1894. Mr. Justice Bucknill, by his judgment (which is reported in *The Times* for July 25, 1899), declared that the railway company were entitled to limit their liability in respect of all things whatsoever, which would include personal effects and luggage. A number of claims have been put forward against the fund in Court, and amongst the claims so put forward was one by Mrs. Joshua Le Mare and her four children, under Lord Campbell's Act, for the loss they had sustained by the death of Mr. Le Mare. Mrs. Le Mare also claimed in respect of the loss of her luggage, and, as legal personal representative of her husband, for the loss of his luggage. It appeared that on the face of the free pass under which Mr. Le Mare and his wife were travelling were the words, "For conditions see back," and on the back were the words:—"This free pass is granted on the following conditions:— . . . Condition 2.—That it shall be taken as evidence of an agreement that the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass." The claim on behalf of Mrs. Le Mare and her children, under Lord Campbell's Act, was disallowed by the Registrar, having regard to the wording of the second condition of the free pass set out above. From this decision the claimants appealed, and, by consent, the question as to Mrs. Le Mare's right to claim in respect of the loss of her own and her husband's luggage was also dealt with at the hearing.

Mr. H. TINDAL ATKINSON, for the appellants, contended, with regard to the claim under Lord Campbell's Act, that the conditions of the free pass were not binding on Mr. Le Mare at all, and certainly not with respect to the sea portion of the journey. As regards the claim for the lost luggage, he contended that the conditions of the free pass could not be allowed to exonerate the company from liability in respect of goods carried by them, having regard to the provisions of section 7 of the Carriers Act, 1854, as extended by section 16 of the Regulation of Railways Act, 1868, and to section 31 of the Railway Clauses Act, 1863. He also contended that section 14 of the Regulation of Railways Act, 1868, applied to this contract, which was one of through-booking, and that under the last-mentioned section it was necessary, in order to exempt

*Reported by HUGH C. S. DUMAS, Esq., Barrister-at-Law.

the company from liability, that the conditions of the contract must be published in a conspicuous manner in the office where the through-booking was effected, and be printed in a legible manner on the receipt or freight note given by the company for the goods, and that these requirements were not complied with. He cited the cases of "*Henderson v. Stevenson*" (2 H.L., Scotch Appeals, 470), "*Watkins v. Rymill*" (10 Q.B.D., 178), "*Zunz v. the South-Eastern*" (4 Q.B., 539), "*Harris v. the Great Western*" (1 Q.B.D., 515), "*Cutler v. the North London*" (19 Q.B.D., 64), "*The Great Western v. Bunch*" (13 App. Cas., 31), "*Marshall v. the York and Newcastle*" (11 C.B., 655), and "*The Great Northern v. Shepherd*" (8 Ex., 30).

Mr. R. B. D. ACLAND, for the railway company, argued, with respect to the claim under Lord Campbell's Act, that the conditions of the free pass were binding. Here there was no contract of carriage; there was merely a licence to Mr. Le Mare to be upon the company's premises and conveyances on certain conditions. With reference to the claim for lost luggage, the conditions of the free pass also applied. The Carriers Act extension to steamboats under section 16 of the Regulation of Railways Act, 1868, had been repealed by the Railway and Canal Traffic Act of 1888. He cited the case of "*Bergheim v. the Great Eastern*" (3 C.P.D., 221).

Mr. H. TINDAL ATKINSON, in reply, referred to the case of "*Gallin v. the London and North-Western*" (10 Q.B., 212).

At the conclusion of the arguments,

MR. JUSTICE GORRELL BARNES said he did not feel much doubt about the life claim, but with regard to the luggage he would like to consider the operation of the statutes. He therefore reserved judgment.

HIS LORDSHIP, in giving judgment, stated the facts and pointed out that Mr. Le Mare was a railway official, well cognisant of the form and nature of free passes. He thought that, whether the free pass was a contract or merely a licence, there was no doubt it was issued on certain conditions, and he came to the conclusion of fact that Mr. Le Mare was being carried on those conditions. He was not able to take the view that the conditions only applied to the land portion of the journey. The condition was general in its terms and applicable to the whole of the journey. That disposed of the claim under Lord Campbell's Act. With regard to the luggage, he thought that the condition was equally binding. The Carriers Act of 1854 did not apply, because its extension to steamboats under section 16 of the Regulation of Railways Act, 1868, had been repealed by the Railway and Canal Traffic Act, 1888, and section 31 of the Railway Clauses Act, 1863, had not been incorporated with the special Acts of the London and South-Western Railway Company, which, indeed, were passed prior to that Act—viz., in 1848 and 1860 respectively. However, even if the Act of 1868 had been incorporated, he was doubtful how far it would apply in the case of free passes given without any consideration. With reference to the argument that this was a through-booking of goods and that the requirements of section 14 of the Regulation of Railways Act ought to have been complied with, in order to exempt the railway company from liability, he was of opinion that that section only applied where a fare was paid, and there was nothing in that Act to prevent the company from making such a contract as in this case. The appeal would accordingly be dismissed, and the claims for lost luggage be disallowed. The railway company would be entitled to the costs of the appeal.

[Solicitors—Willson and Norman, for the appellants; Birchams and Co., for the railway company.]

Court of Appeal (Collins and }
Romer, L.JJ.)

1900.
March 29.

STREET V. STREET.*

Arbitration—Costs—"Costs of reference"—
Reference by consent—Sum recovered less than
£50—Discretion of arbitrator.

"*Moore v. Watson*" (L.R., 2 C.P., 314)
doubted.

This was an appeal from the refusal of Mr. Justice Bigham to order a review of the taxation of certain costs. The action was brought to recover the sum of £90 alleged to be due from the defendant to the plaintiff. On a summons taken out by the plaintiff the District Registrar of Manchester made an order directing that the matter in dispute, being merely a matter of account, should be referred to the award of a named arbitrator, the costs of the action to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator made an award in favour of the plaintiff for £33, and he ordered the defendant to pay the plaintiff's taxed costs of the action and also the plaintiff's taxed costs of the reference and award. On the case coming before the District Registrar for taxation of costs, he made an order directing that, as the plaintiff had recovered a sum less than £50, the costs of the action should be taxed on the County Court scale, as provided by Order 65, rule 12, of the rules of the Supreme Court, but that the costs of the reference and award should be taxed on the High Court scale. The defendant appealed to the Judge at Chambers, and objected that the costs of the reference and award, as well as the costs of the action, ought to be taxed on the County Court scale. Mr. Justice Bigham affirmed the order of the District Registrar. The defendant appealed to the Court of Appeal.

Mr. Tindal Atkinson appeared for the defendant; Mr. A. J. Ashton for the plaintiff.

The COURT dismissed the appeal.

LORD JUSTICE COLLINS said that the defendant relied on the case of "*Moore v. Watson*" (L.R., 2 C.P., 314), which was a case of compulsory reference, and in which it was held that in a compulsory reference the costs of the reference and award were to be treated as part of the costs of the cause, and that, as the plaintiff, having recovered less than £20, was deprived of his costs of the cause by virtue of section 11 of the County Court Act (13 and 14 Vict., c. 61), he was thereby deprived of his costs of the reference and award. The defendant contended that the present case was covered by "*Moore v. Watson*"; but that case had been criticized in the subsequent case of "*Galatti v. Wakefield*" (4 Ex.D., 249). There the arbitration was by consent, and it was urged that the principle of "*Moore v. Watson*" was applicable to arbitrations by consent. But Lord Justice Bramwell said:—"Reliance has been placed upon '*Moore v. Watson*'; it seems to me that that case is quite distinguishable from that before us; but I desire to add that, as at present advised, I do not agree with the decision." Lord Justice Brett also refrained from approving of it. "*Moore v. Watson*" had been referred to again without being approved of in "*Fergusson v. Davison*" (8 Q.B.D., 470). Counsel for the plaintiff now called their attention to an earlier case of "*Holland v. Vincent*" (9 Exch., 274), in which it was distinctly held, under similar circumstances, that the costs of a reference and award were not part of the costs of the action. That case was not cited in "*Moore v. Watson*." There was the further authority of "*Forshaw v. De Wette*"

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

(L.R., 6 Ex., 200), in which it was held that the costs of the reference were on a different footing from the costs of the cause, and that, though the plaintiff was debarred from recovering the costs of the cause, he was entitled to have his costs of the reference taxed on the High Court scale. These cases seemed to him to be inconsistent with the principle at the bottom of "Moore v. Watson." This was in a sense a compulsory reference, but it also had some of the elements of reference by consent, because the person named as arbitrator could only be named by consent; and he thought the order of reference was virtually a consent order. But whether that were so or not, he was of opinion that the authorities justified them in holding that, even if it were a compulsory reference, the order appealed from was right.

LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—G. Featherstone Johnson, agent for J. A. Bradbury, Manchester, for the plaintiff; Robbins, Billing, and Co., for the defendant.]

Q.B. Div. }
(Kennedy, J.) }

1900.
March 29.

WATSON V. GRAY AND OTHERS.*

Damages—Remoteness—General loss of business.

This case, which was recently tried by his Lordship with a special jury, came on for further consideration. The plaintiff was a barge-builder at Gainsborough. The defendants carried on business as the West Hartlepool Steel and Iron Company. The action was brought to recover damages for the breach of two contracts for the sale by the defendants to the plaintiff of 400 tons of steel plates. The breach alleged was the non-delivery of the plates at the times specified in the contracts. The plates had been ordered by the plaintiff for the purpose of barges which he was then building. The damages claimed, in substance, fell under two heads. First, the plaintiff claimed the increased expenditure incurred in the building of the barges for which the plates were required by reason of the delay in delivery; secondly, the plaintiff claimed the loss of profit on other business which he alleged he would have been able to do if the plates had been delivered at the proper time and there had consequently been no delay in the completion of the barges. The defendants contended that the delay of delivery was due to causes within the meaning of a "strike" clause in the contracts, by which they were protected, and that the damages claimed were too remote; and they counter-claimed for the cost of the plates. The learned Judge left certain questions to the jury, in answer to which the jury found that there had been a breach of contract and that the plates could not have been obtained elsewhere, and after making allowance for stoppages, for which the defendants were not responsible, they awarded £633 damages under the first head. His Lordship was of opinion that the damages claimed under the second head were not recoverable in law, but, in order to avoid the possibility of a new trial, he asked the jury a further question as to the damages claimed for general loss of business. On this head the jury awarded £500 damages. The case then stood over for argument.

Mr. C. A. Russell, Q.C., Mr. P. Rose Innes, and Mr. Hildenheimer, appeared for the plaintiff; Mr. Carver, Q.C., and Mr. J. A. Hamilton for the defendants.

In the course of the arguments the following cases were cited:—"Gee v. Lancashire and Yorkshire Rail-

way Company" (30 L.J., Ex., 11); "Smeed v. Poord" (1 E. and E., 602); "Waters v. Towers" (8 Exch., 401); "British Columbia Saw Mill Company v. Nettleship" (L.R., 3 C.P., 499).

MR. JUSTICE KENNEDY, in giving judgment, said that he still held the same view as he had done when the case was before the jury. The claim arose out of a contract for the supply by the defendants to the plaintiff of steel plates which the defendants knew were wanted by the plaintiff for building certain barges which were then at such stages of construction that delivery of the plates in strict accordance with the provisions of the contracts was of the utmost importance to the plaintiff. There was, however, no evidence to show that the defendants had any knowledge of the size of the plaintiff's premises, or as to the state of his contract book, or whether he had any other contracts on hand. The jury had found that there had been a breach of contract by the defendants in not delivering the plates at the proper time, and that the plaintiff could not have got any similar plates elsewhere. With regard to the damages awarded by the jury for loss and expenditure occasioned in connexion with the barges for which, as the defendants knew, the plates were required, his Lordship was of opinion that these were matters which might be reasonably contemplated as resulting from a breach of the contract, and that it was within the competence of the jury to find the facts as they had done and to give damages in respect of these matters. But as to the claim for the loss of business generally his Lordship adhered to his opinion that that was far outside the region of damages as recognized by the law. The verdict of the jury on this head was an estimate of what the plaintiff's business ought to have produced during the time in question. That introduced all sorts of questions as to the way in which the business was carried on, the advantages or disadvantages of taking or not taking contracts at a particular time. Such a claim was purely speculative, and could not be said to have been within the contemplation of the parties, for the defendants had no knowledge as to what contracts the plaintiff had or could have had at the time in question. There would therefore be judgment for the plaintiff on the claim for £633, and for the defendants on the counterclaim for £149.

[Solicitors—Cattarns and Jelu; W. A. Crump and Son, for Turnbull and Tilly, West Hartlepool.]

Court of Appeal (Collins and }
Romer, L.JJ.) }

1900.
March 30.

EDWARDS V. THE PNEUMATIC TYRE COMPANY (LIMITED)
—THE DUNLOP PNEUMATIC TYRE COMPANY (LIMITED)
AND DU CROS.*

Practice—Pleading—Statement of claim—Embarrassing pleading.

This was an appeal from an order made by Mr. Justice Lawrance at Chambers on a summons taken out by the defendants asking that the statement of claim in the action might be struck out as embarrassing and irrelevant. The statement of claim, which consisted of 18 paragraphs, alleged (*inter alia*) as follows:—"By an agreement made on April 18, 1893, between the plaintiff of the one part and the Pneumatic Tyre and Booth's Cycle Agency (Limited) of the other part, the plaintiff agreed to grant to the said company a licence to make, use, and vend certain patents for improvements in tires. The agreement provided that the company should pay to the plaintiff a royalty of 1s. for every tire manufactured and sold by them in accord-

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

ance with the said patents, and that the licensees should use their utmost endeavour to promote the sale of such tires and advertise them in a conspicuous manner in all journals relating to bicycling in which they might advertise their business. The said company under their seal contracted in the said agreement for their successors and assigns. By divers agreements and assignments the whole of the interest of the said company had become vested in the defendants, the Dunlop Company, together with all obligations and liabilities belonging thereto. On November 14, 1893, the name of the said company was changed to "The Pneumatic Tyre Company (Limited)." In 1896 the whole of the business of the Pneumatic Tyre Company (Limited) was taken over by the Dunlop Pneumatic Tyre Company (Limited), subject to all existing contracts entered into by the Pneumatic Tyre Company (Limited) and their predecessors. The defendant companies had not used their utmost, or in fact any, endeavour to promote the sale of the plaintiff's tires. Alternatively, in May, 1896, the Dunlop Company issued their prospectus to the public inviting a subscription of four millions sterling. The defendant Harvey Du Cros was the chairman and managing director of the Pneumatic Tyre Company and managing director of the Dunlop Company. The said prospectus stated that the Dunlop Company had been formed to acquire as a going concern the whole of the assets and undertaking known as the Pneumatic Tyre Company, and that the business would be taken over subject to all existing contracts. The plaintiff said that he was entitled to all the benefits of the contract of April 18, 1893, as against the defendant companies. The plaintiff, relying upon the statements in the prospectus of the Dunlop Company and upon the knowledge of Du Cros and the Pneumatic Tyre Company that the contract was an existing one, permitted the Pneumatic Company to transfer and assign all their business and assets to the Dunlop Company to his damage. If, as alleged, the Dunlop Company had not taken over the said contract, then the plaintiff had been damaged by reason of their statement that they were taking over all existing contracts. If the allegation of the Dunlop Company was as alleged, then the plaintiff said that, by reason of the fraud or gross negligence amounting to fraud of Du Cros and the Pneumatic Tyre Company in not procuring the Dunlop Company to take over the said contract, he had suffered damage. Mr. Justice Lawrence made an order that, as against the Pneumatic Tyre Company and Du Cros, the statement of claim should be struck out as embarrassing and irrelevant and disclosing no cause of action, and that the action should be dismissed. As against the Dunlop Company he ordered that the statement of claim should be struck out, and that, if the plaintiff did not deliver an amended statement of claim within seven days, the action should be dismissed. The plaintiff appealed.

Mr. Rufus Isaacs, Q.C., and Mr. Crispe appeared for the plaintiff; Mr. Bray, Q.C., and Mr. C. E. Allan for the Pneumatic Tyre Company; Mr. Shakespeare for the Dunlop Company; and Mr. T. W. Chitty for Du Cros.

LORD JUSTICE COLLINS said that, in his opinion, the statement of claim as against all the defendants was embarrassing. As against the defendant Du Cros, he thought it disclosed no cause of action at all, and to that extent the Judge's order was perfectly right and must stand. As against the defendant companies, he thought the statement of claim, though embarrassing, might possibly be amended. The plaintiff therefore would have leave to amend, but this must be done at the plaintiff's expense, who must pay the costs of the proceedings below and of this appeal.

LORD JUSTICE ROMER concurred.

Q.B. Div. (Day and)
Lawrance, J.J.) }

1900.
March 30.

FARMER V. WILSON AND OTHERS.*

Master and Servant—Intimidation—Besetting
seamen—Conspiracy and Protection of Property
Act, 1875, sec. 7.

This was a special case stated by six justices of South Shields before whom an information laid by the appellant against the respondents under section 7 of the Conspiracy and Protection of Property Act, 1875, was heard. The information charged the respondents for that they, with a view to compelling 37 persons, named in the information, to abstain from doing certain acts which the said persons had a legal right to do, to wit remaining on board the steamship *Siren* and fulfilling engagements made by them with the Shipping Federation (Limited), wrongfully and without legal authority beset a certain place where the said persons happened to be, to wit the said steamship *Siren* and the approach thereto. The facts were as follows:—At the time of the besetting charged the *Siren* was lying moored near Jarrow Slake in the Tyne and was occupied by the Shipping Federation as a depot ship for men intending to serve as seamen on board ships belonging to members of the federation, which is an association of shipowners. The 37 persons were at the time on board the *Siren* and had entered into engagements with the federation to remain on board of her until duly engaged to ship as seamen on board vessels belonging to members of the federation, receiving in the meantime daily wages and rations from the federation. The engagements between the 37 persons and the federation were made by the federation through its officials being *bona fide* the servants and in the constant employment of the federation. Neither those officials nor the federation had at any material time a licence from the Board of Trade under section 111 of the Merchant Shipping Act, 1894, for the purpose of engaging or supplying seamen to be entered on board any ship in the United Kingdom, nor were the federation or its servants the owner, master, or mate of any ship, or *bona fide* the servant and in the constant employment of the owner, or a superintendent within that section. The 37 persons while so on board the *Siren* did not work or serve as seamen or otherwise. On the part of the respondents, it was contended that in entering into the engagements with the 37 persons the Shipping Federation had contravened the provisions of section 111 of the Merchant Shipping Act, 1894; that, therefore, remaining on board the *Siren* and fulfilling their engagements were not acts which the 37 persons, or any of them, had a legal right to do; that the relation of master and servant or employer and workman did not exist between the federation and any of the 37 persons; and that, therefore, section 7 of the Conspiracy and Protection of Property Act was not applicable to the case. On the part of the appellant, it was contended that the federation, in entering into the engagements in question, had not contravened section 111 of the Merchant Shipping Act, 1894; that remaining on board the *Siren* and fulfilling their engagements were acts which the 37 persons had a legal right to do, whether the federation had contravened the section or not; and that it was immaterial, for the purposes of section 7 of the Conspiracy and Protection of Property Act, 1875, whether or not the relation of master and servant or employer and workman existed between the federation and the 37 persons. The justices found that there was a besetting in fact with a view to compel the 37 persons

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

from remaining on board the *Siren* and fulfilling their engagements with the federation. They were, however, of opinion that the federation, in entering into the engagements with the 37 persons, had contravened section 111 of the Merchant Shipping Act, 1894, and that, therefore, none of the 37 persons were legally entitled to remain on board the *Siren* and fulfil their engagements with the federation for the purpose of being shipped on board vessels belonging to members of the federation; that the relation of master and servant or employer and workman did not exist between the federation and any of the 37 persons; and that, therefore, section 7 of the Conspiracy and Protection of Property Act, 1875, did not apply. They accordingly dismissed the information subject to the present case.

Mr. MARSHALL-HALL, Q.C., who, with Mr. Temperley, appeared for the appellant, stated that the Shipping Federation has now a licence under section 111 of the Merchant Shipping Act, and that, in view of that circumstance, he would not argue the question whether there had been a breach of that section on their part, since even if there had, that would not prevent the sailors engaged by them from having a legal right to go on board the *Siren* and remain there, and would therefore, as he contended, afford the respondents no defence to the charge against them.

Mr. ROBSON, Q.C., who, with Mr. Pilcher, appeared for the respondents, contended that the effect of section 111 of the Merchant Shipping Act was to render the whole transaction between the federation and the sailors engaged by them illegal; that the sailors had, therefore, no legal right to be upon the *Siren* for the purpose of fulfilling their engagements with the federation; and that the respondents had accordingly not been guilty of the offence charged.

The COURT allowed the appeal, and remitted the case to the justices with directions to convict.

MR. JUSTICE DAY said he was clearly of opinion that the magistrates were wrong. The men engaged by the federation had been beset with a view to compel them to abstain from doing acts which they had a legal right to do. They had a legal right to be upon the ship, to stay there, and to receive their wages if they could get the money. There might have been a breach of the statute by the federation, but that would not prevent the men from having a legal right to be on the ship.

MR. JUSTICE LAWRENCE concurred.

[Solicitors—Botterell and Roche, for the appellant; Patkinson and Brewer, for Robert Jacks, South Shields, for the respondent.]

Chan. Div. } 1900.
(Stirling, J.) } March 31.

IN RE GOY AND CO. (LIMITED)—FARMER V. GOY AND CO. (LIMITED).*

Company—Debentures—Transferee of debentures—Debt due to company from transferor—Conditions of debentures.

This was a debenture-holder's action. The question now before the Court was whether a Mr. Robey, who, since the judgment in the action, had become the transferee of certain debentures in the company, was entitled to receive anything in respect thereof until payment had been made of a sum which his transferor had been ordered to pay to the liquidator of the company. The debentures in question formed part of an issue of 60 debentures of £100 each made in October, 1897. By each debenture the company charged its undertaking and all its property, both present and future, including

its uncalled capital. On May 12, 1898, a resolution was passed for the voluntary winding up of the company, and a Mr. Doggett was appointed liquidator. Upon the passing of this resolution the principal sums secured by the debentures became payable. On June 9, 1898, Mr. Doggett was appointed receiver in the action, and on June 11, 1898, the usual judgment in a debenture-holder's action was pronounced. In August, 1898, J. H. Chandler, who was a debenture-holder and had been a director of the company, applied to Mr. Robey for an advance on his debentures. On September 1, 1898, Mr. Robey's solicitor wrote to Mr. Doggett, the liquidator and receiver, making inquiries about the debentures and asking whether there were any cross-claims by the company against Mr. Chandler. On September 2 Mr. Doggett sent a letter answering some of the inquiries, but taking no notice of that as to cross-claims. On September 14, 1898, Mr. Robey made an advance to Chandler on the security of a mortgage and transfer of the debentures. On September 22, 1898, Mr. Robey's solicitor sent the transfer to Mr. Doggett for registration. Mr. Doggett referred the matter to the solicitor acting in the proceedings, but that gentleman thought that, having regard to the judgment in the action, there was a difficulty as to registration, and after some correspondence Mr. Robey's solicitor gave Mr. Doggett formal notice requiring him to register the transfers. Ultimately the matter was brought before the Master, who directed that the receiver should enter a note of the transfers on the register, but should not enter the transferee's name thereon. In October, 1898, Mr. Doggett discovered that Mr. Chandler had been guilty of misfeasance in respect of a sum of £300, which had come to his hands as a director of the company, and on March 16, 1899, Chandler was ordered to pay that sum to the liquidator. Under these circumstances the above-mentioned question now came before the Court upon the further consideration of the action.

Mr. Upjohn, Q.C., and Mr. C. T. Mitchell appeared for the receiver; and Mr. C. E. Jenkins, Q.C., and Mr. A. & B. Terrell for Mr. Robey.

MR. JUSTICE STIRLING, in giving judgment, said that Mr. Robey had clearly become transferee for value and in good faith, and was fully entitled to whatever benefit might accrue from that position. If Chandler had remained the owner of the debentures he would, on the one hand, have been entitled to receive out of the property comprised in his debentures a dividend thereon, and on the other he would have been liable to contribute to that same property a sum of £300. It had been repeatedly held inequitable that a person entitled to a share of a fund should receive anything in respect of that share without paying what he might be bound to contribute to the same fund. Under such circumstances the Court said in effect to the person claiming to be paid, "You have in your own hands that which is applicable to the payment, pay yourself out of that." That had been done on the distribution of the residuary estate of a testator where a person entitled to a share was also indebted to the estate; "*Willes v. Greenhill*" (29 Beav., 376), "*Re Akerman*" ([1893] 1 Ch., 212), "*Re Watson*" ([1896] 1 Ch., 958). Where two companies were in liquidation and one held shares in the other, and was at the same time a creditor, it was held that the creditor could not take any dividend until all calls due on the shares were paid; "*Re Auriferous Properties*" ([1898] 2 Ch., 425), and "*In re Milan Tramways Company*" (L.R., 25 Ch.D., 587), where Lord Justice Cotton said that probably the principle was applicable to the distribution of a fund to which debenture-holders were entitled. In his Lordship's opinion it was applicable to the present case, so that Chandler could not

*Reported by G. A. STARKEN, Esq., Barrister-at-Law.

have claimed payment of a dividend until he had paid the £300. Then was his transferee in a better position? As a general rule the transferee of a chose in action stood in no better position than his transferor. There was nothing, however, to prevent a debtor from contracting with his creditor that he would not avail himself against a transferee of any rights which he might possess against the creditor or any assignee of his. See "*Re Agra and Masterman's Bank*" (L.R., 2 Ch. App., 391) and "*Re Blakeley Ordnance Company*" (L.R., 3 Ch. App., 154). It was contended that such a contract existed in the present case. His Lordship then referred to the conditions of the debentures, which provided, *inter alia* (4), that every transfer must be delivered at the registered office of the company with a fee of 2s. 6d. and such evidence of identity or title as the company might reasonably require, and thereupon the transfer would be registered and a note of such registration would be endorsed thereon. Condition 6 provided that the principal and interest secured by the debentures would be paid without regard to any equities between the company and the original or any intermediate holder thereof. It seemed to his Lordship that condition 4 imposed an absolute obligation on the company to register a transfer upon the requirements of the condition being fulfilled. It was suggested that that only applied while the company was a going concern, but having regard to section 131 of the Companies Act, 1862, his Lordship thought that the right to transfer and to have the transfers registered was not affected by the winding up. It was said, however, that the equity which was set up was not that of the company but of the other debenture-holders; and that the right to transfer could not be insisted on after judgment had been given in a debenture-holder's action, at all events to their prejudice. The title of the debenture-holders to the £300 was derived from the fact that that sum was part of the property of the company. The debenture-holders all held their debentures under the same conditions, one of which was that the moneys secured by any debenture were to be paid without regard to any equities between the company and the original or any intermediate holder. That was a stipulation for the benefit of the debenture-holders, and was one to which debenture-holders attached great importance. The debenture-holders took this piece of property subject to the same obligations as the company, and they no less than the company were precluded by the conditions from asserting this equity against a transferee. His Lordship could not see that the judgment in the action affected the right to transfer, and he held that Mr. Robey was entitled to receive the dividend payable in respect of Mr. Chandler's debentures.

[Solicitors—S. J. R. Stammers; T. Lamartine Yates.]

Q.B. Div. (Day and)
Lawrance, J.J.)

1400.
March 31.

BEALE V. BOND.*

Principal and Agent—Commission—House agent
—Finding a purchaser—Purchaser accepted—
Liability of principal.

This was an appeal from the Deputy Judge of the City of London Court. The claim was for a deposit of £25 paid to the defendant, a house agent, as stakeholder on the purchase of certain houses in Howland-street, Fitzroy-square. The plaintiff was the owner of these houses and retained the services of the defendant to introduce a purchaser, giving him the following commission note:—"April 26, 1899, 48 and 50, Howland-street, Tottenham-court-road. I agree to accept a sum

of £1,150 for the above property and you are to be at liberty to receive anything over and above that as a commission, it being understood that I am to receive the full sum of £1,150 without deduction, except of course apportionments of outgoings. Completion to be within a month and deposit of 10 per cent. to be paid over. Signed, C. W. BEALE. To Messrs. Henry Bond and Son." The time on which the purchase was to be completed was subsequently extended over July 19 by mutual consent. The defendant, having procured this commission note, made a contract dated July 9, on behalf of the plaintiff, with one David Rosenberg, for the purchase of the houses for £1,250, of which £25 was paid as deposit. The contract contained provisions fixing dates for delivery of the abstract of title, requisitions and answers thereto, date of completion, and other matters, and continued:—"If the purchaser shall fail to comply with any of the conditions herein contained the vendor may, without tendering any assignment, either enforce specific performance of this contract or, by notice in writing to be given to the purchaser, declare the said deposit money to be forfeited, and thereupon the said deposit money shall be forfeited to the vendor as liquidated damages and the contract shall be at an end." There was evidence that the plaintiff accepted Rosenberg as a purchaser and communications passed between them upon that footing. Rosenberg, however, did not complete the purchase, and the deposit of £25 became forfeited, and it being in the hands of the defendant the plaintiff claimed it from him. The defendant counterclaimed and pleaded as a set off that he was entitled (1) to £100 on the signing of the agreement between the plaintiff and Rosenberg or (2) to a *quantum meruit* for work done by him in finding a purchaser. The action was tried before a Deputy Judge and a jury, who found that the contract with Rosenberg was a *bona fide* contract and had been entered into on the defendant's introduction. They also found that, in case the defendant was not entitled to his commission, five guineas was a fair remuneration for the work done by him in finding a purchaser. The Deputy Judge gave judgment for the plaintiff for £25 on the claim, and for the defendant for £5 5s. on the counterclaim. The defendant appealed.

Mr. ARTHUR POWELL, for the defendant, cited "*Fisher v. Drewitt*" (48 L.J., Q.B. 32) and "*Passingham v. King*" (14 *The Times* L.R., 392) in the Court of Appeal, and contended that the defendant had earned his commission when Rosenberg was accepted as a purchaser.

Mr. HOLLOWAY, for the plaintiff, argued that the contract was not an absolute contract to purchase the houses as it contained an alternative clause by which the vendor might either sue for specific performance or accept the deposit and rescind the agreement.

The COURT held that the commission of £100 became due when Rosenberg was accepted as a purchaser and that the case was covered by "*Passingham v. King*" (14 *The Times* L.R., 392), and gave judgment for the defendant on the claim and also on the counterclaim for £75, being the amount of his commission less the £25 deposit.

Court of Appeal (Lindley, M.R.,)
Rigby and Vaughan Williams, }
L.JJ.)

1900.
April 2.

DISDISMEIM V. THE LONDON AND WESTMINSTER BANK
(LIMITED).*

Lunatic—Person resident in Belgium—"Administrateur provisoire" in lunacy—Action to obtain securities from English bank.

*Reported by W. HURSEY GRIFFITH, Esq., Barrister-at-Law.

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

Decision of North, J. (15 *The Times* L.R., 457), dismissing the action on the ground that there was no legal finding of insanity, reversed.

This was an appeal from a decision of Mr. Justice North's, reported 15 *The Times* L.R., 457. The action, which was in the nature of a common law action for detinue, raised questions of private international law, relating to the right of a person who had been appointed by a Belgian Court "administrateur provisoire" in lunacy to have handed over to him securities deposited with the London and Westminster Bank amounting in value to between £300,000 and £400,000. The action related to property which, by the terms of a marriage contract between the late Benedict Leopold Goldschmidt and his wife, whose maiden name was Marie Woog, was held by husband and wife under the Swiss system of legal community. The documents held by the bank comprised certificates of shares and securities and bonds and scrip to bearer, representing investments in English, colonial, American, and foreign companies and Government securities which had been lodged by M. Goldschmidt in his lifetime. The income was collected by the bank and placed to the credit of a current account M. Goldschmidt kept at the bank. M. and Mme. Goldschmidt were married at Geneva in 1866, M. Goldschmidt being at the time a German merchant resident at Mayence, his wife being Swiss. Subsequently to the marriage they went to Brussels and resided there for some 25 years, down to the death of M. Goldschmidt in 1892. He made a will bequeathing one-fourth of the half of the common property to which he was entitled to his wife and giving her a life interest in another quarter. The other parts became distributable among their four children. Mme. Goldschmidt was appointed administrator of her husband's personal estate in England. She satisfied the shares of her three elder children, but the share of the youngest had not been handed over to him because he was under age. The bulk of the property in the custody of the bank was either left or re-deposited with them. Mme. Goldschmidt became of unsound mind and was placed under the care of a Dr. Hertz at Bonn, in Germany, where she still resided. Under the Belgian law two proceedings can be adopted in the case of a person of unsound mind, by "interdiction" or "administration." The former, it appears, is analogous to a formal finding by a jury in this country of lunacy, which results in the appointment of a committee of the estate of a lunatic; the latter a proceeding in which a mere receiver in lunacy is appointed. The family adopted the latter procedure, and M. Didisheim was appointed "administrateur provisoire" accordingly, his position being apparently similar to that of a receiver in lunacy in this country. The letters of administration of the estate of her husband, which had been granted to Mme. Goldschmidt, were impounded, and administration *de bonis non* granted to M. Didisheim. The bank considered that M. Didisheim could not give them a valid discharge and refused to part with the securities. This action was brought by M. Didisheim and by Mme. Goldschmidt, suing by him as her next friend. The youngest son—Robert, now of age—of Mme. Goldschmidt, who had not received his share of his father's estate, was made a defendant. Mr. Justice North held upon the authority of "*In re Barlow*" (36 Ch.D., 287) and "*In re Brown*" ([1895] 2 Ch., 666) that, as the lady had not been found lunatic by a foreign Court of competent jurisdiction, M. Didisheim could not compel the bank to hand him over the securities in this country. He therefore dismissed the action. The plaintiffs appealed.

Mr. Haldane, Q.C., and Mr. Henry Fellows were for

the plaintiffs; Mr. Alfred Fellows was for the defendant Robert Goldschmidt in the same interest; Mr. Henry Terrell, Q.C., and Mr. McSwiney were for the bank.

The appeal was heard last month.

The MASTER of the ROLLS delivered the considered judgment of the Court allowing the appeal. He said:—In consequence of the arguments addressed to us we will make a few prefatory observations on actions at law and suits in Chancery by persons of unsound mind not so found by inquisition. If before the Judicature Acts an action at law had been brought in the name of such a person to enforce a purely legal demand—say an action on a covenant or an action of assumpsit or of debt detinue or trover, there would have been no defence to the action on the ground that the plaintiff on the record was of unsound mind. No plea in bar or in abatement applicable to such a case is to be found in the books. Such an action might, perhaps, have been stayed on an application showing that the action was an abuse of the process of the Court—i.e., was brought in the plaintiff's name without his authority (see "*Waterhouse v. Worsnop*," 59 L.T., N.S., 140, which, however, was since the Judicature Act). Such an action could certainly have been stayed by proceedings in lunacy and the appointment of a committee. Unless the action were stayed it would proceed to trial in the ordinary way, and on proof of the plaintiff's case judgment would have been entered for the plaintiff on the record and execution issued accordingly. (See "*Dennis v. Dennis*," 2 Wms. Saund., §34.) If the plaintiff had sued by attorney payment or delivery to him would have discharged the defendant or sheriff. If the plaintiff had sued in person a difficulty would obviously have arisen. An application to stay execution on payment into Court might, we apprehend, have been successfully made, or the Court could, as in "*Gleddon v. Trebble*" (9 C.B., N.S., 367), have ordered payment to his next friend, and so the necessity of instituting proceedings in lunacy would be avoided. (See generally 1 Coll. Lunacy, §39, &c.) In Chancery it had long been the settled practice to institute suits in the names of lunatics not so found by inquisition by a next friend. Applications to stay such suits were also frequently made with success. See generally on such suits "*Jones v. Lloyd*" (L.R., 18 Eq., 265); "*Beall v. Smith*" (L.R., 9 Ch., 85); "*Farnham v. Milward*" ([1895] 2 Ch., 730); "*In re George Armstrong and Sons*" ([1896] 1 Ch., 536). The alleged lunatic could make such application himself if he asserted his sanity, and any one willing to act as next friend could make it in the alleged lunatic's name, as in "*Howell v. Lewis*" (61 L.J., Ch., 89). Even the defendant might apply. See "*Wartnaby v. Wartnaby*" (Jac., 377); and "*Porter v. Porter*" (37 Ch.D., at p. 429), per Lord Justice Cotton. When a lunatic was so found by inquisition the Court of Chancery would stay a suit instituted in his name until the appointment of a committee. See "*Hartley v. Gilbert*" (13 Sim., 596). We are not aware of any case in which a foreign curator has been held to be an improper next friend of the person whose curator he is. Security for costs from such a next friend might be required if he was resident abroad; but no suit could be stayed simply because the next friend filled an official position in a foreign country. The notion that either at law or in equity an action or suit cannot be successfully maintained, if brought in the name of a lunatic not so found by inquisition without the sanction of the Crown, is not supported by authority or sound principle. If this notion were true, the orders for payment made in "*In re Barlow*" (36 Ch.D., 287) and other cases, which will be referred to presently, would have been clearly wrong. Such orders were not made in lunacy, but by the Court of Chancery, which had no lunacy

jurisdiction. It is well settled that until the Crown interferes, or at all events until its interference is invoked by a petition for an inquisition or by an application for the appointment of a receiver, the prerogative of the Crown has no practical legal effect. In other words, no person can avail himself of that prerogative without taking the proper steps to induce the Crown to exercise it. This point was examined by this Court last summer, when Seager Hunt's case was before it. In the present case no lunacy proceedings have been taken in this country; nor was any attempt made to stay the action. Having made these preliminary remarks we pass to the question more immediately before the Court. This action is by M. Didisheim and by Mme. Goldschmidt, by him as her next friend. The object is to obtain a large sum of cash and also share stock and debenture certificates of great value from the defendants. The defendants are quite ready to pay and deliver them up provided they can safely do so. The bulk of the property sought to be recovered formed part of the assets of M. Goldschmidt, a deceased gentleman, domiciled and resident in Belgium. He died some time ago, and his widow, the plaintiff, Mme. Goldschmidt, obtained letters of administration with his will annexed. By her directions most of the property in the hands of the defendants has been placed in their books in her name. She is domiciled in Belgium and is resident abroad. She has become insane and is in a foreign lunatic asylum. M. Didisheim has been duly appointed her "administrateur provisoire," with power to collect and get in all her personal estate. He is also now the legal personal representative of M. Goldschmidt, having obtained letters of administration to his personal assets left unadministered by Mme. Goldschmidt. He and she together, therefore, are clearly entitled to all the property sought to be obtained from the defendants. They do not deny M. Didisheim's right as administrator to such assets of the deceased as have not become Mme. Goldschmidt's property; but they say that owing to what she did when some all his assets in their hands became hers, and they are now accountable to her alone for them. As to the cash and certificates, which are the property of Mme. Goldschmidt, the defendants say they cannot safely hand them over to M. Didisheim, as the ownership of them is still vested in her and has not been legally vested in M. Didisheim. Mr. Justice North has held that unless an order is made in lunacy requiring or authorising the defendants to deliver the property of Mme. Goldschmidt to M. Didisheim they cannot safely deliver such property to him. The relations and friends of Mme. Goldschmidt are particularly desirous of avoiding any formal adjudication of lunacy, and this appeal has been brought on purpose to avoid the necessity of such an adjudication. The demand of the plaintiffs, it will be observed, is a purely legal title; there is no trust in the case. Under the old practice one action could not have been maintained to enforce a claim by M. Didisheim as administrator and also a claim by Mme. Goldschmidt to recover her own property. Two separate actions of detinue or trover would have been necessary. Our modern practice, however, is less rigid, and the defendants have raised no objection to the two claims being joined in one action. The Court, therefore, can properly entertain the action and decide the real question raised by the defendants, which is whether in an action brought by M. Didisheim in his own name and in the name of Mme. Goldschmidt and as her next friend the High Court ought to make an order for the delivery to him of her property. The question may be put in another way, whether he is entitled in an action so framed to demand delivery of her property to him. We are of opinion that he is. In "Scott v. Bentley"

(1 K. and J., 281) a person resident in Scotland was entitled to an annuity charged on land in England and secured by a covenant entered into with himself. The annuitant became lunatic, and a curator bonis was appointed according to Scotch law. Whether he was judicially declared a lunatic does not distinctly appear. Nor does it appear that the ownership of his personal property was by Scotch law divested from him and vested in his curator. We rather infer that the curator merely had power to collect it and get it in. The annuity being in arrear the curator brought a suit in Chancery in his own name against the executrix and devisee in trust of the grantor of the annuity for payment of the arrears and for payment of the annuity in future. It is to be observed that the demand of the plaintiff was a purely legal demand. He sought to enforce the legal right of the annuitant under the covenant and grant. But the arrears seem to have been set apart as a trust fund, and this was held enough to give the Court of Chancery jurisdiction to entertain the suit. The Vice-Chancellor Wood made an order as prayed by the bill. This decision has been much questioned; but unless it be that the suit ought in strictness to have been in the name of the lunatic by his curator as next friend we see no ground for doubting the correctness of the decision. "Scott v. Bentley" has been questioned mainly because it proceeded to some extent on the supposed authority of a decision in the House of Lords on an appeal from Scotland ("In re Morison's Lunacy"). This case appears to have been to some extent misunderstood. The Vice-Chancellor refers to it as an unreported case cited in "Johnstone v. Beattie" (10 Cl. and Fin., 42) and in "Sill v. Worswick" (1 H. Bl. 677-8). In "Johnstone v. Beattie" (see 10 Cl. and Fin., p. 97) Lord Brougham refers to "Morison's case" as cited in the note to "Sill v. Worswick," and as an authority for the proposition that the legally appointed curator in one country was held entitled to act in another. This it is plain was also Vice-Chancellor Wood's view of "Morison's case," as is apparent from his remark on page 285 that in "Morison's case" the curator sued alone. But the reports of that case to which we have referred in 1 Paton, 454, and Mor. 4,595, show that the decision of the House of Lords in "Morison's case" did not go that length, and Lord Campbell was not satisfied that it did. (See 10 Cl. and Fin., 133.) We understand the decision as showing that a committee appointed in England of a Scotchman resident in England could not sue in Scotland simply in his own name and as committee for the recovery of the lunatic's personal estate; but that such committee could sue there in the name of the lunatic for the recovery of the lunatic's personal estate. "Morison's case," therefore, did not go so far as Vice-Chancellor Wood thought, but it goes a long way to show that the proceedings in this action are properly framed; for this action is brought, not only by M. Didisheim in his double capacity of administrator of Mme. Goldschmidt and curator of Mme. Goldschmidt, but also by her in her own name suing by M. Didisheim as her next friend. In "Scott v. Bentley" Vice-Chancellor Wood did not by any means base his judgment only on the supposed decision in "In re Morison," and after making every allowance for his misapprehension of that case, "Scott v. Bentley" was, in our opinion, well decided, although we cannot help thinking that if Vice-Chancellor Wood had known the form of the order made in "Morison's case" he would have directed the bill to be amended by making it in form a bill by the lunatic by his curator and next friend. In "Avilon v. Furnival" (1 C. M. and R., 277) Baron Parke, page 286, expressed a clear opinion to the effect that a foreign

curator could sue here in his own name for goods and chattels of a person of unsound mind. "*Scott v. Bentley*" is consistent and is really supported by several other cases cited by Mr. Haldane, and of which "*In re Tarratt*" (51 L.T., N.S., 310); "*In re de Linden*" ([1897] 1 Ch., 453); and "*Thiery v. Chalmers*" ([1900] 1 Ch., 80) are the most recent and important. In "*In re de Linden*" an application was made on behalf of a Bavarian lunatic lady for payment out to two foreign gentlemen of some money in Court belonging to her. The application was by her in her own name by her next friend, who was a Bavarian Judge and one of two persons appointed by a Bavarian Court to take charge of her and her property. The order was made as asked—i.e., for payment, not to her, but to the two persons appointed as above mentioned. The lady had been judicially declared lunatic, but there was no judicial vesting of her property in the curators. "*Thiery v. Chalmers*" ([1900] 1 Ch., 80) was a similar case. The lunatic there was a French subject declared lunatic in France and whose property was placed under the care of a duly-appointed tuteur. An action was brought in this country by the lunatic by a next friend and by the tuteur as a co-plaintiff to recover money and securities in the hands of the lunatic's bankers. An order was made for the delivery of them to the tuteur. Mr. Justice Kekewich thought that the tuteur might have sued alone in his own name. He regarded the decision in "*In re Brown*" ([1895] 2 Ch., 666) as an authority for so holding, inasmuch as both in "*In re Brown*" and in "*Thiery v. Chalmers*" the lunatic had been formally so declared by the foreign Court. But "*In re Brown*" was not an action; it was an application to the Court in Lunacy under section 134 of the Lunacy Act, and we doubt whether the action of "*Thiery v. Chalmers*" would have been rightly framed if brought by the tuteur as sole plaintiff. An alteration in the status of a lunatic appears to be necessary in order to enable the Court in Lunacy to exercise the jurisdiction conferred upon it by section 134 of the Lunacy Regulation Act; but it by no means follows that persons whose status has not been altered by their being judicially declared lunatic cannot sue by themselves by a next friend for the recovery of their own property. "*In re Knight*" ([1898] 1 Ch., 257) turned on the discretion which the Court had under section 134 of the Lunacy Regulation Act, and throws no real light on this case. The only difficulty in the way of the plaintiffs is occasioned by "*In re Barlow*" (36 Ch.D., 287). In that case a colonial statute vested in a master in lunacy the care and custody of the property of lunatic patients—i.e., of persons confined in lunatic asylums but not judicially declared lunatic. A colonial lady, confined in a lunatic asylum in the colony, was entitled to some funds in the hands of trustees in this country, and the colonial Master in Lunacy claimed these funds. The trustees paid them into Court under the Trustee Relief Act. The colonial master and the lady by her next friend presented a petition for the transfer of the funds in Court to the colonial Master in Lunacy. The Court made an order for the payment out of capital of some past maintenance and for the payment of the income to the master whilst the lady continued in an asylum. But the Court would not order the rest of the corpus to be paid over to the master. It is to be observed that the general statutory authority given by the colonial Act to the master as an officer of the colonial Court was not supplemented by any order giving the master any express authority as the lunatic's attorney to get in any property not locally within the jurisdiction of the Court; and as we understand Lord Justice Cotton's judgment he was much influenced by the omission of any such order. If the master's authority derived from the colonial statute was

unsatisfactory, it is obvious that such authority was not improved by his assumption of the right to use the lunatic's name. In that view of the case the fact that the lunatic petitioned in her own name by her next friend did not remove the difficulty. Having decided that the Master was not entitled as a matter of right to demand payment to himself, it became necessary for the Court, acting as trustees, to consider what it was the duty of trustees to do in such a case as that before them, and they considered that in such a case the trustees ought not to part with the trust fund without seeing to its application, and ought not to part with the fund to the Master further than they were satisfied that the interests of the lunatic rendered it necessary to do so. This was the view taken in "*In re Garnier*" (13 Eq., 532), where, however, the lunatic was a domiciled Englishman, and we see no reason to dissent from it where the authority of the foreign curator to get in the trust property is regarded by the Court as unsatisfactory. But where it is not the considerations which weighed with the Court in "*In re Barlow*" do not arise. A person absolutely entitled to trust money is entitled to have it paid to him or to any one duly appointed by him to receive it, and the trustees or the Court acting for them have no discretion to refuse payment. The same principle is, in our opinion, applicable to the case in which trust money belongs to a lunatic and a person is duly appointed by a competent authority to get in such money for the lunatic. If the title of the lunatic is clear, and the authority to act for him is equally clear, we fail to see what discretion the Court, acting for the trustees, has in the matter. The trustees may properly say that they cannot safely act without the sanction of the Court, but we fail to see what other discretion there is. Where the lunacy jurisdiction is being exercised, as it was in "*In re Stark*" (2 Mac. and G., 174), other considerations at once arise. If, as in "*In re Garnier*," the lunatic were an Englishman temporarily abroad, we should feel considerable difficulty in holding that the Courts of this country were bound to recognize the title of a foreign curator to sue in this country. But here we are dealing with an alien domiciled abroad and over whom the Courts of this country have no jurisdiction except such as is conferred by the fact that she has property here. All that the Court here has to do is to see that the person claiming it is entitled to have it. In this case the order of the Belgian Court of November 5, 1899, removes all doubt as to M. Didisheim's authority to take these proceedings and to obtain and give a good discharge for the property which he seeks to recover. On general principles of private international law, the Courts of this country are bound to recognize the authority conferred on him by the Belgian Courts, unless lunacy proceedings in this country prevent them from doing so. What ought to be done in lunacy has not to be considered, and we say nothing on that subject. In our opinion, the appeal should be allowed, and an order be made as asked by the claim. But the plaintiffs must pay all the costs; for the bank was perfectly justified in not complying with M. Didisheim's demands without an order of the High Court—i.e., without proving his title in such a way as to make it unreasonable for the bank to refuse to recognize it. Under the old practice an action of detinue or trover might have failed; for under the general issue the defendants could have given in evidence facts excusing delivery to a person rightfully entitled, but whose title was not such as the defendants could safely recognize. (See per Justice Blackburn in "*Hollins v. Fowler*," L.R., 7 H.L., 766, and the cases there cited.) But in practice if in such a case the plaintiff proved his title to the satisfaction of the Court and paid the defendant's costs,

the plaintiff always obtained delivery. Under the modern practice, if this case had been tried by a jury there would be no difficulty, we apprehend, in ordering delivery to M. Didisheim, and in a proper case like this giving the defendants the costs of the action—i.e., there would be good cause for making the plaintiffs pay the costs, although they succeeded in establishing their title. (See “*Gleddon v. Treble*,” 9 C.B., N.S., 367.) If the action were tried without a jury, whether in the Chancery Division, as this was, or in the Queen’s Bench Division, the costs would be in the discretion of the Judge, and there would be no difficulty in ordering them to pay the costs. However tried, any other result would be very unjust. Mr. Terrell suggested that the order of the Court would not protect the bank if the lunatic were to recover and were to sue the bank for her money and property after the bank had paid and delivered it to M. Didisheim. We do not entertain any misgiving on this point. The High Court clearly had jurisdiction to entertain the action and to decide the questions raised in it and to make the order which this Court now declares it ought to have made; and this Court clearly has jurisdiction to entertain this appeal. This being clear, and the Belgian Court having had jurisdiction to make the order which it made, the bank would unquestionably have a perfectly good defence to any action which the lunatic could bring against it, either by another next friend or by another official curator, or by herself if she should recover.

[Solicitors—Stibbard, Gibson, and Co.; Travers-Smith, Braithwaite, and Robinson.]

Q.B. Div. (Ridley) 1900.
and Darling, JJ.) April 2.

THE BUXTON LIME FIRMS CO. (LIMITED) V.
JAMES HOWE.*

Master and Servant—Disputes between employers and workmen—Truck Act, 1896—Employers and Workmen Act, 1875.

This was a special case stated by justices of the peace of the Bakewell division of the county of Derby. The following facts were set out in the case:—On January 2, 1899, the respondent, James Howe, entered into the service of the appellants, and was employed by them under an agreement of that date signed by him, and by William Brierley on behalf of the company. By the terms of the agreement the respondent agreed to serve the company exclusively for 12 calendar months from January 1, 1899, until December 31, in the work of getting limestone and breaking it to the required size. The agreement contained a clause which said that the workman should be “subject to a fine, or penalty, or drawback of 2s. 6d. for each and every working day on which he was absent without leave, except in case of sickness.” The company agreed to pay the workman, on the usual fortnightly pay days, the sum of 7½d. for every 2,240lb. of limestone got and properly loaded into the company’s wagons, and the agreement concluded “in the event of the breach of any of the conditions of this agreement on the part of the workman then, and in every such case, it shall be lawful for the company to dismiss the workman without any notice or without being liable to make any payment by way of damages or otherwise for dismissal without notice, but all wages earned shall be paid up to the time of such dismissal, less any amount then due for fines, penalties, or drawbacks for absence as aforesaid, should the company insist thereon.” A notice setting out the terms of the contract as to absence without leave and the penalties therefor, was posted up in the

cabin where the respondent had his meals. On September 13, 1899, the respondent applied for leave of absence from his work on the 14th, 15th, and 16th of September, and leave was granted for the first and refused for the other two days. On hearing that leave on the 15th and 16th was refused, the respondent said he should take French leave, and he absented himself without permission on the days in question. By reason of his absence the company sustained a greater loss than 2s. 6d. for each day he was absent. The respondent after this continued in the employment of the appellants, and received wages from them, but no demand was made upon him for any penalties under the agreement for absenting himself from his employment, or for damages consequent thereon, until he received the particulars of claim attached to the summons to appear before the magistrates. The company preferred their claim under the Employers and Workmen Act, 1875, and claimed 5s. as a fine or penalty, or alternatively by way of damages, from the respondent for having absented himself from his work on the 15th and 16th of September, 1899, being at the rate of 2s. 6d. a day. It was contended on behalf of the respondent before the magistrates that the agreement brought the case within the Truck Act, 1896. That Act provided, under section 1, subsection 2, clause (b), that the giving of particulars in writing was to be a condition precedent to the levying of a fine or penalty such as was claimed—that the appellants had their remedy for the respondent’s misconduct in their own hands by deducting the penalties from his wages as provided by the agreement; and that their only remedy was by so deducting the amount claimed after complying with the requirements of the Truck Act. For the appellants it was argued that the case was not governed by the Truck Act, but that if it were the service of the claim in the form of particulars attached to the justices’ summons was sufficient notice under the Act, and that the deduction from the respondent’s wages was not obligatory. The justices held that the appellants by their agreement with the respondent had the remedy for the offence in their own hands, and that their proper course was to have deducted the penalty from the next payment of wages as they had done in similar cases; that the agreement came within the Truck Act and that the proceedings to recover a penalty under it could only be brought after a strict compliance with the terms of that Act; that, in their opinion, section 1, subsection 2 (b), of the Truck Act, 1896, had not been complied with, and that the particulars of claim attached to the summons was not a compliance with the Act, and they, therefore, dismissed the summons. The question for the Court was whether the justices were right in dismissing the summons on those grounds; if they were wrong their order was to be quashed and the case was to be remitted to them.

Mr. Hextall appeared for the appellants; and Mr. H. Jacobs for the respondent.

The COURT reversed the decision of the justices.

MR. JUSTICE RIDLEY, in giving judgment, said he thought the justices were wrong in their decision. It was necessary to bear in mind the legislation on this matter. The Employers and Workmen Act, 1875, gave to a Court of summary jurisdiction the power to determine disputes between employers and workmen, and under that Act a summons was taken out in the present case. The Truck Act, 1896, contained certain provisions with regard to contracts made between employers and workmen which contained agreements under which deductions were to be made in the sum contracted to be paid as wages. That Act said that such contracts should not be made unless certain forms were complied with; the terms of the contract must be contained in a notice to be put in some place open to the workmen, and there were other conditions

*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

which had been complied with in the present case. The second subsection of the first section said that the employer was not to make any deductions unless they were made in accordance with the contract and unless particulars in writing were given to the workman. He thought that the justices had gone wrong in this way; they had supposed that because the Truck Act contained these provisions it ousted the jurisdiction of the magistrates to determine disputes between employers and workmen in all cases where the contract in question fell within the Truck Act. In other words that employers and workmen must make use of it in all contracts which provide for a deduction in wages, and if they did not comply with the provisions of the Truck Act the employers were without a remedy and could make no deduction. In order to read the Act in that way the word "receive" must have a wider construction than it bore in the subsection. It was never intended that the power given to the justices under the Employers and Workmen Act, 1875, should be interfered with in any way. If that had been intended they would have found provisions to that effect in the Truck Act, 1896. He was of opinion that the justices were wrong in finding as a fact that the agreement in the present case came within the Truck Act. It might be that the agreement came within the Act, but it did not follow that the proceedings to recover the penalty could be only taken when the contract complied with the requirements of the Act. The magistrates then went on to find that under section 1, subsection 2 (b), particulars had not been delivered, and, therefore, the claim could not be maintained. He thought that was an erroneous conclusion. It had been argued that damages could not be recovered because penalties were provided for in the agreement. He doubted if that was the proper construction of it, but he did not wish to make that a part of his decision. He thought the matter must be sent back to the magistrates for them to determine it under the Employers and Workmen Act, 1875.

MR. JUSTICE DABLING said he was of the same opinion. The case arose in this way. Section 1 of the Truck Act, 1896, said that no contract between an employer and a workman should be made except in accordance with the requirements of the Act. Here the employer and the workman entered into a contract for the payment of a fine or penalty, or for the making of a deduction, and therefore that contract would be bad in law if it did not comply with the provisions of the Truck Act, 1896. The workman did something which would have entitled the employer to subject him to a deduction, penalty, or drawback; the employer could have deducted half-a-crown from the wages of the workman because the contract into which they entered provided for that being done. The workman absented himself without leave, and thereupon the employer took out a summons, on which he proceeded before the magistrates, by virtue of the Employers and Workmen Act, 1875, to recover 5s., as a fine or penalty, or, alternatively, by way of damages for such abstinence. It had been argued that because that was a penalty under the Truck Act, it could not be recovered before the magistrates by means of that summons. What the Truck Act provided was that they shall not make a contract unless certain terms are complied with and those terms were complied with in the present case, so the contract was good. Section 1, subsection (2) of the Act said "that an employer shall not make any such deduction"—he did not here make any deduction so that does not apply—"or receive any such payment." It was argued that if he proceeded before the magistrates and got judgment in his favour and received the proceeds he was receiving a payment and must comply with subsection 2 of section 1, which prevented him from recovering "unless particulars in writing . . . are

supplied to the workman." That argument was of no use to the appellants. The statute provided that the particulars are to be given when the payment is made, and therefore it would be sufficient if the particulars were given after the justices had given their decision awarding the sum claimed. It seemed to him that the magistrates were wrong on that ground. He would not say, also, that the master might not recover if he sued at law. The workman might have stayed away upon a day when the master owed him nothing and so would have no opportunity of deducting anything. He should be sorry to say that he could not sue on the contract for the penalty agreed on in the contract. But however that might be it would not conclude this case, because this was a summons to recover unliquidated damages, and it was said that because a penalty was agreed upon, unless proceedings were taken to recover the penalty, no right to recover damages remained. He could not accede to that. The Truck Act did not deal with damages, and he could not see that either by means of the Truck Act or the contract the master had given up his right to sue for any damages he might have sustained by reason of the workman having failed to do what he ought to have done. It seemed to him that the justices were misled by not understanding that the Truck Act applied to the making of a good contract, and he thought that if the parties had tried to make a contract and had made a bad one neither would have given up his rights under the Employers and Workmen Act, 1875.

[Solicitors—Cree and Son, for Sidney Taylor, Buxton, for the appellants; Steadman and Van Praagh, for Arthur Veal, Sheffield, for the respondent.]

Q.B. Div. (Bigham and }
Phillimore, JJ.) }

1900.
April 2.

BARNETT V. CORPORATION OF ECCLES.*

Local Government—Public health—Sanitary works—Damage sustained by reason of exercise of powers of Public Health Act, 1875—"Full compensation," what is—Costs.

This was an argument on a special case stated by an arbitrator acting under section 308 of the Public Health Act, 1875, and raised the question whether the "full compensation" to which a person is entitled who is damaged by the exercise of the powers of the Act includes costs reasonably incurred as between solicitor and client in defending himself before the justices and appealing to quarter sessions upon a charge made against him by the local authority. The special case stated the following facts:—William Barnett was the owner of certain cottages in Ellesmere-street, in the borough of Eccles, the sanitary arrangements in which constituted a nuisance, for which it was alleged that Mr. Barnett was liable. Accordingly the Corporation of Eccles, under section 94 of the Public Health Act, 1875, caused a notice, dated May 6, 1897, to be served on Mr. Barnett requiring him to abate the nuisance and for that purpose to execute certain works. This notice not being complied with, a complaint was laid by the corporation under section 95 of the Public Health Act, alleging that the nuisance was caused by the act, default, or sufferance of Mr. Barnett. The complaint was heard and determined by a Court of summary jurisdiction in October, 1897, at which Mr. Barnett called several witnesses, and an order was made requiring him to comply with the requisitions of the notice of May 6, 1897. Nothing was said as to costs on that hearing. William Barnett appealed to quarter sessions, and in

* Reported by W. HUSKEY GRIFFITH, Esq., Barrister-at-Law.

January, 1898, the appeal was heard and dismissed, subject to a case stated for the opinion of the Queen's Bench Division, with the result that the order of the quarter sessions dismissing the appeal was quashed and judgment was entered for Mr. Barnett. The order of the justices was also quashed, and it was further ordered that the corporation should pay the costs of the appeal and (though this did not appear on the special case) the costs of the proceedings before the petty sessions, such costs to be taxed by the Master of the Crown Office, the Court at the same time holding that the nuisance arose from the default of the corporation themselves, and that there had been no default on the part of Mr. Barnett. The costs of the appeals to the Queen's Bench Division and to the quarter sessions were taxed at £62 5s. 6d. and £83 8s. 5d. respectively and paid to Mr. Barnett. The costs of defending himself before the justices in petty sessions were not paid. His actual expenses reasonably and properly incurred exceeded the costs which had been paid by £160 18s. By section 308 of the Public Health Act, 1875, a person who is not in default is entitled to full compensation for any damage sustained by reason of the exercise of the powers of the Act. Clause 32 of the case was in these terms:—"If the Court should be of opinion that full compensation only includes the costs as taxed between party and party, and does not include the costs incurred by the said William Barnett in defending himself before the said justices, then I award that there is nothing due to the said William Barnett from the corporation." If otherwise, the arbitrator awarded the sum of £160 18s.

Mr. DANCKWERTS, Q.C., now moved, on behalf of the corporation, that judgment might be entered according to Clause 32 of the special case set out above, contending that only the fact of damage and the amount of compensation were within the jurisdiction of the arbitrator. He cited "*Brierley-hill Local Board v. Pearsall*" (9 App. Cas., 595), "*Bater v. Mayor of Birkenhead*" ([1893] 1 Q.B., 679; in the Court of Appeal [1893], 2 Q.B., 77). He argued that the law took no account of any expenses beyond taxed costs—"*Purton v. Honnor*" (1 B. and P., 205), "*Grace v. Morgan*" (2 Bing., N.C., 534), "*Malden v. Fyson*" (11 Q.B., 292), "*Quartz-hill Company v. Eyre*" (11 Q.B.D., 674)—and that the justices in petty sessions, having made no order as to costs, no further costs could be recovered. He also cited the Judicature Act, 1894, section 2, subsection 2; the Summary Jurisdiction Act, 1879, section 31, subsection 5; "*Cockburn v. Edwards*" (18 Ch.D., 449), "*In re Arbitration between Davies and Rhonda District Council*" (80 L.T., 696), "*Walshaw v. Brighthouse Corporation*" ([1899] 2 Q.B., 286).

Mr. MARSHALL, Q.C., and Mr. CLARKE HALL, for Mr. Barnett, cited "*Mayne on Damages*" (Sixth Ed., 1899, pp. 88 and 90), "*Andrews v. Barnes*" (39 Ch.D., 133), "*Slaughter v. Mayor of Sunderland*" (55 J.P., 519), and contended that the expression "full compensation" meant something more than mere legal damage.

Mr. JUSTICE BIGHAM, in giving judgment, said that Mr. Barnett was not entitled to more than his taxed costs of the proceedings before the petty sessions, quarter sessions, and the Divisional Court. The law did not contemplate as a head of damage the difference between the sum awarded by law and that larger sum which in practice every litigant has to pay. Section 308 of the Public Health Act, 1875, in his opinion made no difference. The case of "*Bater v. Mayor of Birkenhead*" was distinguishable, for there the plaintiff could not have recovered the cost of appearing before the justice under any order. He only recovered the sum claimed as the reasonable expenses to which he had been put through the act of the local authority. In "*Walshaw v. Brighthouse Corporation*" the justices had not

been asked to adjudicate on the costs at all. Judgment must be entered in the terms of Clause 32 of the special case.

MR. JUSTICE PHILLIMORE concurred.

Q.B. Div. }
(Mathew, J.) }

1900.
April 2.

LEICESTERSHIRE BANKING COMPANY (LIMITED) v.
HAWKINS.*

Bill of Exchange—Promissory note—Joint note
—Surety—Notice to creditor—Subsequent
advances—Indemnity to surety.

This was an action brought by the Leicestershire Banking Company (Limited) against Mr. E. Hawkins, of Cheslyn-hall, near Walsall, to recover £452 18s., for principal and interest due on a joint and several promissory note, dated June 15, 1898, made by the defendant and one Lowe for the sum of £450, payable to the plaintiffs on demand, together with interest at the rate of 5 per cent. per annum, from January 1 to February 16, 1900.

Mr. M. M. Macnaghten appeared for the plaintiffs; Mr. E. H. Pollard for the defendant.

It appeared that in September, 1897, Mr. S. Lowe, the defendant's son-in-law, deposited with the plaintiffs the deeds of two houses by way of security for an overdraft of £200, and on October 19, 1897, signed the following memorandum of deposit:—

"To the Leicestershire Banking Company (Limited).
"I the undersigned, Sam Lowe, of 206, Station-street, Burton-on-Trent, in the county of Stafford, accountant, agree with the Leicestershire Banking Company (Limited) (hereinafter referred to as the said company), that I, my heirs, executors, or administrators, will, on demand, pay to the said company, their successors or assigns, all and every sum and sums of money now due or hereafter to become due from me, either solely or jointly with any other person or persons to the said company, their successors or assigns, either upon banking account or any other account, or in any manner whatsoever, including interest, commission, and all usual banking charges, in relation to discount and otherwise. And I further agree that the deeds and writings deposited by me with the said company and the property shortly referred to in the schedule hereto and other the property, if any, to which such deeds and writings relate shall be a security for and charged with the payment to the said company, their successors and assigns of all money hereby agreed to be paid. And I further agree that I, or my heirs, and all other necessary parties, if any, will, whenever thereunto required by or on behalf of the said company, their successors, or assigns, effectually assure the property hereinbefore referred to free from all charges and incumbrances unto the said company, their successors, or assigns by way of mortgage for securing payment of all money hereby agreed to be paid, and that in any such mortgage there shall be contained all usual clauses and covenants, including a covenant for payment and a power of sale. And I further agree that during the continuance of this security I, my heirs, executors, or administrators will keep insured, or cause to be kept insured, the buildings for the time being in and upon the said property from loss or damage by fire to the satisfaction of the said company, their successors, or assigns, and that on request the policies and receipts for the premiums shall be delivered to the said company, their successors, or assigns. And I further agree

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

that I, my heirs, executors, administrators, or assigns shall not, without the previous consent in writing of the said company, their successors, or assigns, be entitled to exercise any power conferred on mortgagors by the 18th section of the Conveyancing and Law of Property Act, 1881. And, lastly, I agree that, notwithstanding this security, I and every person who is or may become liable for any money hereby secured shall remain liable for the same as if this security had not been given, and this security shall be only a collateral security and in addition and without prejudice to any other security or securities now or hereafter to be held by the said company, their successors, or assigns for any money hereby secured, and shall be a continuing security to the said company, their successors, and assigns, notwithstanding any settlement of account or other matter or thing whatsoever. In witness whereof I have hereunto set my hand the 19th day of October, 1897."

The schedule contained a short description of the two houses. On April 29, 1898, the first advance was cancelled, and Lowe obtained an advance of £900 on the deeds deposited in September, 1897, and on the deeds of two other houses. On August 5, 1898, he signed a similar memorandum of deposit in respect of these two houses. On June 15 Lowe obtained a further advance of £450 from the plaintiffs, and he and the defendant signed the promissory note now sued upon. At the time he signed the note the defendant was not aware of the previous securities given by Lowe to the plaintiffs. As between the plaintiffs and defendant, there was no contract of suretyship; but as between Lowe and the defendant, the defendant signed the note merely as surety, and the plaintiffs' manager had notice of that fact. In April, 1899, the plaintiffs made further advances to Lowe to the extent of £500 against the security already in their hands. Lowe subsequently became insolvent. The defendant did not dispute his liability upon the note, but contended that the further advances made by the plaintiffs after the date of the promissory note ought not to be repaid until he had been recouped the amount of the promissory note, and he claimed that on payment by him of the £450 and interest the plaintiffs should assign to him the securities held by them until he obtained repayment thereof of the amount so paid by him.

MR. JUSTICE MATHEW, in giving judgment, said that the question of principle upon which he had to give his decision was whether the defendant had priority over the bank in respect of the subsequent advances made by them. It was agreed that there was no contract of suretyship between the plaintiffs and the defendant. But it was argued upon behalf of the defendant that no contract of suretyship was necessary. It was said that an equity arose from the plaintiffs' manager having notice that, as between the defendant and Lowe, Lowe was primarily responsible. It was said that that notice was sufficient to give rise to the defendant's claim, and "*Pooley v. Harradine*" (7 E. and B., 431), and "*Davies v. Stainbank*" (6 De G. M. and G., 679) were relied on. It was clear from "*Forbes v. Jackson*" (19 Ch.D., 615) that the obligation of the creditor was the same whether the surety knew of the existence of a security at the time he entered into the contract of suretyship or not. The surety was entitled to the benefit of any security existing at the time of the contract of suretyship or subsequently given, and the defendant had, therefore, priority over the advances the plaintiffs subsequently made to Lowe.

[Solicitors—Bridges, Sawtell, and Co., agents for Lowe and Auden, Burton-on-Trent, for the plaintiffs; Marshall and Marshall, agents for Loxton and Newman, Walsall, for the defendant.]

Q.B. Div. (Bigham and }
Phillimore, JJ.) }

1900.
April 3.

CANNAN V. EARL OF ABINGDON.*

Tolls—Bridge—Carriage with less than four wheels—Bicycle.

This was a special case stated for the opinion of the Court. The plaintiff was Mr. Edwin Cannan, who is a representative of the University of Oxford on the City Council and also a member of the committee of the Cyclists' Touring Club, and the defendant was the Earl of Abingdon. The special case stated that in pursuance of an Act passed in the 7th year of the reign of George III., intitled "An Act for building a bridge across the river Thames from Swynford, in the county of Berks, to Eynsham, in the county of Oxford," the Right Hon. Willoughby, Earl of Abingdon, the defendant's predecessor in title, erected the bridge known as Swainford bridge in the highway leading from Oxford to Cheltenham, in lieu of an ancient ferry across the river, of which he was the owner and proprietor. Amongst other things it was enacted that in consideration of the expense entailed upon the Earl of Abingdon and his successors in connexion with the building, repairing, and supporting the bridge, and also of the loss sustained owing to the ceasing of the tolls of the ferry, it should be lawful for the Earl of Abingdon and his successors at all times thereafter "to erect a gate or gates, turnpike or turnpikes, and also a toll-house or toll-houses at, near, or upon the said bridge, and there to ask, demand, receive, recover, and take, to and for his and their own proper use and behoof, in respect of his and their charges as aforesaid, before any passage over the said bridge shall be permitted, the several sums following, that is to say:—

"For every coach, chariot, berlin hearse, chaise, chair, calash, wagon, wain, dray, cart, car, or other carriage whatsoever, with four wheels, the sum of fourpence, and with less than four wheels the sum of twopence. . . ."

"For every foot passenger whatsoever the sum of one halfpenny."

There were also tolls of different amounts levied upon various kinds of animals, and a provision that no toll should be taken for the driver of any coach, cart, or other carriage drawn by horses or other cattle or for any person or persons riding in and *bona fide* belonging to the same, or for any one person riding upon a horse or other animal, with a proviso that if more than one person were riding on the same animal one person should be excused from the toll, and every person not *bona fide* belonging to a coach, cart, &c., should pay the same tolls as if they were passing on foot. The plaintiff, acting in the interests of the Cyclists' Touring Club, in December, 1898, on various occasions passed over a portion of the road and over the bridge in the following circumstances:—On the first occasion he rode a bicycle without any luggage or luggage-carrier; on the second occasion he rode a bicycle with a valise attached carrying luggage; on the third occasion he rode a tricycle without any luggage-carrier; on the fourth he rode a tradesman's tricycle having a box fitted to its frame for carrying goods; and on the fifth occasion he rode a tricycle known as a "bath-chair" tricycle having a wicker chair fitted to its frame in which another person was seated. On each occasion the defendant, by his servant the keeper of the toll-gate, refused to allow the plaintiff to pass over the bridge without paying a toll of twopence, and the plaintiff accordingly paid under protest. The plaintiff contended

*Reported by F. B. DUMFORD, Esq., Barrister-at-Law.

that the Act did not authorize the defendant to charge him any toll on the first three occasions mentioned, or alternatively that he should only have been charged one halfpenny, and that on the fourth and fifth occasions he should have been charged nothing, or alternatively only a halfpenny on the fourth and a penny on the fifth. The defendant contended that all the bicycles and tricycles were "chairs, cars, or carriages" within the meaning of the Act and were liable to the toll of two-pence. The questions for the opinion of the Court were what tolls, if any, was the defendant entitled to charge the plaintiff by virtue of the Act when riding over the bridge in the various ways stated above.

Mr. A. Macmorran, Q.C., and Mr. A. Glen appeared for the plaintiff; and Mr. A. Shaw for the defendant.

Mr. GLEN, for the plaintiff, contended that under the Act it was not intended that everybody who went across the bridge should have to pay. For instance, the Act only applied to carriages with wheels, and consequently a sledge could pass without paying. All kinds of animals were also omitted from the list given. The case of a bicycle would be a *casus omissus*. If the plaintiff was riding a bicycle he did not come within the Act at all. If he came within the Act, then he ought only to be charged as a foot passenger.

MR. JUSTICE BIGHAM.—If it was down hill to the bridge, he might come with his feet in the air.

Mr. GLEN said that a foot passenger might jump and have his feet in the air. There were three cases on the question of tolls on carriages and as to what was a carriage for the purpose of paying tolls. All of these cases, including one with regard to a bicycle, had been decided on the *ejusdem generis* principle with the other vehicles mentioned in the list of tolls. In "Taylor v. Goodwin" (4 Q.B.D., 228) which was a case as to furious driving under the Highways Act, the Court held that a bicycle was a carriage, for the reason that it came within the mischief aimed at by the Act. "Williams v. Ellis" (5 Q.B.D., 175) decided that a bicycle was not a carriage within the words of the particular Toll Act involved in the case. The case also decided that in ascertaining whether a particular structure is a carriage you must look at the other carriages specified and see whether the one in question is *ejusdem generis*.

MR. JUSTICE BIGHAM said that "Williams v. Ellis" was no authority to prevent them from saying that the passenger in the present case was a foot passenger. All it laid down was that a bicycle was not a carriage within the meaning of the particular Act with which the Court was dealing.

On being asked for a definition of a foot passenger by his LORDSHIP, Mr. GLEN said that if the plaintiff was to come within the Act at all he should suggest that he was a foot passenger because he worked himself along the roads with his feet. After the two decisions which he had quoted had been given by the Court the Local Government Act, 1888, was passed, and section 85 of that Act, after repealing all power to make by-laws with reference to bicycles, tricycles, velocipedes, and other similar machines, declared that such machines should be carriages within the meaning of the Highway Acts. The Act undid the decision of "Williams v. Ellis," but it was careful not to make these machines carriages for purposes except under those Acts. The case of "Hatton v. Treby" ([1897] 2 Q.B., 452), which had to do with a bicycle, showed that the provision in the Local Government Act was a limited one.

MR. JUSTICE BIGHAM.—What is the case of a man on roller skates? Is he to pay toll for two four-wheeled carriages?

Mr. GLEN submitted that it would be absurd if he was to pay the same toll as two large wagons.

MR. JUSTICE BIGHAM.—I should say that a man on

roller skates was a foot passenger with a particular kind of shoes, and I think that if the road was frozen over and a man skated on it, he would be a foot passenger. I think it would be better for you to argue that the plaintiff is a foot passenger than that he ought to go without paying at all.

After some further argument, Mr. GLEN submitted that bicycles did not come within the Act, or that if they did the plaintiff on the first three occasions ought to have been treated as a foot passenger.

Mr. SHAW, for the defendant, contended that nothing was intended to go across the bridge without paying toll. That had been held by the House of Lords in a similar case. Apart from the authorities, he submitted that the words in the present Tolls Act, "or other carriage whatsoever," were intended to include everything which by its function was a carriage. Where weight was borne upon wheels there was a carriage. By the Act, first of all carriages were taxed, then the horse drawing the vehicle, then foot passengers, then beasts. These were the only things which would pass over this country bridge, but they had taken the precaution to put in a clause including other vehicles. A bicycle was a carriage, whether it had a valise or not, because the person riding it was borne by the wheels in a way entirely different from if he was on his feet.

MR. JUSTICE BIGHAM said there was a provision in the Act that when two people rode on one horse only one should pay toll, but he did not see why in the case of a double bicycle the young lady sitting behind should not pay; it could not be said that she "belonged to the same" within the meaning of the Act, though she might belong to the young man in front.

Mr. SHAW, continuing, said that a foot passenger was a person whose weight was borne on his own feet.

MR. JUSTICE BIGHAM said that he should think that a man on a bicycle bore the whole weight of the bicycle on his feet, because he propelled it with his feet.

Without hearing further argument their Lordships gave judgment for the defendant.

MR. JUSTICE BIGHAM said that he thought the machines in question were carriages with less than four wheels within the meaning of the Act, and they were therefore liable to pay a toll of 2d. The framers of the Act possibly never contemplated the invention of any such things as bicycles; but the Legislature had, he thought, used words which would cover such things which had only come into existence since the Act had been passed. A bicycle was a thing that "carried"; it might carry a man as a horse or carriage did, or it might carry goods as a tradesman's tricycle did, and it must, therefore, pay toll as a carriage.*

MR. JUSTICE PHILLIMORE said he was of the same opinion. He thought that in the case before them a bicycle was a vehicle or carriage. Any mechanical contrivance which carried people or weights over the ground, raising the weights, or taking the person off his feet, so that the feet of the person did not support him or the burden he might be bearing, was, he thought, a carriage, and he did not think it mattered that the person himself provided the propulsion for the carriage. Since he held that a bicycle was a carriage, the necessity for making certain nice distinctions which would have arisen was obviated. Even if he had held that a bicycle was not a carriage when being ridden by a man, he should have hesitated to say that it was not one if it was being used for carrying luggage.

There must, therefore, be judgment for the defendant. [Solicitors—Leslie J. Williams, for the plaintiff; Witham, Roskell, Munster, and Weld, for the defendant.]

* [Cf. "Ellis v. Nott Bower" (13 The Times L.R., 35).—ED.]

Court of Appeal (Lindley, M.B., }
 Jeune, P., Rigby, L.J.) } 1900.
 April 4.
 J. GOLDBERG AND SONS V. THE CORPORATION OF LIVER-
 POOL.*

Nuisance—What amounts to—Exercise of statu-
 tory powers—*Bona fides*.

This was an appeal by the Corporation of Liverpool against a judgment of the Vice-Chancellor of the County Palatine of Lancaster. The corporation, purporting to act in the exercise of their powers under the Liverpool Corporation Tramways Act, 1897, have recently, for the purposes of an electric tramway, erected a pole and a fuse-box close to the principal entrance of the plaintiffs' premises, which are situate at the corner of Paradise-street and College-lane, Liverpool. The plaintiffs objected to this erection, and they brought this action to compel the defendants to remove the pole and fuse-box. The Vice-Chancellor was of opinion that there was no reasonable ground for selecting this particular position in front of the plaintiffs' premises, and that the conduct of the defendants' engineer had been perverse and vexatious; and the learned Judge made a peremptory order for the removal of the pole and the fuse-box.

Mr. Neville, Q.C., Mr. Macmorrison, Q.C., Mr. Maberly, and Mr. Rutherford were for the corporation; Mr. Mattinson, Q.C., and Mr. Rotch were for the plaintiffs.

On behalf of the corporation it was urged that their statutory powers authorized their placing the pole and the fuse-box where they had placed them; that the doing so was reasonably necessary for the working of the tramway, and that their engineer had acted *bona fide*, and in the honest exercise of his judgment in selecting the particular site. For the plaintiffs it was argued that the defendants' statutory powers only enabled them to place the pole and the fuse-box in the roadway of the street, as distinguished from the footway, and that if they had power to place them on the footway the onus was on them to show the necessity for so placing them. They had power to place them in that position, only if they could not otherwise efficiently construct their tramway. But they must act *bona fide* and without negligence, that is, they must not fail to do everything reasonable to prevent damage to the person who complained of their acts. The defendants had not shown that they had done this. And it was suggested that the engineer had placed the pole close to the entrance of the plaintiff's premises from a motive of hostility to the plaintiffs, because he was annoyed at their refusal to consent to a side wire being attached to the wall of their house by means of a rosette to support the central wire. The defendants, on the other hand, said that the erection of the pole was required, because of the plaintiffs' refusal to allow the rosette to be placed on their wall.

The COURT allowed the appeal.

The MASTER of the ROLLS thought that the view taken by the Vice-Chancellor was not correct in point of law. The questions were—(1) What were the statutory powers of the corporation; and (2) whether they had exercised their powers *bona fide* for the purposes for which they were conferred. As to (1), there was no doubt that the corporation had power to make an electric tramway along Paradise-street, and section 36 of the Act of 1897 empowered them to execute in any street all such works as might be "necessary or expedient" for the tramway. His Lordship could not accede to the argument that this power did not extend to College-lane, or to the pavement as distinguished from the roadway. Of course, the rails must be laid

along the roadway. But the words of the section applied also to the pavement for the purpose of doing that which was necessary for making the tramway an electrical tramway. The Act gave an express power to do that which, but for that power, would be a nuisance at common law. This distinguished the present case from those on which Mr. Mattinson had relied, and in which the Court came to the conclusion that the Legislature had not conferred a power to commit a nuisance. As to (2), it was not now alleged that the corporation had not acted *bona fide*, but it was said their engineer had not done so. Upon the evidence his Lordship came to the conclusion that this view could not be maintained. He thought the plaintiffs had misunderstood what had been said by the defendants—viz., that, if the plaintiffs would not have a rosette, there must be a pole. This was not intended as a threat, though the plaintiffs seemed to have taken it as a threat. So far as his Lordship could discover, there was no malice on the part of the defendants' engineer. But for the Act no doubt the plaintiffs could have maintained an action for nuisance. But the Act authorized a nuisance, and, unless the plaintiffs could prove that the powers conferred by the Act had been abused, they had no remedy. They had failed to prove this. In his Lordship's opinion, the Vice-Chancellor had not attached sufficient weight to that which was the key to the whole case—viz., that an express power was given by the Act to do that which the defendants had done. There was no reason for going into the inquiry into which the learned Judge had gone as to what was the most suitable position for the pole. If the Court did that they would have to lay down the tramway themselves. The action must be dismissed.

The PRESIDENT of the PROBATE DIVISION concurred. He pointed out the distinction between such cases as "Metropolitan Asylum District Managers v. Hill" (6 App. Cas., 193), in which the Legislature had not conferred power to commit a nuisance, and the other class of cases such as "Stockton and Darlington Railway Company v. Brown" (9 H.L.C., 246), in which such a power had been expressly conferred, and said that the present case fell within the latter class. In such a case, the officers of the corporation, not the Court, were to be the judges whether what they were doing was necessary or expedient, provided that they acted *bona fide*. On the question of *bona fides*, his Lordship had felt considerable doubt during the argument. But, having regard to all the facts, he could not think it was proved that the engineer was actuated by any improper motive. Indeed, his Lordship thought he was absolved from having been actuated by *mala fides* in placing the pole where it had been placed.

LORD JUSTICE RIGBY agreed with the reasons which had been given by the Master of the Rolls. The *bona fides* of the corporation was not called in question, and his Lordship had no doubt that the engineer was acting with perfect *bona fides*.

[Solicitors—F. Venn and Co., for E. R. Pickmere, Liverpool; J. Hands, for J. F. Harrison and Burton, Liverpool.]

Q.B. Div. (Bigham and }
 Phillimore, JJ.) } 1900.
 April 4.

EBBETTS V. CONQUEST.*

Landlord and Tenant—Lessee's covenants—Covenant to repair—Action for breach of covenant to deliver up in repair—Recovery in former action—Measure of damages.

This was an argument on a special case stated by the

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

*Reported by W. HUSKEY GRIFFITH, Esq., Barrister-at-Law.

parties for the opinion of the Court under order 34, rule 2, of the Rules of the Supreme Court. The action was brought to recover damages for breach of covenant to keep and deliver up in repair certain premises in the parish of St. Leonard, Shoreditch. By a deed of March 24, 1851, one Thomas Rouse let to Benjamin Oliver the premises in question for a term of 47½ years less ten days from Lady Day, 1851, at a rent of £350. By this deed Benjamin Oliver covenanted to repair the premises, and at the end of the term to yield them up whole, safe, and undefaced, reasonable use and wearing excepted. The plaintiffs were assignees of the reversion on this lease and entitled to sue on this covenant, and were in their turn liable to a superior landlord on similar covenants. The defendant was the executor of Benjamin Oliver, and admitted that he had sufficient assets of his testator in his hands to satisfy the plaintiff's claim, which was for breaches of the covenants above-mentioned, the action having been brought after the expiration of the term, which happened on September 19, 1898. The defendant admitted that he was responsible to the plaintiffs for the breaches complained of, except so far as his liability had been discharged or lessened by what follows—namely, that during the currency of the lease, on April 4, 1894, the plaintiffs had brought an action against the defendant for damages for breach of covenant to repair. On March 26, 1895, the action was referred to the Official Referee, who awarded £1,305 as damages. The judgment of the Official Referee was affirmed by the Court of Appeal in “*Ebbetts v. Conquest*,” reported in ([1895] 2 Ch., 377) and again in the House of Lords in “*Conquest v. Ebbetts*” ([1896] A.C., 490). The plaintiffs estimated that at that time it would have required £4,500 to put the premises into repair, if there had been no judgment for breach of covenant during the term. They claimed to recover the cost of repairing the premises after making due allowance for the sum of £1,305 received as aforesaid. They claimed alternatively for damages for breach of covenant committed between March, 1895, and September 19, 1898, estimating the amount at £1,200. The defendant contended that the whole of his liability down to March, 1895, had been ascertained and discharged by the judgment for and satisfaction of the sum of £1,305; that he was only liable for additional breaches; and that the measure of such damages was the cost, on September 19, 1898, of restoring the premises to the state in which they were in March, 1895. He paid into Court the sum of £400 in satisfaction of this liability, at the same time denying that he was liable at all. Four questions were propounded for the opinion of the Court to obtain a direction as to what was the true measure of damages which the plaintiffs were entitled to recover from the defendant for any breaches by the defendant of the covenants in the lease of March 24, 1851. The first of the questions was in these terms:—Whether the true measure of damages . . . is the cost of putting the said premises into the state of repair in which the tenant was bound to leave them at the expiration of the said term less a proper allowance for the sum of £1,305.

Mr. ROBSON, Q.C., and Mr. BOXALL, for the plaintiffs, cited the case of “*Henderson v. Thorn*” ([1893] 2 Q.B., 164), impugning it on the ground that “*Coward v. Gregory*” (L.R., 2 C.P., 153) was inconsistent with, and not considered in, that case. The former action had nothing to do with the present one, for the cause of action there was for breach of covenant during the term, while this action was also for breach of covenant to yield up in good repair at the end of the term.

Mr. JOSEPH WALTON, Q.C., and Mr. CHARLES H. SARGANT, for the defendant, contended that when the

sum of £1,305 had been recovered the premises must be taken to have been put into thorough repair. They cited “*Ebbetts v. Conquest*” ([1895] 2 Ch., 377), and the same case in the House of Lords ([1896] A.C., 490). In assessing that sum the official referee had taken into account that the defendant would have to yield up the premises in good repair.

MR. JUSTICE BIGHAM, in giving judgment, said that the ordinary rule by which damages are assessed for breach of covenant at the end of the term was this—the actual state of disrepair was ascertained and the cost of correcting that and restoring the premises to their proper condition was estimated, and that cost was the measure of damage. The question was whether that measure should be applied here. It had been argued that it ought not, because in the previous action for breach of covenant to keep in repair the fact that the defendant would have to yield up in repair was taken into account. His Lordship did not think that argument valid. There was no estoppel, because, though the parties to the actions were the same, the questions to be decided were different. In the former case the damages to the reversion at the date of the judgment was the matter in dispute; in the present action it was the state of repair now. The first question in the special case should therefore be answered in the affirmative; but, under the circumstances, as the defendant's liability to his superior landlord had admittedly been considered in the former action, the amount therein recovered—£1,305—should be credited, with interest thereon at 4 per cent. from the date of payment to the date of the expiration of the lease. The plaintiffs should have the costs of the special case.

MR. JUSTICE PHILLIMORE concurred.

House of Lords (Lord Halsbury, L.C., } 1900.
Lords Macnaghten and Robertson) } April 5.

GLUCKSTEIN V. BARNES.*

Company—Promoters—Undisclosed profit—Liability—Misfeasance summons.

Decision of the Court of Appeal (14 *The Times* L.R., 451) affirmed.

This was an appeal from a decision of the Court of Appeal (the Master of the Rolls and Lords Justices Rigby and Collins) of May 26, 1898, reversing a judgment of Mr. Justice Wright's dated February 17, 1898. The case before the Court of Appeal is reported under the title “*In re Olympia (Limited)*” (14 *The Times* L.R., 451; L.R., 1898, 2 Ch., 153; and 67 L.J., Chanc., 433). The case was argued before their Lordships on November 30 and December 1, 4, and 5 last, when judgment was reserved. The questions involved were raised by a summons taken out by the Official Receiver and liquidator under section 10 of the Companies Winding Up Act, 1890, against Mr. Montague Gluckstein. The summons asked for a declaration that Mr. Gluckstein was guilty of misfeasance or breach of trust in that he and Messrs. Joseph Lyons, John Hart, and H. T. Hartley, being promoters and directors of the company, had secretly obtained and retained for their own use out of the purchase money paid by the company for Olympia the sum of £6,341, which was alleged to have been divided among them; and that Mr. Gluckstein might be ordered to pay the whole amount, with interest. Mr. Justice Wright dismissed the application; but the Court of Appeal made an order in accordance with the terms of the summons.

Mr. Swinfen Eady, Q.C., Mr. Muir Mackenzie, and

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

Mr. F. Cassel were for the appellant; Mr. A. T. Lawrence, Q.C., and Mr. Kirby for the respondent.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said:—My Lords.—In this case the simple question is whether four persons, of whom the appellant is one, can be permitted to retain the sums which they have obtained from the company of which they were directors by the fraudulent pretence that they had paid £20,000 more than in truth they had paid for property which they, as a syndicate, had bought by subscription among themselves, and then sold to themselves as directors of the company. If this is an accurate account of what has been done by these four persons, of course so gross a transaction cannot be permitted to stand. That that is the real nature of it, I now proceed to show. In the year 1892 the freehold grounds and buildings known as Olympia were the property of a company which in that year was being wound up. That company had issued debentures to the extent of £100,000 as a first charge, and a mortgage as a second charge for £10,000. The four persons in question knew that the property would have to be sold, and they combined to buy it in order that they might resell it to a company to be formed by themselves. The combination, which called itself the Freehold Syndicate, but which, perhaps, the common law would have described by a less high-sounding title, proceeded to buy up so far as they could the encumbrances on the property called Olympia. They expended £27,000 in buying debentures. These, of course, very much depreciated in value, and they gave £500 for the mortgage of £10,000. As soon as this transaction had been completed they, partners in it, proceeded to form a company, and it was of course necessary that the company should be willing to help, and accordingly the four persons in question were made, by the articles of association, the first directors. The property was sold on February 8 by the chief clerk to Mr. Justice North for £140,000, and the syndicate purchased nominally for that sum, but, by reason of the arrangement to which I have referred, that sum was less by £20,734 6s. 1d. than what they appeared to give. On March 29 they completed as directors the purchase of the property for £180,000, and they as directors paid to themselves as members of the syndicate £171,000 in cash and £9,000 in fully paid up shares, in all £180,000. The prospectus, by which money was to be obtained from the public, disclosed the supposed profit which the vendors were making of £40,000, while in truth their profit was £60,734 6s. 1d., and it is this undisclosed profit of £20,000 and the right to retain it which is now in question. My Lords, I am wholly unable to understand any claim that these directors, vendors, syndicate, associates, have to retain this money. I entirely agree with the Master of the Rolls that the essence of this scheme was to form a company. It was essential that this should be done, and that they should be directors of it, who would purchase. The company should have been informed of what was being done and consulted whether they would have allowed this profit. I think the Master of the Rolls is absolutely right in saying that the duty to disclose is imposed by the plainest dictates of common honesty as well as by well-settled principles of company law. Of the facts there cannot be the least doubt; they are proved by the deed now that we know the subject matter with which that deed is intended to deal, although the deed would not disclose what the nature of the transaction was to those who were not acquainted with the ingenious arrangements which were prepared for the entrapping the intended victim of these arrangements. In order to protect themselves, as they supposed, they inserted in the deed qualifying the statement that they had bought the property for £140,000, payable in cash, that they did

not sell to the company, and did not intend to sell, any other profits made by the syndicate from interim investments. Then it is said there is the alternative suggested upon the deed that the syndicate might sell to a company or to some other purchaser. In the first place, I do not believe they ever intended to sell to anybody else than a company. An individual purchaser might ask inconvenient questions, and if they, or any one of them, had stated as an inducement to an individual purchaser that £140,000 was given for the property, when in fact £20,000 less had been given, it is a great error to suppose that the law is not strong enough to reach such a statement; but as I say, I do not believe it was ever intended to get an individual purchaser, even if such an intention would have had any operation. When they did afterwards sell to a company, they took very good care there should be no one who could ask questions. They were to be sellers to themselves as buyers, and it was a necessary provision to the plan that they were to be both sellers and buyers, and as buyers to get the money to pay for the purchase from the pockets of deluded shareholders. My Lords, I decline to discuss the question of disclosure to the company. It is too absurd to suggest that a disclosure to the parties to this transaction is a disclosure to the company of which these directors were the proper guardians and trustees. They were there by the terms of the deed to do the work of the syndicate, that is to say, to cheat the shareholders; and this, forsooth, is to be treated as a disclosure to the company, when they were really there to hoodwink the shareholders, and, so far from protecting them, were to obtain from them the money, the produce of their nefarious plans. I do not discuss either the sum sued for, as only Gluckstein alone is sued. The whole sum has been obtained by a very gross fraud, and all who were parties to it are responsible to make good what they have obtained and withheld from the shareholders. I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN.—My Lords, Mr. Swinfen Eady argued this appeal with his usual ability, but the case is far too clear for argument. The learned counsel for the appellant did not, I am sure, raise the slightest doubt in the mind of any of your Lordships as to the propriety of the judgment under appeal. The only fault to be found with the learned Judges of the Court of Appeal, if I may venture to criticize their judgment at all, is that they have treated the defences put forward on Mr. Gluckstein's behalf with too much ceremony. For my part, I cannot see any ingenuity or any novelty in the trick which Mr. Gluckstein and his associates practised on the persons whom they invited to take shares in Olympia (Limited). It is the old story. It has been done over and over again. These gentlemen set about forming a company to pay them a handsome sum for taking off their hands a property which they had contracted to buy with that end in view. They bring the company into existence by means of the usual machinery. They appoint themselves sole guardians and protectors of this creature of theirs, half-fledged and just struggling into life, bound hand and foot while yet unborn by contracts tending to their private advantage, and so fashioned by its makers that it could only act by their hands and only see through their eyes. They issue a prospectus representing that they had agreed to purchase the property for a sum largely in excess of the amount which they had, in fact, to pay. On the faith of this prospectus they collect subscriptions from a confiding and credulous public. And then comes the last act. Secretly, and therefore dishonestly, they put into their own pockets the difference between the real and the pretended price. After a brief career, the company is ordered to be wound

up. In the course of the liquidation the trick is discovered. Mr. Gluckstein is called upon to make good a portion of the sum which he and his associates had misappropriated. Why Mr. Gluckstein alone was selected for attack I do not know, any more than I know why he was only asked to pay back a fraction of the money improperly withdrawn from the coffers of the company. However that may be, Mr. Gluckstein defends his conduct, or, rather I should say, resists the demand on four grounds, which have been gravely argued at the bar. In the first place, he says that he was not in a fiduciary position towards Olympia (Limited) before the company was formed. Well, for some purposes he was not. For others he was. A good deal might be said on the point. But to my mind, the point is immaterial, for it is not necessary to go back beyond the formation of the company. In the second place, he says that if he was in a fiduciary position he did in fact make a proper disclosure. With all deference to the learned counsel for the appellant, that seems to me to be absurd. "Disclosure" is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company, when as yet there were no shareholders, is a mere farce. To the intended shareholders there was no disclosure at all. On them was practised an elaborate system of deception. The third ground of defence was that the only remedy was rescission. That defence, in the circumstances of the present case, seems to me to be as contrary to common sense as it is to authority. The point was settled more than 60 years ago by the decision in "*Hichens v. Congreve*," and, so far as I know, that case has never been questioned. The last defence of all was that, however much the shareholders may have been wronged, they have bound themselves by a special bargain, sacred under the provisions of the Companies Act, 1862, to bear their wrongs in silence. In other words, Mr. Gluckstein boldly asserts that he is entitled to use the provisions of an Act of Parliament, which are directed to a very different purpose, as a shield and shelter against the just consequences of his fraud. My Lords, I am afraid I must call your Lordships' attention for a moment to the prospectus of Olympia (Limited). In my opinion, it is the cardinal point of the case. And I do not think full justice has been done to it. The prospectus, I am sorry to find, was prepared in the office of a well-known solicitor. I wish I could say that it displays the simplicity and candour which some persons perhaps might expect from such an origin. Now this is what the self-constituted guardians of Olympia (Limited) and its shareholders tell those whom they invite to join with them in their enterprise:—

"The promoters of this company, hereinafter called the vendors, who constitute the entire board of the company which lately produced Venice in London, recently entered into a contract on behalf of a syndicate of which they themselves are members, for the purchase of the entire Olympia property. The vendors effected this purchase on February 8, 1893, at competition before the chief clerk of Mr. Justice North in the Chancery Division of the High Court of Justice for the sum of £140,000 payable in cash, and they will, acting on behalf of such syndicate, be the vendors of that property to this company. Any other profits made by the syndicate from interim investments are excluded from the sale to the company. A printed form of the memorandum of agreement which was signed by each member of that syndicate may be inspected by intending applicants for shares or debentures at the offices of the solicitor of the company. . . . The vendors have agreed to resell to the company the whole of the property purchased by them on

February 8, 1893, for the sum of £180,000, being nearly £18,000 less than the amount of Messrs. Driver and Co.'s valuation, payable as to £155,000 in cash, and the balance in cash or shares of the company. . . . Out of the profit to be made by the vendors on behalf of the syndicate the vendors have agreed to pay interest at the rate of 5 per cent. per annum upon the amount for the time being paid up on the shares and debentures until the opening of the first entertainment. They will also provide all the preliminary expenses of the formation and bringing out of the company, and the issue of its capital up to and including allotment, and all costs, including stamp duty, in connexion with the completion of the purchase of the property and the mortgage to secure debentures. The conveyance will be made direct to the company by direction of the vendors."

My Lords, it is a trite observation that every document as against its author must be read in the sense which it was intended to convey. And everybody knows that sometimes half a truth is no better than a downright falsehood. Is the statement in the prospectus which I have just read as to the price which the vendors had to pay for the property true or false? In the letter it is true. The vendors had bid £140,000 for the property and had formally agreed to pay that sum for it. But, for all that, the sum of £140,000 was not the sum they were going to pay, and they knew that well enough. They had provided themselves with counters obtained at little cost, which in reckoning the price would be taken, as they knew, at their face value, so that the price of the property to them would be only about £120,000. Is that what Mr. Gluckstein and his associates meant the public to understand? Surely ordinary persons reading the prospectus, and attracted by the hopes of profit held out by it, would say to themselves, "Here is a scheme which promises well. The gentlemen who are putting the property on the market know something about it, for they were the sole directors and managers of 'Venice in London,' which was a very profitable speculation. They have had the whole property valued by well-known auctioneers, who say that it is worth more than is asked for it. True, they secure a profit of £40,000 for themselves, but then they disclose it frankly, and it is not all clear profit. There is interest to be paid, and all the expenses of forming the company. And they have actually agreed to pay £140,000 down. That sum they tell us is 'payable in cash.'" You will observe those last words, "payable in cash." Their introduction is almost a stroke of genius. That slight touch seems to give an air of reality and *bona fides* to the story. Would anybody after that suppose that the directors were only going to pay £120,000 for the property and pocket the difference without saying anything to the shareholders? But then, says Mr. Gluckstein, there is something in the prospectus about "interim investments," and if you had only distrusted us properly and read the prospectus with the caution with which all prospectuses ought to be read, and sifted the matter to the bottom, you might have found a clue to our meaning. You might have discovered that what we call "interim investments" was really the abatement in price effected by purchasing charges on the property at a discount. My Lords, I decline altogether to take any notice of such an argument. I think the statement in the prospectus as to the price of the property was deliberately intended to mislead the shareholders and to conceal the truth from them. My Lords, on so plain a case as this I am very reluctant to quote any authority; but I think I ought to call your Lordships' attention to the case of "*Hichens v. Congreve*," to which I have already alluded, and that for two reasons—first, because it seems to have been lost sight of in the argument of this case; and, secondly, because the facts there have a singular resemblance to the facts of the

present case. The defences in the two cases are, for the most part, identical. "*Hichens v. Congreve*" was decided by Vice-Chancellor Shadwell in 1831. There had been a demurrer to the bill, which was overruled by the Vice-Chancellor, and by Lord Lyndhurst, Chancellor, on appeal (1828, 4 Russ., 562; 1829, 1 R. and M., 150; 1831, 4 Sim., 420), a motion for payment of money into Court, which was successful, and then the case came on for hearing. The facts were these:—A Mr. Flattery was the fortunate possessor of a property in Ireland containing treasures of coal and iron rarely met with on the other side of the Channel, and he was anxious to dispose of it. One Sir William Congreve entered into negotiations with him and found that he was willing to sell for the modest sum of £10,000. Then Sir William associated with himself two gentlemen of the name of Clarke, and the three proposed to themselves to buy the property and work it by means of a company. But they thought that the company could well afford to pay £25,000 for it, and they supposed that they might honestly, or, at any rate, without being found out, put the extra £15,000 into their own pockets, concealing from the proposed shareholders the difference in price. Mr. Flattery seems to have been not unwilling to lend himself to the scheme. So a contract was drawn up for the sale of the property from Mr. Flattery to the trustees of the company for the price of £25,000, out of which, of course, Mr. Flattery was only to keep £10,000. Sir William Congreve and the two Clarks got up the company, issued a prospectus, and prepared a deed of settlement stating that the property had been bought from Mr. Flattery for £25,000. And they appointed themselves and other persons directors of the company. A large sum of money was collected, a large body of subscribers executed the deed of settlement, and later on a private Act of Parliament was obtained establishing and regulating, but not incorporating, the company. Some years afterwards the proceedings of Sir William Congreve and his associates were discovered, and a bill was filed by certain shareholders on behalf of themselves and the other shareholders, other than the defendants, to compel them to refund the £15,000. As the Vice-Chancellor pointed out, if Sir William Congreve and the Messrs. Clarke had agreed among themselves that they would form a partnership or a company for the purpose of working the mines, and had held out to the persons who should form the company that it should be formed on the basis that they should pay £15,000 to Sir William Congreve and the Messrs. Clarke as the consideration for their having the mines, no objection whatever could have been made to the transaction. But the objection was that the real transaction was not disclosed, and "that the persons who became members of the company could not possibly know that it was the intention of Sir William Congreve and the Messrs. Clarke that the £15,000 should be paid out of the funds of the company for the benefit of Sir William Congreve, the Messrs. Clarke, and those gentlemen whom they permitted to participate in it." The noble and learned Lord, after reading an extract from the Vice-Chancellor's judgment and observing that it covered practically the whole of the present appeal, continued:—There are two things in this case which puzzle me much, and I do not suppose that I shall ever understand them. I mention them merely because I should be very sorry if it were thought that in those two matters the House unanimously approved of what has been done. I do not understand why Mr. Gluckstein and his associates were not called upon to refund the whole of the money which they misappropriated. What they did with it, whether they put it in their own pockets or distributed it among their confederates, or spent it in charity

seems to me absolutely immaterial. In the next place, I do not understand why Mr. Gluckstein was only charged with interest at the rate of 3 per cent. I should have thought it was a case for penal interest. In these two matters Mr. Gluckstein has been, in my opinion, extremely fortunate. But he complains that he may have a difficulty in recovering from his co-directors their share of the spoil, and he asks that the official liquidator may proceed against his associates before calling upon him to make good the whole amount with which he has been charged. My Lords, there may be occasions on which that would be a proper course to take. But I cannot think that this is a case in which any indulgence ought to be shown to Mr. Gluckstein. He may or may not be able to recover a contribution from those who joined with him in defrauding the company. He can bring an action at law if he likes. If he hesitates to take that course or takes it and fails, I fear his only remedy lies in an appeal to that sense of honour which is popularly supposed to exist among robbers of a humble type. I agree that the appeal must be dismissed with costs.

LORD ROBERTSON.—My Lords,—I am satisfied of the liability of the appellant. Once the facts are analysed (and this has been done thoroughly in the Court of Appeal) they are seen to be of no ambiguous import. The appearance of complexity which the case presents arises from the matters in hand having been dressed up artificially, so that things have been separated in language and treatment which, in their nature, are inseparable and correlative. To my thinking, the central fact in the history is that, while the object of the syndicate was to make profit out of the resale of Olympia, it was an essential part of the enterprise, as originally designed and as actually carried out, that the same individuals who sold as syndicate should buy as directors. This was provided by the third head of the agreement which set up the syndicate, and it has a far-reaching effect at all the stages of the argument. First of all, it seems to me to conclude the question whether these gentlemen were promoters when they bought the mortgages. I do not lay out of account the refreshment contract and the advertising contract, for the entering into contracts for the company is a clear assumption of agency, and therefore of a fiduciary relation to it. But, apart from those contracts, where speculators have formed, exclusively of themselves, the directorate of a company, to be immediately floated for the purpose of buying the property which those same individuals are associated to acquire and resell, they have brought themselves directly within Lord Cairns's statement of the law in "*Erlanger*" (L.R., 3 App. Cas. 1,218; 48 L.J., Ch. 73). They have taken a decisive step in shaping and limiting the company. It may well be asked, If this be not an act of promotion, what is? The hypothesis of all the law which we are considering is that the company is not yet formed; and, unless these gentlemen had registered the company (and thus passed out of this stage altogether), it is difficult to see what more overt acts of promoting and forming the company they could have done. The only available argument against this conclusion was that the gentlemen forming the syndicate might have changed their minds and sold to an individual. This is true, but true only in the sense that, till registration of the company and a bargain with the company, they were free to change their minds, true in the sense in which every enterprise not actually consummated may be abandoned. But, as matter of fact, these men intended, when they bought the mortgages, to sell to a company constituted in the mode and form described; and they did sell to that company. The appellant in his evidence avows it; and the other facts are indicative, to the point of conclusiveness, that nothing but a company

would have served the ends of the syndicate. The mere expression in a deed of the truism that the adventurers could sell to an individual if they did not sell to a company can never avail against the ascertainment of the true facts of the scheme. The facts here are that the company had been so far organized that its executive was provisionally appointed. The directors of a company are its executive organ: to them its interests are confided; and in the present instance the company, even in this, its inchoate stage, was identifiable through its executive. I hold that from the moment this step was taken the coming directors stood in a fiduciary relation to the company whose interests were to be in their sole hands. This conclusion rests, not on technical rules of law, but on the dictates of fair play embodied in law. The people for whom these gentlemen were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain. And now I pass to the next stage of the case. Assuming the members of the syndicate to have been promoters at the date of the purchase of the mortgages, did they properly disclose it? In the skilful argument for the appellant the duty of disclosure on this hypothesis was conceded. But this concession must not disarm the criticism which, in considering the adequacy of the disclosure, first ascertains the relevancy of the transaction to the question what sum ought to be paid by the directors for the mortgaged property. The theory of the appellant is that the purchase of the mortgages was a collateral and independent transaction. It seems to me, on the contrary, to be an essential and inseparable part of one and the same transaction, and for this plain reason that the syndicate's gain on the mortgages had to be paid by the company. The relevancy of the mortgage transaction to the question solved by the syndicate sitting as directors is this—a company, or any one else, considering what price shall be paid draws inferences as to the true value from the price paid by the seller and the proposed advance on that price. In short, what the possible buyer wants to know is the profit to be made by his seller. He may be entitled to know this, or he may not, according as his seller is bound, or is not bound, to disclose it, but the materiality of the knowledge is indisputable. Again, this transaction had another importance. The inference of value drawn from a competitive sale by auction is founded on the assumption that the sum paid was the least that the property could have been got for. In the present case, that inference would have been unsound. I do not know whether it was necessary, in order to secure the property, that the syndicate in their last bid should advance by £8,000, whereas all previous advances had been only of £1,000. But I do know that the appellant had no interest to bid £133,000 rather than £140,000, for by the time the biddings had run thus high, it was certain that the mortgages would be paid in full, and, as the syndicate knew that the directors would pay their price, it was indifferent to them, to the matter of a few thousands, whether the price which they nominally, and the shareholders really, paid to the vendor was more or less. On these grounds I consider that the transaction in mortgages was so relevant to the question—what price should the company pay for the property, that it was necessary that it should be disclosed to the company completely and in detail, and the question is whether this was done. There are several overwhelming reasons for a negative answer. In the normal case, where the directors are truly and not merely in name the executive of the company, it may be assumed that they will be vigilant and critical of the particulars of a bargain of such paramount importance as the purchase of the property to be traded with, and that, dealing at arm's length, they

will examine into anything bearing on that matter that does not tell its own story in its face. But, in the present case, the company was paralysed, so far as vigilance and criticism were concerned, for the board-room was occupied by the enemy. Now, the question whether adequate disclosure had been made to a company by a vendor bound to do so must necessarily depend upon the intelligence brought to bear on the information. And if, by his own act, the promoter has weakened, or, as here, has annulled the directorate, his case on disclosure becomes extremely arduous, for he has to make out such disclosure to shareholders as makes directors unnecessary. How this could be done we have no occasion to consider, for the appellant is not within sight of doing it. Indeed, the case is so clear that I do not think it is a case of inadequate disclosure, but of direct misrepresentation. Two statements were made which are clearly of that character. The one is the assertion that the purchase of the mortgages was a temporary investment. If this means anything, it means that the syndicate, having money on hand awaiting investment in one thing, had temporarily put it into another. The contrary is the fact; part of the price of the mortgages was subscribed by the syndicate for its purposes of which this was, in terms, one, and much the greater part was borrowed from their bankers *ad hoc*. The second overt misrepresentation is that the syndicate had paid £140,000 for the property, whereas the truth is that they were paying only £119,265 13s. 11d., the excuse for the former sum having been stated coming to no more than this, that they had to pay the vendor before their own accounts were closed. I have only to add that I consider the liability of the appellant for the whole sum in the order appealed against to be the necessary result of the ground of judgment which I adopt.

House of Lords (Lord Halsbury, L.C., } 1900.
Lords Macnaghten, Morris, Davey, } April 5.
Brampton, and Robertson)

THE NORTH-EASTERN RAILWAY COMPANY V. LORD HASTINGS.*

Landlord and Tenant—Agreement for lease—Way-leave—Construction of agreement—*Contemporanea expositio*.

Decision of the Court of Appeal (15 *The Times* L.R., 247) affirmed.

This was an appeal from an order of the Court of Appeal (the Master of the Rolls and Lords Justices Rigby and Vaughan Williams) dated March 7, 1899, affirming the decision of Mr. Justice Byrne of July 7, 1898. The hearing below is reported in 15 *The Times* Law Reports, 247: L.R., 1899, 1 (Ch., 656; 68 L.J., Ch., 315). The question involved was the construction of certain indentures and the applicability to documents executed about 1853 and 1854 of the doctrine of *contemporanea expositio*—that is, whether the interpretation accepted and acted upon by both parties for more than 40 years must be accepted by the Court as the true meaning though it may differ from that which the words themselves bear. The action was brought to establish liability on the part of the North-Eastern Railway Company to pay a way-leave rent to the respondent for coals shipped at certain shipping staiths erected by the company on the north bank of the estuary of the Blyth. This coal in its passage from the collieries to the staiths was not carried over any land of the respondent, and the contention of the company was that the respondent was therefore not entitled to any way-leave rent in respect of its carriage. The question at issue depended upon the true construction of an agreement for

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

a way-leave lease executed on May 18, 1854, by Jacob, Lord Hastings, and the Blyth and Tyne Railway Company, the predecessors in title of the respondent and the appellants respectively. It was not in dispute that since the date of the said agreement no such rent had ever been demanded or paid. The Blyth and Tyne Railway Company was incorporated by the Blyth and Tyne Railway Act, 1852, and was thereby authorized to maintain a railway running from the town of Blyth on the south side of the estuary of the Blyth to coal staiths on the River Tyne at Hayhole. The main railway passed for part of its length through the estate of Lord Hastings, and on May 20, 1853, an indenture of lease was executed by which Lord Hastings granted a way-leave for the railway for 1,000 years to the Blyth and Tyne Company, and that company agreed to pay 5s. per ten (each ten being about 48 or 49 tons) of all coal, &c., passing over the railway, and 1s. 3d. per ten of all coal, &c., conveyed from the coalfield situated northward of the estate of Lord Hastings described as the Seaton Delaval Estate to Blyth over a line known as the Bedlington branch. The Bedlington branch was a colliery line which passed for part of its length over lands of Lord Hastings. In 1853 the Blyth and Tyne Company applied to Parliament for power to make two branch railways, to Morpeth and Tynemouth respectively, and on May 21, 1853, that company and Lord Hastings entered into an agreement by which the company agreed to execute a counterpart of a lease by Lord Hastings in favour of the company of a way-leave over his lands for the said branch railways for the same term of years and upon the terms and conditions specified in the said indenture of lease of May 20, 1853, it being understood that the rents reserved were to apply to the railway already authorized as well as the proposed branches. Early in the year 1854 a Bill was introduced into Parliament, which afterwards became the Blyth and Tyne Railway Consolidation and Extensions Act, 1854. This Act repealed but substantially re-enacted the Acts of 1852 and 1853, and authorized the construction of further branches, one called the Tynemouth extension (coloured light blue on the ordnance map), being the southern portion of the proposed line to Tynemouth for which Lord Hastings had agreed to grant a way-leave in 1853, and the other called the Longhirst branch, which did not pass over any lands of Lord Hastings. On May 18, 1854, there was executed an indenture containing a form of way-leave lease to be granted by Lord Hastings to the Blyth and Tyne Company. This indenture, the construction of which was the main question at issue in this appeal, recited that a Bill had lately been introduced into and was then pending in Parliament for the purpose of enabling the company to continue and maintain or make complete and maintain the Dairy House branch, the Tynemouth extension, and the Morpeth branch. No reference was made to the Longhirst branch. It further recited that the said railways and works were intended to be made to a great extent upon lands belonging to Lord Hastings, and that the company had applied to him to make to them, in the event of the passing of the said Bill, a grant of way-leave over his lands through which the said railways were intended to be made. Then followed a covenant by Lord Hastings and the company, that after the passing of the Bill Lord Hastings would grant and the company would accept a grant of way-leave over such portion of the lands of Lord Hastings as were thereafter mentioned, which said grant of way-leave was agreed to be in the form of a lease as thereafter set forth. The said form of lease which was then set forth reserved as was reserved by the indenture hereinbefore mentioned of May 20, 1853, rents calculated at the rate of 5s. per ten of coals, &c., passing along the said railways and not comprised in the subsequent reservations, and at the

rate of 1s. 3d. per ten of coals, &c., conveyed from the coalfield situate northward of the Seaton Delaval estate to Blyth over the Bedlington branch. But in addition to the said rents of 5s. per ten and 1s. 3d. per ten reserved by the earlier indenture, the agreed form of lease also reserved a rent calculated at the rate of 3s. per ten on coals, &c., conveyed over any part of the railways comprehended in the Blyth and Tyne Railway Consolidation and Extensions Act, 1854, and shipped at the Port of Blyth (other than coals, &c., comprised in the reservation of 1s. 3d. for coals, &c., carried over the Bedlington Branch). The appellants contended that the true construction to be put upon the reservation of the rent of 3s. in the indenture of May 18, 1854, was that in respect of coals, &c., conveyed over any part of the railways comprehended in the Act of 1854 for shipment at the Port of Blyth and passing over the lands of the respondent, but not otherwise, the company were liable to pay a rent of 3s. per ten instead of 5s. per ten as provided by the earlier indenture of May 20, 1853. It was admitted that the rent of 3s. applied, and had always been treated as applying, to the main railway as well as to the branches authorized by the Acts of 1853 and 1854. The respondent now contended that the appellants are liable to pay the 3s. rent on all coals, &c., conveyed over any part of the said railways for shipment at the port of Blyth, whether passing over lands of the respondent or not. For a period of upwards of 40 years dating from the year 1854—the date of the execution of the said indenture—the respondent had not nor had any of his predecessors in title ever claimed, nor had the appellants or their predecessors in title ever paid, the rent of 3s. per ten or any other rent of any kind in respect of coal, &c., whether conveyed to Blyth or elsewhere, which did not pass over some part of the respondent's lands, although rent had been regularly claimed and paid upon all coal which had passed over any land of the respondent. Mr. Justice North decided in favour of Lord Hastings, and his judgment was affirmed by the Court of Appeal. The appeal was heard on March 22, when judgment was reserved.

Mr. Swinfen Eady, Q.C., Mr. Astbury, Q.C., and Mr. Mackarness were for the appellants; Mr. Eve, Q.C., and Mr. George Henderson for the respondent.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said:—In this case I think the whole question turns upon a very few words to be found in the instrument under construction. A variety of circumstances have been insisted upon to alter the construction which the words themselves naturally bear, but I am unable to see that either in the language used or on the construction of the whole instrument there is any room for doubt. The chief argument used to give an unnatural construction of the words is that the parties have so acted during a period of 40 years that the only reasonable inference to be derived from their conduct is that they have understood and acted on their bargain in a sense different from that which the words themselves convey. I am of opinion that if this could be truly asserted it is nothing to the purpose. The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous. So far as I am aware no principle has ever been more universally or vigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself. More than 100 years ago a case arose in the Court of Queen's Bench (*Clifton v. Walmisley*, 5 T.R., 564), in which, under a demise of certain coal mines, the lessee had covenanted to pay, among other rents and royalties reserved, one half share of all such sum or sums of money as any of

the coal to be gotten by virtue of the said indenture should sell for at the pit mouth. At the time when the covenant was drawn, all the coal was sold at the pit's mouth, but after that time a canal had been made and an opportunity afforded of carrying the coal to a more distant market, where it was sold at an enhanced price. For a period of ten years the lessee had paid to the lessor the half of the enhanced price when the coal was sold at the distant market, and the same line of argument was presented in that case which has been out before your Lordships here. It was said that the circumstances showed what the real meaning of the parties must have been—namely, that the lessor should receive one-half of the price which the coal produced in the market, and it was urged that the course would not tie down the parties to the mere words but would look to the meaning that for a period of ten years the parties had acted on that view of the contract, and whether the coal was sold further from the pit or nearer to it could not possibly vary the real right of the parties. The Court rejected the evidence and held that the covenant not being ambiguous in its terms could not be explained in the way suggested. It certainly, in that case, could not have been much matter of doubt that what the parties really had in their mind, if one had been at liberty to reject the words of the covenant or treat them as ambiguous, was that the lessor should obtain one-half of the selling price of the coal. As was argued by the learned counsel in that case it was very difficult to conceive any hypothesis upon which a distinction should have been insisted upon as to the place of sale. It may be that in particular instances an adherence to the letter of a contract may produce an apparent injustice, but a different rule would render all contracts uncertain and would produce much graver injustice. And in the case of the "Trustees of the Clyde Navigation v. Laird" (8 App. Cas., 668) Lord Blackburn says:—"But though I think the reasonableness of a scheme is a very good reason for thinking that the Legislature might have wished to adopt it, and therefore for construing words as showing an intention to carry it out, if the words used will bear such a sense, it affords no justification for introducing new words, or construing the words used in a sense which they cannot bear, and I find no words in the Act of 1858 capable of bearing a meaning which would show that the Legislature intended this reasonable scheme. I equally fail to see words indicating an intention to make this, perhaps not unreasonable, exemption from the general rate if it were imposed." Now the facts out of which this case arises are simple enough. In May, 1853, Lord Hastings granted certain way-leaves to a railway company, and without going very minutely into the terms of the instrument in question, it is enough to say that the way-leave then granted or agreed to be granted was a way-leave by which, upon certain terms, the coal going over any part of the railway which crossed Lord Hastings's land should pay certain rates. It cannot be denied that in this agreement the sole right of Lord Hastings was to claim in respect of railway or parts of railways conveying coal through or over his own land. But the agreement of May, 1854, is the instrument upon which the question arises. Certain way-leaves and rights in respect of them are granted by Lord Hastings, and the whole question is whether in this instrument, like that of 1853, the right to get rents or sums is dependent upon whether the coal carried is carried through or over any part of Lord Hastings's land. The appellants seek to limit it by suggesting that the real meaning of the words used must be read by the light of the earlier agreement, in which, undoubtedly, Lord Hastings's rights were limited to coal carried over some portion of his land. But I am very clearly of opinion

that no such limitation can be imported. I agree with the Master of the Rolls that the clause under construction is clear and unambiguous. It does not deny that the language of the covenant—namely, "the railways comprehended in the Blyth and Tyne Railway Consolidation and Extension Act, 1854," is conclusive against the appellants, unless these words can be used in some different sense, and I am wholly unable to see how they can be. The coal in respect of which way-leave rent has been charged, and which has not been paid, undoubtedly did pass over railways comprehended in this description, and it is sought to qualify the rights of Lord Hastings under this instrument by three considerations. (1) It is said that it is unreasonable that Lord Hastings should receive way-leave rent in respect of coal passing over a railway or part of a railway which was not on Lord Hastings's land. But it is a very familiar thing that in granting similar rights a proprietor will protect himself against an evasion of the obligation by a railway company to guard against alternative routes by which when a railway company has obtained, so to speak, the key of the situation it may render a reservation of rents for way-leave of little value. Next it is said that the instrument reserves no rights of inspection or right to account, whereas such rights are expressly given in respect of such portions of the railway as pass over Lord Hastings's land, and this is true. But though it may go to show the bad drafting which the appellants so strongly insist on, I am wholly at a loss to see that the absence of such provisions can affect the plain and unambiguous words in which the obligation to pay is created. The next argument is the practice which has prevailed for 40 years between the parties, which, it is said, is inconsistent with the only sense in which the words creating the obligation can be understood. I think the argument is overstated, since there may have been circumstances which caused one particular pit, which was undoubtedly comprehended within the language of the covenant, not to be called upon to pay. That question has neither been litigated nor inquired into, and I am not at liberty to inquire into it, but whatever may be the history of it, it cannot affect the generality of the covenant to be construed between these parties, whatever may be the rights of the proprietors of the particular colliery. What those circumstances were and how it happened that the coal carried from the pit over part of the designated lines was not charged for I do not know, nor am I at liberty to conjecture. It may be that circumstances peculiar to itself, or agreement with the owners of it, caused this omission, but now that an alternative line has been created by legislation, it is difficult to see what relation that immunity has to the claim in respect of the coal carried by that alternative line. But, in truth, I do not think I have any right to know what the parties have done. I think in strictness the course they have pursued is not evidence. I think the true view is that laid down by Lord Kenyon in 1794, and I have no right to construe the covenant now questioned differently from the mode in which I should have construed it if the controversy had arisen the day after the agreement had been executed. For these reasons I must adhere to the judgment given by Mr. Justice Byrne and by the Court of Appeal, and move, your Lordships, that this appeal be dismissed with costs.

The other noble and learned Lords concurred.

Court of Appeal (Collins, Vaughan } 1900.
Williams, and Romer, L.JJ.) } April 5.

WRIGHT V. JOHN BAGNALL AND SONS (LIMITED).
Master and servant—Master's liability to servant—Time within which to make claim for

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

compensation—Waiver by employers—Workmen's Compensation Act, 1897.

This was an appeal from the award of the Deputy Judge of the Walsall County Court under the Workmen's Compensation Act, 1897. The appellant, George Wright, was a wagoner in the employment of the respondents, John Bagnall and Sons (Limited), who were iron manufacturers at West Bromwich, and on November 23, 1898, he received personal injuries by accident arising out of and in the course of his employment. He was taken to the hospital suffering from permanent injuries. At the time of the accident his wages were 21s. a week. On November 26, 1898, the appellant's wife saw the respondents' ledger clerk, who told her to get a note from the hospital and bring it in three weeks' time to the works, when her husband would be "due for compensation," and that she would "pick up" half his wages. At the end of the three weeks she went with the hospital note to the works, and received 10s. 6d., and from that time either the appellant or his wife continued to receive that sum each week until September 6, 1899, either from the respondents or from the insurance company with whom the respondents were insured. About Easter, 1899, the appellant saw the respondents' manager, when an offer of £15 was made to him as compensation, "to set him up in a little business," but the appellant refused to take it. The manager told him to go home and talk it over with his wife. A few days afterwards the appellant saw the manager again, when the appellant said that he would take £200. The manager said, "If you talk about £200 we will go to the Court with you." At Whitsuntide the manager offered the appellant £30, saying that he thought that the insurance company would give that amount. The weekly payments having stopped on September 6, 1899, the appellant filed a request for arbitration to assess the compensation payable under the Act of 1897. The respondents, in their answer, took the objection that the claim for compensation was not made within six months from the occurrence of the accident, as required by section 2, subsection 1 of the Act. The Deputy County Court Judge held that "the claim for compensation" meant the filing of the request for arbitration, and that, therefore, the application was out of time. With regard to the question of waiver, he said that the payment by the respondents to the appellant each week up to September 6, 1899, of the exact sum to which the appellant was entitled under the Act, and the commencing of such payments at the time required by the Act, were calculated to make the appellant believe that he was receiving these payments by virtue of the Act and to lull him into a state of false security; but, on the other hand, the appellant should have known his rights under the Act, and if he thought that he had arrived at an arrangement with the respondents, he should have got them to enter into a memorandum of agreement embodying the terms of the arrangement, and registered the memorandum. He did not think that the respondents could be said to have waived any defence they might have on account of the lateness of the appellant's claim. With regard to the question of estoppel, he did not think that the respondents' conduct could dispense with the requirements of the statute. The language of section 2, subsection 1 was peremptory, that proceedings "shall not be maintainable" unless the claim for compensation were made within six months. He accordingly held that the appellant was not entitled to compensation, and made an award in favour of the respondents. Since the hearing before the Deputy County Court Judge the Court of Appeal decided in "*Powell v. Main Colliery Company (Limited)*" (16

The Times L.R., 282) that "the claim for compensation," which was required by section 2, subsection 1 to be made within six months after the accident, meant the filing of the request for arbitration. The decision of the Deputy County Court Judge upon that point was, therefore, not sought to be disturbed.

Mr. DISTURNAL, for the appellant, contended that the respondents, by their conduct, had waived the making of the claim for compensation within the six months. There was nothing in law to prevent the respondents from waiving their right to take the objection that the claim was not made within the six months. The facts showed that it was inequitable to allow the respondents to set up the objection. The limitation of time in section 2, subsection 1 of the Act affected the remedy, like the Statute of Limitations, and did not bar the right. Further, the respondents were estopped by their conduct from denying that proceedings to assess compensation had been commenced within the six months.

Mr. W. F. CRAIES, for the respondents, contended that there could be no estoppel preventing them from setting up the limitation of time. The respondents might waive the objection by not setting it up in their answer, or they might have agreed not to take the objection. The facts here did not show any waiver.

The COURT allowed the appeal and remitted the case to the Deputy County Court Judge.

LORD JUSTICE COLLINS said that the Deputy County Court Judge held, as he (the Lord Justice) read his holding, that it was not for him to consider whether the circumstances of the case debarred the respondents from raising the objection of the lapse of time. It seemed to his Lordship that in the circumstances of this case the Deputy Judge was wrong in holding that as a matter of law the respondents were not debarred from setting up that objection. In his opinion there was evidence before the Deputy Judge that the parties had agreed absolutely that there was a liability under the Act on the part of the respondents to pay compensation, that the amount alone was not agreed upon, and that the appellant had the right to go to arbitration for the purpose of having the amount settled. The weekly payments had been made for a considerable time. Then the question arose as to commuting the weekly payments for a lump sum. Differences arose as to the amount, and the respondents' manager said that if the appellant stood out for so large a sum as £200 they would go to the Court. That was a clear recognition of the jurisdiction of the Court. Upon that the appellant forbore from taking proceedings to have the amount of the compensation assessed, but negotiated upon the question, and while the negotiations were going on the six months' limit of time expired. In that state of things there was ample evidence of an agreement that compensation was to be paid, the only question left open being the amount thereof. If that were made out the respondents were not in a position to take the objection that the six months had expired. In his opinion the respondents had also debarred themselves, by treating the question as still open to negotiations and leading the appellant to act on that view, from taking the objection. In his opinion there was ample evidence upon which the Deputy Judge might find that the respondents were not entitled to raise the defence, and there was nothing in point of law to prevent the Judge from so finding. The case must, therefore, be remitted to the Deputy County Court Judge. The appeal would be allowed, with costs here and below.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER agreed.

Mr. CRAIES said that instead of the case being sent

back to the Deputy County Court Judge his clients would agree to pay the appellant 10s. 6d. a week.

[Solicitors—James Mitchell, for Willecock and Taylor, Wolverhampton, for the appellant; Morgan, Price, and Mewburn, for Hargreave and Heaton, Birmingham, for the respondents.]

Court of Appeal (Collins, Vaughan } 1900.
Williams, and Romer, L.J.J.) } April 5.

DAVIES V. RHYMNEY IRON COMPANY (LIMITED).*

Master and servant—Master's liability to servant—Workmen's Compensation Act, 1897.

Accident held not arising out of and in course of employment.

This was an appeal from the award of the Tredegar County Court Judge under the Workmen's Compensation Act, 1897. The appellant was a collier in the employment of the respondents, the Rhymney Iron Company, who were the owners of a colliery. The respondents owned a line of railway about one and a quarter miles in length, from their colliery, and they ran a train to take the colliers from their work in the colliery to their homes. The colliers did not pay for the use of the train, and it was at their option whether or not they used it. The respondents were not bound to carry the men. The men got off the train at points nearest to their homes, the train stopping for that purpose. The appellant was going home by the train on March 6, 1899, and, when alighting from it at a point about three-quarters of a mile from the colliery, he fell and was slightly injured. The amount of the compensation, if any, was agreed at the sum of £3 13s. 6d. The case was, however, important as a test case. The County Court Judge found (1) that the accident did not arise out of and in the course of the appellant's employment. He found as a fact that it was not a condition of the appellant's employment that he should be carried to and from his work by the train, and that the respondents provided the train as a convenience only for their workmen, and that they were not under any contract, duty, or obligation to provide it. He also found (2) that the accident did not happen to the appellant on or in or about the mine, the accident having happened at a distance of three-quarters of a mile from the pit's mouth. He accordingly made an award in favour of the respondents.

Mr. BRYNMOR JONES, Q.C., and Mr. H. MORGAN, for the appellant, contended that the accident arose out of and in the course of the appellant's employment, and that the employment at the time of the accident was "about" the mine as defined by section 75 of the Coal Mines Regulation Act, 1887, which was incorporated in the Workmen's Compensation Act, 1897, by section 7, subsection 2, of that Act. The railway was the property of the respondents and belonged to the mine. It was adjacent to and appurtenant to the mine, and was used in connexion with their mining operations. They referred to "Holness v. Mackay" (1899, 2 Q.B., 319); "Lowth v. Ibbotson" (1899, 1 Q.B., 1,003); "Chambers v. Whitehaven Harbour Commissioners" (1899, 2 Q.B., 132).

Mr. Ruegg, Q.C., and Mr. Anton Bertram, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE COLLINS said that, in his opinion, upon the findings of the County Court Judge, the accident did not arise out of and in the course of the appellant's employment. The appellant had left his place of work and had availed himself of the facilities given by the respondents to go home. He went home by a route

which he was not bound to take. He was under no duty to the respondents at the time of the accident, and in no sense could the accident be said to have been connected with his employment. The County Court Judge was, therefore, right. It was not necessary to express any opinion upon the other point dealt with by the County Court Judge, but he could see no reason to differ from him upon that point either.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER agreed.

[Solicitors—Holt, Beever and Co., for Daniel Evans, Brecon, for the appellant; H. P. Beecher, for Vaizey Simons, Pontypridd, for the respondents.]

Chan. Div. } 1900.
(Farwell, J.) } April 5.

DIXON V. KENNAWAY AND CO. (LIMITED).*

Company—Shares—Transfer of Shares—Estoppel—Share certificates.

In this action the plaintiff, Elizabeth Rebecca Dixon, claimed a declaration that she was entitled to certain shares in the defendant company, together with the dividends accrued thereon, or for damages.

Mr. Badcock, Q.C., and Mr. T. Ribton appeared for the plaintiff; and Mr. Bramwell Davis, Q.C., and Mr. Kenyon Parker for the defendant company and the other defendant, Charles Halford Thompson.

Mr. BADCOCK, in opening the case, said that the defendant company was formed in 1892 to take over a wine and spirit business at Exeter. The capital of the company was £100,000 in 10,000 shares of £10 each, of which 5,000 were preference and 5,000 ordinary shares. The defendant Colonel Thompson was chairman and one of the managing directors of the company, and to him, as a vendor, had been allotted 333 fully paid-up ordinary shares, numbered 1 to 333. The company appointed a man called Liddell, who was a stock and share broker in Exeter, as their secretary. Colonel Thompson from time to time employed Liddell to sell certain of the 333 shares that had been allotted to him, and such shares were sold either by Liddell or by one of his two clerks, who were named Pitman and Clarke respectively, ostensibly as vendor, but really, as the plaintiff submitted, as agent for Colonel Thompson. In January, 1897, the plaintiff bought from Liddell 30 ordinary shares in the defendant company for the sum of £324 18s. The transfer purported to be a transfer by Pitman to the plaintiff, but the space where the numbers of the shares should have been inserted was left blank. The transfer was brought before a board meeting on March 4, at which Colonel Thompson presided, and was duly passed, and the plaintiff subsequently received a share certificate, under the defendant company's seal, certifying that she was the holder of 30 shares, numbered 115 to 144, being part of the shares allotted to Colonel Thompson. Dividends were paid to the plaintiff, and her name remained on the company's register down to the happening of the events which gave rise to the present action. In June, 1898, Liddell absconded, having never accounted for the £324 18s., and in March of the following year the defendant company instructed a firm of accountants to investigate the dealings with the shares of the company and ascertain what irregularities had been committed. In consequence of the report made by the accountant the defendant company in April, 1899, refused to recognize that the plaintiff was entitled to any shares, and demanded the return of the share certificate, which, of course, was refused. The plaintiff had also an alternative claim. It appeared that Pitman was still regi-

stered in the company's books as the holder of two ordinary shares, numbered 2,296 and 2,297; and if the plaintiff failed as regards the 30 shares she submitted that she was entitled to those two shares, as the transfer had been executed by Pitman. The report made by the accountant would reveal many irregularities and would show that on one occasion at least Colonel Thompson transferred shares to a clerk of Liddell's long after they had actually been transferred to a purchaser by the clerk. In fact it would appear that the company undertook to accept transfers without the shares being numbered, and then selected and allocated the shares to be issued to the purchaser. In any case the share certificate issued to the plaintiff was *prima facie* evidence, under section 31 of the Companies Act, 1862, that she was the holder of 30 shares, and the onus was on the defence to prove that she was not entitled to them.

Mr. BRAMWELL DAVIS, for the defendants, said that the action raised the question which of two innocent parties was to suffer for the fraud of a third party. The plaintiff had no cause of action against Colonel Thompson either by contract or estoppel. She had no transfer from any one entitled to sell. Colonel Thompson had never parted with the 30 shares. He never employed either Liddell or Pitman to sell them, and he had always received a dividend on them. The dividends to the plaintiff had been paid by Liddell. As against the company the authorities showed that the only ground of action was estoppel, and to prove estoppel the plaintiff must prove that since acquiring the shares she had in some way altered her position either by selling or mortgaging them. The plaintiff, however, still held the share certificate.

Colonel Thompson, examined by Mr. BRAMWELL DAVIS, said that Liddell bought and sold shares in the company for his own clients. In March, 1897, he did not know that Pitman was Liddell's clerk. Until June, 1898, the company had absolute confidence in Liddell. If Liddell said that the transfers were correct the board passed them, and did not examine the books in order to verify them. Witness employed Liddell to sell shares for him, and gave him a limit as to what he would take for them. He had never authorized him to sell the 30 shares in question, nor had he empowered Pitman to execute a transfer. He knew nothing of the dividends being sent to the plaintiff.

Cross-examined by Mr. BADCOCK.—There was a running account between witness and Liddell for the sale of shares. He did not remember transferring a preference share to a clerk of Liddell's which had been transferred by the clerk to a purchaser some months before. So far as he remembered, he never refused to sign anything that Liddell asked him to sign. All he cared about was to get a proper price for his shares. He had implicit confidence in Liddell.

Other evidence having been given for the defence, Mr. BRAMWELL DAVIS submitted that if the plaintiff had any remedy at all she was only entitled to damages. He cited the following cases:—"Simm v. Anglo-American Telegraph Company" (5 Q.B.D., 188), "Foster v. Tyne Pontoon and Dry Docks Company" (63 L.J., Q.B., 50), "Knights v. Wiffen" (L.R., 5 Q.B., 660), "Balkis Consolidated Company v. Tomkinson" ([1893] A.C., 396), "Bishop v. Balkis Consolidated Company" (25 Q.B.D., 77).

Mr. Pitman, examined by Mr. BADCOCK, said that he received £1 a week as Liddell's clerk. He had never had any private means. He signed the transfer by Liddell's orders.

Mr. BADCOCK contended that Colonel Thompson was either the undisclosed principal of Liddell or was estopped by his conduct from setting up a title to the 30 shares. The company also was estopped, and in support

of this argument he referred to "Carr v. London and North-Western Railway Company" (L.R., 10 C.P. 307) and "Bloomenthal v. Ford" ([1897] A.C., 156).

MR. JUSTICE FARWELL, after stating the facts, said that the plaintiff set up two claims—the first against Colonel Thompson and the second against the company. As regards Colonel Thompson, who had given his evidence in a very straightforward manner, the plaintiff contended that he could not be heard to say that the shares were not hers on the ground that he was either the principal of Liddell in the transaction or was estopped by his conduct. It was true that Liddell had some sort of general authority to sell shares for Colonel Thompson, but Liddell had no authority to execute a transfer of those 30 shares, and, in fact, had not executed any such transfer. There was no evidence to show that Liddell was acting as Colonel Thompson's agent in this matter, and he could not hold that a general authority went so far as to make him liable. Then was Colonel Thompson estopped by his conduct? He thought not. The Colonel did not sign the plaintiff's certificate and could not be fixed with knowledge that the shares mentioned in it were his. In his Lordship's opinion it was not the duty of the directors to inspect every share certificate and see that it corresponded with what was contained in the books of the company. The plaintiff's claim therefore failed as against Colonel Thompson, but he could not acquit him of negligence in the way he trusted Liddell, and would consequently not order the plaintiff to pay his costs. Then, as regards the claim against the company, the point was one of general interest. *Prima facie* the certificate was evidence that the person named therein was the holder of the shares specified, and a certificate was an estoppel in favour of any person who accepted it and acted upon it. He accepted the definition of estoppel given by Lord Blackburn in "Knights v. Wiffen," with the addition of what was said by Mr. Justice Butt in "Carr v. London and North-Western Railway Company." To prove estoppel the plaintiff must show that she had altered her position, either actively by selling or mortgaging the shares or passively by resting upon the certificate to her detriment. It was clear from Pitman's evidence that the plaintiff could not have recovered anything from him. As regards Liddell she could not have recovered as against him at the date of the writ, for Liddell was then bankrupt. Could she have recovered if she had sued him before bankruptcy or before action brought? From what Lord Blackburn had said in "Knights v. Wiffen," and Lord Justice Collins seemed to have meant the same thing in "Foster v. Tyne Pontoon and Dry Docks Company," it was for the defendants to prove that no money could have been recovered from Liddell. That they had failed, in his opinion, to prove. Liddell's pass-books had been put in, and, though they showed that at times his account was overdrawn, he could not say that Liddell could not have paid if the plaintiff had brought an action against him. The defendants had relied on "Simm v. Anglo-American Telegraph Company." But that was a different case altogether, as the transfer was forged, and it was really a case of estoppel against estoppel. He held that in the present case the plaintiff had rested to her detriment on the certificate, as the time had gone by in which she could bring an action, with any hope of recovery, against Liddell. There was, therefore, a clear estoppel as regards the company arising out of the certificate. The company, of course, could only pay damages. He would order them to pay the plaintiff £324 18s., with interest at the rate of 4 per cent. from January 1, 1898, as had been arranged between counsel. The company must also pay the plaintiff's costs.

Judicial Committee of the Privy Council }
(Lord Halsbury, L.C., Lords Hob- } 1900.
house, Macnaghten, Morris, Davey, } April 6.
and Robertson)

SIMMS AND OTHERS V. THE REGISTRAR OF PROBATE.*
Privy Council Appeals—South Australia—
Revenue—Succession Duty—Evading the pay-
ment of duty—Succession Duties Act, 1893,
sec. 27.

This was an appeal from a decree of the Supreme Court of South Australia of December 20, 1898, reversing an order of the Right Hon. the Chief Justice (Sir Samuel Way).

Mr. Haldane, Q.C., Mr. Lawson Walton, Q.C., and Mr. Vaughan Hawkins appeared for the appellants; Mr. Warmington, Q.C., and Mr. Danckwerts, Q.C., for the respondent.

LORD HOBHOUSE, in delivering their Lordships' judgment, said the question in the appeal was what amount of succession duty was payable to the respondent, representing the Crown, from the estate of William Knox Simms, who died on December 25, 1897, domiciled in South Australia. The appellants were entitled under his will and they claimed that duty was not payable in respect of £200,000 which the testator had covenanted to pay in 1896. The respondent contended that the testator's covenant was made with intent to evade the payment of duty, and that under the Succession Duties Act, 1893, double duty was chargeable on that sum. On September 26, 1892, the testator, who had been a brewer in Adelaide, but had retired from business, made his will. After giving some specific properties and a life annuity of £2,000 to his wife, he gave his residuary estate in trust for his children in equal shares. As to the shares of the daughters, he gave the income to the separate use of each for life. If she did not leave issue she had power to dispose of her share by will; and if she did leave issue, they took the share. Further trusts were declared in favour of husbands or wives of all his children on failure of the prior trusts. The present Succession Duties Act received the Royal Assent on October 25, 1893. It superseded the previous Act of 1876, and it imposed much heavier rates of duty—amounting for an estate so large as that of the testator to an increase of 8 per cent. When it passed and up to the time of the testator's death there were living six children of his, three sons and three married daughters, two of whom had living issue. On January 10, 1896, the testator executed a deed poll in the following terms:—"Know all men by these presents that, in consideration of natural love and affection, I, William Knox Simms, of Adelaide, in the province of South Australia, gentleman, do hereby covenant, promise, and agree, jointly and severally with my children Alfred Simms, Harry Simms, Edward Simms, Louie Colley, Clara Jane Bonnin, and Eleanor Varley, that I will pay to them the sum of £200,000, such sum to be divided between them in equal shares. And I further covenant and agree, jointly and severally with my said children, that until the said sum of money be paid and divided between them as aforesaid, or suitably invested on their behalf, I will pay to them interest thereon at the rate paid by the Associated Banks in Adelaide on deposits at three months, provided such interest shall not be less than at the rate of £1 10s. per centum per annum, such payments to be paid and payable quarterly in advance, the first of such payments to become due and payable on January 1, 1896. And I declare that as to the interest accruing due to my said children until the said principal sums be otherwise invested I will pay to my sons as they may direct, but

to my daughters personally or into their respective banking accounts and to and for their sole and separate use, free from the control of their respective husbands. And I hereby declare that I will pay the principal sums due to such of my daughters as have issue living into the hands of my said sons, Alfred Simms and Edward Simms, and my son-in-law, Paul Frederick Bonnin, as trustees on their behalf, to invest the same for such daughters for life, and pay the annual income thereof to them, and thereafter to divide the same between their respective children *per stirpes* and not *per capita*. And I hereby acknowledge and declare that I am indebted to my said children in the said sum of £200,000, such principal sum to be utterly irrespective of any sum I may leave to them under my will, and not to be brought into hotchpot with my testamentary estate. In witness," &c. When the testator died no part of the £200,000 was paid, but interest thereon at $1\frac{1}{2}$ per cent. was regularly paid by him in advance to the six children. It was shown that he received about 3 per cent. on his investment. As under his covenant he paid interest one quarter in advance, the debt was not payable strictly on demand, but it was payable at call, varying in time from three months down to a day. The Chief Justice said that $1\frac{1}{2}$ per cent. was a very fair rate of interest for money at call of three months. On the testator's death his executors claimed to treat the whole sum as a debt and to deduct it from the estate for the purpose of ascertaining the amount of duty. On the part of the Crown it was not disputed that, independently of the express provisions of the Succession Duties Act with reference to gifts made prior to death, the estate was entitled to that deduction. Deducting the £200,000, the residuary estate had been found to amount to upwards of £115,000, on which duty had been paid. The further claim of the Crown was founded on those statutory provisions which imposed duties on gifts made with intent to evade duty. In the Act of 1876 there were two sections bearing on the question. Section 14 enacted to the effect that if a deceased person had made a gift of property with intent to evade the payment of duty, and such property were in the hands of donees or of volunteers claiming under him, it should for the purposes of the Act be deemed part of the property of the deceased donor; and it added that every voluntary gift made within one year prior to the death of the donor should be presumed to be made with the intent to evade unless the contrary be proved. The same section declared that any voluntary gift of property to take effect upon the death of the donor should be deemed to have been made with intent to evade payment of duty. It also contained a provision making donations *mortis causa* part of the property of the donor. Section 27 corresponded to the eighth section of the English Succession Duty Act of 1853. It enacted that where any disposition of property should purport to take effect presently, but by some secret arrangement capable of being enforced in a Court of law or equity the beneficial ownership should not *bona fide* pass according to such disposition, but should in fact devolve on death, the taker should be deemed to acquire the property as a succession, and, further, that where any disposition was judicially declared to be fraudulent and made for the purpose of evading the duty, the Court might declare a succession to have been conferred on the taker at such time and to such an extent as it should think just. There were difficulties in construing those clauses, occasioned probably by the fact that the Act imposed two sets of duties. The first part, in which section 14 occurred, related to probate duties. The second part, in which section 27 occurred, related to succession duties imposed by section 20 on successions as defined by section 21. Section 14 made the property given with intent to evade part of the donor's estate, clearly

* Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

for the purpose of bringing it under the head of probate duty. The same provision would appear to bring the same property within the definitions of section 21, and so make it liable to succession duty, if it were not for the last clause of section 27, by which the Court was empowered to declare a succession to have been conferred after it had declared a disposition to have been fraudulent and made for the purpose of evasion. Mr. Justice Bunday laid it down in this case that to impose succession duty the Court must find fraud, and Mr. Justice Boucaut said that section 27 said substantially that an attempt to evade duty was a fraud. That question was obscure, but it was clear that neither section 14 nor 27 was framed to interfere with gifts taking full effect *in presenti*, except in the one case of a gift made within a year of the donor's death; in which a positive rule was laid down that intention to evade should be presumed, but might be rebutted by evidence. In the Act of 1893 matters were much simplified. Only one duty—viz., succession duty—was imposed. Section 14 of 1876 disappeared as a whole. Its provisions as to donations *mortis causa* were the subject of a separate section 10 of the present Act; its provision as to voluntary conveyances to take effect on death had become useless, for such gifts conferred a succession, and the object of imposing probate duty had ceased to exist. Its provision as to gifts made within a year prior to the donor's death was superseded by sections 16 and 17 of the new Act. Section 16 declared that a deed of gift should mean and include among other things every non-testamentary disposition of property containing trusts or dispositions to take effect during the lifetime of the donor. It was enacted by section 17, "The property given or accruing to any person under any deed of gift shall, in the event of the death of the donor within three months from the date of the deed of gift, be chargeable immediately after such death with succession duty according to the scale in the third schedule hereto, except in cases of death by accident." The time which might be called that of probate was shortened from a year to three months, but the imposition of duty was made a positive and peremptory rule of law, and was not reached by the indirect road of an artificial presumption rebuttable by evidence. The more general words of section 14 and the whole of section 27 of 1876 were replaced by section 27 of the present Act as follows:—"If any person has made or shall hereafter make any conveyance, assignment, gift, delivery, transfer, declaration of trust, or other non-testamentary disposition, whether in writing or otherwise, of any property, real or personal, or of any money or securities for money, or has given or shall give any mortgage or encumbrance, or has incurred or shall incur any debt, with intent to evade the payment of duty hereunder, such disposition, mortgage, or encumbrance, or the incurring of such debt, shall be deemed, so far as the circumstances will admit, to be a deed of gift under section 16 hereof, and any property accruing to any person thereunder shall be liable to duty as if the donor had died within three months from the date thereof, but double duty shall be payable in respect of such property." The matter was brought by summons before the Chief Justice sitting in Chambers. The respondent tendered no evidence of intent, relying entirely on the inferences to be drawn from the dates of events and the documents. The Chief Justice dismissed the summons with costs, holding that the act of the testator was sufficiently explicable, by a desire to make a beneficial family arrangement, resembling though by no means identical with that of his will, and not alterable as his will was. The respondent appealed to the full Court, consisting of the Chief Justice and Justices Boucaut and Bunday. The Chief Justice adhered to his former conclusion;

but inasmuch as the two other Judges were of a different opinion the Court decreed that the order of the Chief Justice should be set aside and that the summons should stand over to be dealt with on the merits, the Registrar having made out a *prima facie* case to be answered. From that decree the present appeal was brought. The Chief Justice, in his judgment, examined the meaning of the expression "evade," and said:—"I am driven to the conclusion that the word 'evade' in section 27 means to avoid by some direct means, by some device or stratagem. The phrase 'with intent to evade payment of duty' would cover some arrangement, trust, or device—whether concealed or apparent on the face of the non-testamentary disposition—by which what is really a part of the estate of the deceased is made to appear to belong to somebody else in order to escape payment of duty." Inasmuch as no evidence was offered to qualify the effect of the covenant and the actual dealings under it, it was a necessary conclusion that Mr. Simms completely deprived himself of the power of reclaiming the £200,000, and that he put that sum entirely in the power of the covenantees. Subject only to the delay resulting from the acceptance of interest in advance the money might have been demanded from him at any moment. Whatever he might have wished or have expected to be done by his children, he took all risks. His children might forbear to enforce their claim against the wish of their father from deference and respect, or even from the reflection that the receipt of interest by their father would increase his estate, which they knew he intended for them. But changes of feeling might occur, quarrels or estrangements; or changes of circumstance, a death, an insolvency, or some great pressure for money; any of which things might lead to demands under the covenant such as the testator had made himself incapable of resisting. An act involving such consequences the Chief Justice held to be a non-testamentary disposition of property within the meaning of section 16 of the statute, which was not subject to duty under section 17 unless the donor died within three months. With regard to the expression "disposition of property," one of the other Judges below doubted, and one denied, that a covenant to pay was such a disposition. It was not, however, so contended by the respondent's counsel at the Bar. Their Lordships held that a covenant to pay conferring complete ownership of the debt, and diminishing the covenantor's net assets by that amount, was rightly deemed to be a disposition of property within the meaning of the Act. With respect to the opinion of Mr. Justice Bunday that the covenant was a sham, their Lordships could not find any evidence to support it. For all that appeared it was a genuine deed creating valid obligations on the covenantor, which might have been enforced at once. It was quite true, as the learned Judges observed, that the Act struck at valid transactions. But that was nothing new in the Act of 1893. The Act of 1876 did the same. No gift was thereby invalidated for being evasive, and, except to the extent of letting in the duty, neither past nor future enjoyment by the donee of the property evasively given to him was interfered with. It did not follow at all that because duty was made to attach on property validly transferred, it was also made to attach on property transferred *in presenti* and placed beyond the control of the transferor and within the immediate control of the transferee. It did not appear to their Lordships that an examination of the decisions in which the word "evade" had been the subject of comment led to any tangible result. Everybody agreed that the word was capable of being used in two senses—one which suggested underhand dealing and another which meant nothing more than the intentional avoidance of something disagreeable. Beyond that

nothing was to be found having much bearing on the construction of the word, which depended entirely upon its use in the Colonial Acts. According to the majority of the Judges below, the Legislature of South Australia had enacted that every voluntary disposition of property, however honest and open, in favour of any person, however innocent or even ignorant of the transaction, might, if the motive of escaping succession duty could be traced to the disposer, be made liable to what everybody spoke of as and felt to be a penal tax; and that with no limit of time and with no limit of person such as was provided in section 14 of the Act of 1876. If a man for family or personal reasons conveyed a property in trust for an absent son and died ten years afterwards and it was shown then when the conveyance was contemplated, he said that an additional reason for making it would be avoidance of succession duties, then, according to that view of the Act, the owner of the property, whether the son or anybody claiming under him, would, though he might have been in enjoyment for years, find himself saddled with the tax doubled by way of penalty. It was quite true, as Mr. Justice Bunday intimated when he was pointing out the severity of the law, that Courts must nevertheless construe it according to its true meaning. But where there were two meanings each adequately satisfying the language, and great harshness was produced by one of them, that had legitimate influence in inclining the mind to the other. Now if the word "evade" be taken to signify some contrivance between donor and donee, that which was pointed out as the greatest harshness of the enactment would be removed or substantially reduced, seeing that the donee would be a party to the transaction which caused loss to him. It was more probable that the Legislature should have intended to use the word in that interpretation which least offended our sense of justice. Again, as regarded the difficult question of mixed motive. If the thing which constituted evasion was some contrivance between two or more persons, that was a substantial subject of inquiry with easily-defined limits. The question whether an apparent transfer was also a real one was a question which occurred not very rarely, and on which the evidence of actual dealings by the parties could usually be brought to bear. But if they were to dive into the motives of a person acting by himself, and to find out whether a desire to avoid a tax, which probably everybody thought desirable *per se*, was, when he gave away property, a dominant motive with him, or a substantial motive, or a minor motive, or any motive at all, that was an inquiry of a vague and indefinite kind. If the Legislature had ordered it there was no help, the Courts must obey as best they could, but they would certainly be led, as in this case, into the region of conjecture and the chances of error and injustice would be considerable. Other things being equal, it was preferable to suppose that the Legislature contemplated the more ordinary and tangible kind of judicial inquiry rather than the vaguer and more elusive one. Having regard to the language of the Act, to its connexion with the Act of 1876, and to the consequences of the two admissible constructions, their Lordships held that there was a strong preponderance of probability in favour of that which had been adopted by the Chief Justice. They thought that the law of 1893 had, as the previous law had, left people at liberty to dispose of their property during life so that it should not form part of their estates at death for the purpose of taxation or any other purpose. Against death-bed gifts the public Treasury was protected by section 17. Against sham disposals it was protected by section 27 on its narrower construction. Against real gifts on any large scale made while yet the ordinary expectation of life remained it had probably been considered in South Australia as elsewhere that there was

sufficient protection in the general reluctance of mankind to part with their property to others. The Supreme Court should have dismissed the appeal to them with costs. That was the decree which their Lordships would humbly advise her Majesty now to make in lieu of the decree appealed from. The respondent must pay the costs of the appeal.

[Solicitors—Trinder, Capron, and Co., for the appellants: O. E. Dawson, for the respondent.]

Court of Appeal (Collins, Vaughan } 1900.
Williams, and Romer, L.JJ.) } April 6.

OSBOEN V. VICKERS, SONS, AND MAXIM (LIMITED).*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897, Schedule 1, Clause 3—Medical Examination.

Clause 3 of Schedule 1 applies where no notice of an accident has in fact been given, but the employer waives the absence of notice.

In making an order for medical examination under Schedule 1, Clause 3, a County Court Judge has no power to order the employer to pay the fee of a doctor attending on the workman's behalf.

This was an appeal from the award of Judge Waddy, Q.C., sitting at the Sheffield County Court in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, Robert David Osborn, was an iron planer in the employment of the appellants, Vickers, Sons, and Maxim (Limited), at the River Don Works, Sheffield, and on March 20, 1899, he was injured by an accident arising out of and in the course of his employment. His average weekly earnings had amounted to £2. The doctor attached to the appellants' firm, who was employed and paid by them, attended him. The appellants paid the respondent £1 a week from the first fortnight after the accident. In August another doctor was called in to examine him in consultation with the firm's medical man. On October 21 the firm's doctor reported that the respondent was completely recovered from the accident, and the appellants thereupon discontinued paying him the £1 a week. On December 5 the respondent filed with the Registrar of the County Court a request for arbitration to assess the compensation payable to him under the Act. No notice of the accident had been given. The appellants in their answer did not take the objection that no notice of the accident had been given, nor that the claim for compensation was not made within six months from the occurrence of the accident. They stated in their answer that they had paid compensation to the respondent from 14 days after the date of the accident up to October 21 at the rate of £1 per week, and they denied their liability to pay further compensation in respect of the injury on the ground that the respondent was not then suffering from the effects of the accident, and that if he was incapacitated from working it was from causes independent of and apart from the accident. The appellants thereupon desired to have the respondent examined by a medical man under Clause 3 of Schedule 1 to the Act, but the respondent's solicitor refused to consent unless the appellants paid the fee for the attendance of the respondent's medical man at the examination. On December 27 the appellants filed a supplemental answer stating the refusal of the respondent to submit himself to a medical examination as required by the appellants in accordance with Clause 3 of Schedule 1. The hearing of the arbitration was fixed for January 5, 1900, and

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

upon that day the appellants applied for a stay of proceedings upon the ground that the respondent had refused to submit himself to a medical examination as required. The County Court Judge ordered that there should be no stay of proceedings, but that the respondent should submit himself for examination by a duly qualified medical practitioner on the appellants' behalf, the appellants paying the respondent £1 ls. for the attendance of a medical practitioner on his behalf on such examination, and he adjourned the hearing of the arbitration. The appellants contended that the County Court Judge had no power to impose the condition that they should pay for the attendance of the respondent's medical man at the examination. By Clause 3 of Schedule 1, "Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation and any proceeding under this Act in relation to compensation shall be suspended until such examination takes place."

Mr. RUGGE, Q.C., and Mr. ARTHUR SIMS, for the appellants, contended that the County Court Judge had no power to impose the condition which he did. Clause 3 of Schedule 1 was imperative. The respondent could not say that the clause did not apply on the ground that no notice of the accident had been given. The appellants in their answer did not take that point, the sole question being whether the respondent had recovered from the effects of the accident, and therefore the case must be treated as if every step in the proceedings had been properly taken. If the appellants had intended to raise the point that no notice of the accident had been given, or that the claim for compensation was made too late, they would have been bound, under rule 17 (1) of the Workmen's Compensation Rules, 1898, to have taken the objection in their answer.

Mr. ISRAEL DAVIS, for the respondent, contended that Clause 3 did not apply, as no notice of the accident had been given. The clause was governed by the words, "Where a workman has given notice of an accident." He also contended that the Judge had a discretion under the clause to impose the condition. The respondent had already been examined by a medical man in the preceding August, and the Judge might well have thought that if the appellants wanted to have him examined again they should pay the respondent's expenses in the matter.

The COURT allowed the appeal.

LORD JUSTICE COLLINS said that in his opinion the County Court Judge was wrong. The application for the examination of the workman was made under Clause 3 of Schedule 1. The workman was injured by an accident while in the employment of his masters. No notice of the accident appeared to have been given, but the workman was attended by the doctor employed and paid by the masters. The workman was paid a weekly sum of £1, being 50 per cent. of his former average weekly earnings, for a considerable period after the accident. On one occasion a consultation took place between the doctor employed by the masters and another doctor who was called in to advise as to the treatment to be adopted. Then came the time when the doctor thought that the workman had recovered from the effects of the accident. The workman was of a different opinion, and proceedings were taken by him to have the compensation to which he claimed to be entitled under the Act of 1897 assessed by arbitration. No objection was taken by the masters that no notice of the accident had been given, nor that the claim for compensation was made after the expiration of six

months from the occurrence of the accident. By section 2, subsection 1, of the Act of 1897, "proceedings for the recovery under the Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof. . . . and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or in case of death within six months from the time of death. Provided that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause." The workman having started these proceedings without giving notice of action, and after the six months had expired, now said that, notwithstanding that he was in default in not giving notice of the accident, he could now turn round and allege that it was a condition precedent to his examination by a medical man that he should have given notice of the accident. To his Lordship's mind that was an impossible position for the workman to take. In order to get rid of the vice of not having given notice of the accident the workman must be deemed to have shown, or the masters must be taken to have admitted, that the latter were not prejudiced by the want of notice. Therefore, the workman took these proceedings, subject to the right of the masters to insist upon his submitting himself to a medical examination as required by Clause 3 of Schedule 1, just as if notice of the accident had been given. In truth this point was taken for the first time in this Court. It was not taken before the County Court Judge. The application by the masters that the workman should submit himself to an examination by a medical man on their behalf was met at the hearing by a request that the order should only be made upon condition that the masters paid for the attendance of the workman's doctor at the examination. It was also said that the workman had been already medically examined by a doctor in August last on behalf of the masters. But that objection was quite irrelevant, because the doctor was called in for the benefit of the workman himself to consult with the doctor who was attending him as to his treatment. It was not an examination under any provision of the Act, but was only done by voluntary arrangement between the masters and the workman. If an obligation to submit to medical examination existed under the Act, it was immaterial that the workman had previously allowed himself to be examined by another medical man for a different purpose not under the Act. The masters therefore had a right to require the workman to be examined by a medical practitioner employed and paid by them. That being so, what jurisdiction had the County Court Judge to impose the condition that the masters should pay the fee of the workman's doctor for his attendance upon the examination? He (the Lord Justice) did not say that there might not be very special circumstances which would make it reasonable, and it might be almost necessary, on account of the state of health of the workman, to have the workman's own medical man present at the examination. That might be a possible case as to which he would say nothing. But no such case was made out here. The only point taken was that the County Court Judge had a right to impose the condition which he did when making the order. In his opinion, it was *extra vires* of the Judge to impose such a condition. The appeal must therefore be allowed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER agreed.

[Solicitors—H. G. Campion and Co., for Clegg and Sons, Sheffield, for the appellants; Halse, Trustram, and Co., for A. Muir Wilson, Sheffield, for the respondents.]

Court of Appeal (Collins, Vaughan Williams, and Romer, L.J.J.) 1900.
April 6.

STUART V. NIXON AND BRUCE.*

Master and Servant—Master's liability to servant
—Workmen's Compensation Act, 1897—

“Average weekly earnings.”

To come within the Act a workman who meets with an accident, fatal or otherwise, must have worked for his employer not less than two weeks.

This was an appeal from an award of the Liverpool County Court Judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The appellant was the widow of a deceased workman who at the time of the accident causing his death was a stevedore's labourer in the employment of the respondents. The following are the admitted facts:—The deceased man was a casual labourer and had been employed by the respondents for five days continuously at daily wages. On the fifth day he was killed by an accident. The respondents were engaged as stevedores in loading a ship in the docks at Liverpool from the wharf by means of a winch worked by steam power, a derrick, and a fall, and they were in the occupation of the machinery. The deceased was on the day of the accident, in the course of his employment, finishing off a hold on board the ship, the hold having just been filled with cargo. The finishing off consisted in putting two iron cross beams across the hatchway. The beams had to be slung into position by means of the winch, derrick, and fall, which were all on board the ship. The deceased with three other men had put the port piece into position. The fore and aft piece was then slung, the fall was round it, and it was slung by the winch over the hatchway. The two pieces were made to fit by two cleats. The fall got entangled, and the deceased went to disentangle it, when the fore and aft beam canted and jerked him down into the hold. He died a few days afterwards from the effects of the accident. The County Court Judge held (1) that the Act of 1897, by reason of Schedule 1, Clause 1 (a), did not apply, as the deceased man had only been employed for five days by the respondents; (2) that the machinery was not, at the time of the accident, used in the process of loading the ship, as the cargo had been put on board, and the accident happened when the hatches were being put on to preserve the cargo from injury, and that therefore the machinery was not a “factory” within the meaning of section 7 of the Act. He accordingly made an award in favour of the respondents. Since the decision of the County Court Judge the Court of Appeal decided, in the case of “*Sysons v. Andrew Knowles and Sons (Limited)*” (*ante* p. 250), that a workman who had been employed for less than two weeks and was injured did not come within the Act, Schedule 1, Clause 1 (b) not being applicable to such a case. By Schedule 1, Clause 1, “The amount of compensation under this Act shall be, (a) where death results from the injury, (i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case the sum of £300, provided that the amount of any weekly payments made under this Act shall be deducted

from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer.”

Mr. LESLIE SCOTT (Mr. Joseph Walton, Q.C., with him), for the appellant, said that the first part of Clause 1 (a) (i.) of Schedule 1 gave compensation equal to the workman's earnings in the employment of the same employer during the three years next preceding the injury, the *maximum* sum not to exceed £300 and the *minimum* sum to be £150. That was the important part of the clause. The rest of the clause merely provided a mode of calculating the workman's weekly earnings where a calculation was necessary. The right to compensation was given by section 1 of the Act, the schedule merely stating what should be the amount of compensation. In the present case no calculation was necessary, as the appellant was entitled to the *minimum* compensation of £150. The decision in “*Sysons v. Andrew Knowles and Sons*” (*ante* p. 250) turned upon Clause 1 (b) of Schedule 1, where the language was different. The County Court Judge was, therefore, wrong upon his point. (The Court intimated that they were against the appellant upon the first point, and that, therefore, it was not necessary to argue the second question.)

Mr. Ruegg, Q.C., and Mr. A. G. Steel, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE COLLINS said that, in his opinion, the appeal must be dismissed. The question was whether the case of a labourer, who was employed only for one day, taking an extreme case, and who met with his death by an accident arising out of and in the course of his employment on that day, came within the Act. It was contended that the decision in “*Sysons v. Andrew Knowles and Sons*” did not govern the present case. In that case the workman, who was injured, but not killed by an accident, had, at the time of the accident, been employed by the same employer for a period less than two weeks. It was said that the observations of the Court in that case upon Clause 1 (a) (i.) were merely *obiter dicta*, and did not decide the present case, and that the appellant was entitled to compensation to an amount not less than £150. He (the Lord Justice), and he thought he could also speak for Lord Justice A. L. Smith, arrived at the conclusion, taking all the sections and provisions of the Act together, that the Legislature could not have intended to introduce labourers of this class into the Act. He was not pressed with the difficulties of this view suggested in the argument. He could not follow the difficulties. He did not think that Clause 1 of Schedule 1 created any real difficulty of construction at all. Its meaning was reasonably simple. The first part of Clause 1, which dealt with the death of a workman, contemplated in the first place that the workman should have been in the employment of the same employer during the three years next preceding the injury causing his death. If his earnings during those three years amounted to or exceeded £300, the workman's dependants would get that sum. If his earnings did not amount to £300, then they would get the amount of his earnings, the *minimum* sum being fixed at £150. So far the clause related to employment by the same employer during the three years next preceding the injury. The next part of the clause dealt with a case where the employment was for less than three years. The Act said that in such a case “the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer.” The compensation was based

*Reported by W. F. BARRY, Esq. Barrister-at-Law.

upon the average weekly earnings during the period short of three years. That was subject to this, that the employment must have lasted for at least two weeks. He did not say that it was absolutely necessary that the workman must have been employed every day during those two weeks, but the employment must be such as to form the basis for the calculation of average weekly earnings. That was the reasoning adopted by this Court in "*Sysons v. Andrew Knowles and Sons*." It would be most anomalous to hold that a casual workman who was injured by an accident not resulting in death would not be entitled to any compensation, whereas, if the workman died from the effects of the accident, his dependants would be entitled to compensation. If that were the true view of the statute, a workman who after an accident lingered for some time between life and death would during that time be in a position in which he would not know whether compensation would eventually be payable or not. In his opinion, the case was covered by the decision in "*Sysons v. Andrew Knowles and Sons*."

LORD JUSTICE VAUGHAN WILLIAMS concurred. They ought to construe the Act upon the basis that workmen who were not in the employment of the same employer for at least two weeks did not come within the purview of the Act.

LORD JUSTICE ROMER agreed that the case was governed by the reasoning upon which "*Sysons v. Andrew Knowles and Sons*" was decided.

[Solicitors—Crowders, Vizard, and Oldham, for G. J. Lynskey, Liverpool, for the appellant; W. Hurd and Son, for Oliver Jones, Billson, and Co., Liverpool, for the respondents.]

Court of Appeal (Collins, Vaughan Williams, and Romer, L.JJ.) } 1900.
April 6.
PEARCE V. LONDON AND SOUTH-WESTERN RAILWAY COMPANY.*

Master and servant—Master's liability to servant—Workmen's Compensation Act, 1897, sec. 4—Sub-contractors—Exceptions from liability—"Work which is merely . . . incidental to . . . the trade . . . carried on by the undertakers."

This was an appeal from the award of the Southwark County Court Judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The appellant was a painter in the employment of Messrs. Perry and Co., who were builders and contractors. Messrs. Perry and Co. had entered into a contract with the respondents, the London and South-Western Railway Company, to do such work in the way of altering, repairing, and painting the respondents' stations in the London district as they might be directed to do by the district engineer at a fixed schedule of prices. Messrs. Perry and Co. were engaged under this contract in reconstructing Hampton Court Station, and the appellant was employed by them on the work. While so employed the appellant was injured by an engine belonging to the respondents. The appellant contended that the respondents, though not his employers, were liable under section 4 of the Workmen's Compensation Act, 1897, to pay compensation. The County Court Judge held that the respondents were not liable to pay compensation, because the operation of section 4 was excluded by the clause at the end, the building of a station being "no part of or process in the trade or business carried on by" the railway company, but being "merely ancillary or incidental"

thereto. He therefore made an award in favour of the respondents. The County Court Judge also found that the accident arose "in the course of" the appellant's employment, but did not arise "out of" his employment. Upon that ground also he decided in favour of the respondents, but as it became unnecessary to argue this point in the Court of Appeal, and as they expressed no opinion upon it, the facts relating to it are omitted from this report. By section 4 of the Workmen's Compensation Act, 1897:—"Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies. Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively."

Mr. J. D. CRAWFORD, for the appellant, contended that section 4 of the Act applied to this case. The "undertakers," in the case of a railway, were defined by section 7, subsection 2, to mean the railway company. The railway company had entered into a contract with a contractor to do certain work at their station, and section 4 made them liable to pay compensation for an accident to a workman employed by the contractor in the execution of the work, if they would have been liable to pay compensation had such work been executed by their own workmen. The last clause of the section, however, provided that the section was not to apply to any contract with any person for the execution by or under such contractor of any work which was merely ancillary or incidental to, and was no part of or process in, the trade or business carried on by the undertakers. The reconstruction of the station was part of the business of the railway company, and was not merely ancillary or incidental thereto. The business of a railway company was to carry passengers and goods and to provide reasonable accommodation for that purpose. A station was a reasonable accommodation to provide. The County Court Judge was, therefore, wrong.

Mr. J. Lawson Walton, Q.C., and Mr. R. B. D. Acland, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE COLLINS said that, in his opinion, the learned County Court Judge was right. The appellant was in the employment of a contractor who was, under a contract with the railway company, engaged in rebuilding Hampton Court Station. He would assume that the accident to the appellant arose out of and in the course of his employment. Inasmuch as he was not employed by the railway company he could only make them liable under section 4 of the Act. That section was clearly an enabling section. It conferred a special boon in certain cases. If the section had stopped before the proviso, a liability would, in his opinion, have been imposed upon the railway company under the section. It was not unnatural, however, to find that the boon thus conferred was clogged with a

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

condition. The last clause in the section contained the condition. The section was not to apply to a contract with any person for the execution by or under such contractor of any work which was merely ancillary or incidental to, and was no part of or process in, the trade or business carried on by the railway company. In his opinion, it would be difficult to find a better illustration than the present of work which was merely ancillary or incidental to the business of a railway company as distinguished from work which was part of the actual business of the company. It was easy in certain cases to imagine a contract for work which was part of the business or trade of certain undertakers. But it was difficult to imagine such a contract in the case of a railway company. It was difficult to imagine a railway company entering into a contract with a contractor to work their engines upon their line for them. The business of a railway company was to carry passengers and goods. That was their primary duty. The erection of a station was no part of or process in the trade or business carried on by a railway company. There was no obligation upon a railway company, apart from any special obligation assumed by them under their Acts, to place a station at any intermediate spot on their line. Their trade and business was to carry passengers and goods from one place to another. The construction of the station was not part of the main work of the company, but was merely ancillary or incidental to it. It was, therefore, "no part of or process in the trade or business carried on by" the company. The County Court Judge was therefore right.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

[Solicitors—Brooks and Heller, for the appellant; Bircham and Co., for the respondents.]

Chan. Div. } 1900.
(Cozens-Hardy, J.) } April 6.
THE ATTORNEY-GENERAL V. THE LONDON COUNTY COUNCIL.*

Metropolis—Tramways—County Council—London County Tramways Act, 1896.

The London County Council have no power to carry on the business of omnibus proprietors in connexion with their tramways.

The trial of this action was shortly reported in *The Times* of the 23rd ult.

Mr. Asquith, Q.C., Mr. E. C. Macnaghten, Q.C., and Mr. Blaiklock were for the plaintiff; Mr. Haldane, Q.C., Mr. Vernon Smith, Q.C., and Mr. Methold for the defendants.

His LORDSHIP read the following judgment:—This is an action by the Attorney-General on the relation of a large number of the omnibus proprietors of London against the London County Council, seeking a declaration that it is beyond the powers of the London County Council to carry on the business of omnibus proprietors in connexion with their tramways, or to apply the county fund for the purpose of maintaining and working omnibuses and for consequential relief. It was argued that the Court ought not to apply the doctrine of *ultra vires* to a public body such as the London County Council, but it seems to me that there is no foundation for this contention. The County Council is a body created by statute, and to every such statutory creation the language used by Lord Blackburn in the House of Lords with reference to a railway company in "Attorney-General v. Great Eastern Railway Company" (5 App. Cas., 481) applies. "Where there

is an Act of Parliament creating a corporation for a particular purpose and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited." And Lord Watson at p. 486 uses almost the same language. This principle was applied to the School Board for London in "Reg. v. Reed" (5 Q.B.D., 483), and I think it must be applicable to the London County Council in their character of owners of the tramways. The question is, however, of an academical character, for the jurisdiction of the Court to restrain the application of public funds to unauthorized purposes, apart from the doctrine of *ultra vires*, is too well established to admit of dispute, and it was not challenged before me. See "Mayor of Newcastle v. Attorney-General" (1892, A.C., 568). It was also urged that the Court ought to give a more liberal construction to the powers conferred upon a public body for the public benefit than it is in the habit of giving to similar powers claimed by companies trading for gain. I am not satisfied that this distinction is well founded. In each case a reasonable construction ought to be put upon the language of the document conferring the powers, whether it is a statute, or a charter, or a memorandum of association. Tramways are made by virtue of special Acts or provisional orders, and Parliament has, when the promoters are not the local authority, given to the local authority a power of compulsory purchase of "the tramway and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within the district." This power can only be exercised on notice at the expiration of certain periods of years and upon terms of payment which have been the subject of litigation, but which are not material for the present case. The London County Council are the local authority for this purpose. The local authority has in general no power to work any tramways they may purchase. In the year 1896 the London County Tramway Act, 1896, was passed. It contains the following recitals:—"And whereas there are in force within the county of London other local Acts authorizing tramway undertakings (all or some of which are mentioned in the schedule to this Act) under and by virtue of which Acts the Council have, or claim to have, powers to purchase at the expiration of certain periods the several tramways and undertakings thereby respectively authorized, so far as they are within the county of London, but some of the said Acts confer no powers on the Council for the working of the said tramways after they have been purchased. And whereas the Council are proceeding to give effect to the powers of purchase so conferred upon them with respect to the tramway undertakings authorized by the Acts and provisional orders mentioned in Part II. of the schedule to this Act. And whereas it is expedient that powers such as are in this Act contained should be conferred on the Council for the working of the tramways authorized by the local Acts mentioned in the schedule to this Act as and when such tramways are acquired by the Council." And section 2 is in the following words:—"It shall be lawful for the Council to exercise with respect to any tramways authorized by the local Acts mentioned in the schedule to this Act, which have been or shall be purchased or acquired by them under their statutory powers, the same powers of making such tramways respectively as were possessed by the company or companies respectively owning such tramways, and the Council may provide, place, and run carriages thereon and provide such horses, cars, fixed and movable plant, harness, and apparatus as may be requisite or convenient for enabling the Council to exercise such powers, and they may employ such persons as may be requisite or convenient for working the tramways for the time being worked by

*Reported by D. FITCHAM, Esq., Barrister-at-Law.

them." Section 10 is as follows:—"All costs and expenses of the Council in the execution of this Act (except so far as they may be otherwise provided for by this or any other Act) shall be defrayed as payments for general county purposes within the meaning of the Local Government Act, 1888, and the costs, charges, and expenses preliminary to and of and incidental to the preparing, applying for, obtaining, and passing of this Act shall be paid by the Council in like manner." Before this Act of 1896 the County Council had no power to work tramways which they might purchase, and both before and after that Act they could only purchase tramway undertakings. For example, they could not purchase the whole of the undertaking of the limited company which owned in 1896 the tramways mentioned in the schedule to the Act of 1896, and whose objects, as defined by its memorandum of association, extended beyond the owning and working of tramways. The actual terms of purchase were settled by an agreement dated December 27, 1898. From the beginning of 1899 the London County Council have worked the purchased tramways. The tramways, to which alone my attention has been called, are three on the south side of the Thames. The County Council run omnibuses from the south side of Blackfriars-bridge, where one tramway ends, across the bridge to Farringdon-street, and *vice versa*. They also run omnibuses from the south side of Waterloo-bridge, where a second tramway ends, across Waterloo-bridge, along the Strand, down Whitehall, and across Westminster-bridge to the place where a third tramway ends and *vice versa*. A halfpenny fare is charged for each omnibus journey or part of a journey. The question I have to decide is whether it is competent to the County Council to run these omnibuses. It is admitted that moneys raised by or on the security of rates have been applied for the purchase and working of the omnibuses. My attention has been called to a number of statutes, but in the result it seems that the County Council can only justify their action by reference to section 2 of the Act of 1896. It is said, and I have no doubt with truth, that it is convenient to passengers by the tramways to have a cheap conveyance to the north side of the Thames and along the Strand. I do not doubt that the traffic on the tramways is increased by reason of these omnibuses. The course adopted by the County Council in this respect is that which was followed by the limited company, the former owners of the tramways, except that the limited company did not run omnibuses along the Strand, but only ran omnibuses across each of the three bridges and back. The word "convenient" occurs twice in the section—"Convenient for enabling the Council to exercise such powers" and "convenient for working the tramways." In neither place does it mean convenient to the public or for the advantage of the public. The tramways which alone the County Council were empowered to purchase have certain definite limits at the southern and northern ends. Within those termini the County Council may, in the language of the section, "work" the tramways and convey passengers in tramcars. There are many things fairly incidental to this which they may do, and, indeed, must do. They may have stables and sheds for their horses and cars, they may have carts and horses to convey forage to their stables. In short, anything reasonably proper for the "working" of the tramways is within their powers. Anything not falling within this definition is outside their powers. It seems to me that the London County Council are really carrying on a separate and distinct business as omnibus proprietors. They do not, and they cannot lawfully, convey in their omnibuses only passengers from and to their tramways. By the Act of 1843 for regulating hackney and stage carriages in and near London they

are bound to take any passenger who desires a ride and is willing to pay a halfpenny, provided there is a vacant seat. The running of omnibuses in the streets of London is certainly not expressly authorized by the Act of 1896, and in my opinion it is not impliedly authorized. It is not for me to consider whether the business of omnibus proprietors is one which may conveniently or advantageously be combined with the business of working the tramways. Parliament has, in the Companies (Memorandum of Association) Act, 1890, recognized this as a ground for altering and enlarging the memorandum of association of a company. The Act of 1890 has, of course, no direct application to the present case. I refer to it only as a statutory recognition of the doctrine that, however convenient or advantageous may be the combination of a new business with an authorized business, such combination or connexion may nevertheless be *ultra vires*. The result is that I must make a declaration in the terms of the claim, and I will give liberty to apply. The defendants must pay the costs of the action. I do not propose to grant an injunction unless the plaintiffs insist upon it.

Mr. MACNAGHTEN.—A declaration will be no doubt attended to.

Mr. VERNON SMITH.—I need not therefore ask for a suspension to allow an appeal.

[Solicitors—Hicks, Davis, and Hunt; W. A. Blaxland.]

Q.B. Div. (Bigham and) 1900.
Channell, J.J.) April 6.

THE QUEEN V. THE LOCAL GOVERNMENT BOARD AND THE GUARDIANS OF WILLESDEN (EX PARTE THE GUARDIANS OF HENDON).*

Poor Law—Alteration of Union—Apportionment of Annuities—Poor Law Act, 1834, sec. 32—Poor Law Act, 1844, sec. 66.

In this case cause was shown by the Local Government Board and the Willesden Board of Guardians against a rule for a *certiorari* to quash an order made by the Local Government Board under section 32 of the Poor Law Act, 1834. Before August, 1896, the Hendon Union had comprised the parish of Willesden. On August 12 of that year the parish of Willesden was separated from the Hendon Union by an order of the Local Government Board made pursuant to section 32 of the Poor Law Act, 1834, as amended by section 66 of the Poor Law Act, 1844, and on the following day, by a further order of the Board, the parish of Willesden was constituted a Poor Law district. Thereupon it became the duty of the Local Government Board to ascertain the proportionate value to the parish of Willesden of the workhouses of the Hendon Union and of "other property held or enjoyed by such union for the use of the poor or benefit of the ratepayers therein," and to "fix the amount to be received, or paid or secured to be paid, by" the parish, pursuant to section 32 of the Act of 1834. Under and by virtue of section 24 (2) (d) of the Local Government Act, 1888, since March, 1889, there had been payable by the County Council of Middlesex to the Hendon Union the annual sum of £18 towards the remuneration of registrars of births and deaths, and, under and by virtue of section 26 (1) of the same Act, there had been payable the sum of £2,597, to be expended on the salaries, remuneration, and superannuation allowances of the officers of the Hendon Union (other than teachers in the Poor Law schools), and on drugs and medical appliances. By an order dated December 23, 1898 (the order now sought to be

*Reported by O. G. WILBRHAM, Esq., Barrister-at-Law.

quashed), the Board ordered *inter alia* as follows :—
 "As and when the sums of £18 and £2,597 are received by the guardians of the poor of the said Hendon Union from the County of Middlesex in pursuance of the provisions of section 24 (2) (d) and section 26 (1) of the Local Government Act, 1888, in respect of the financial year ended March 31, 1899, and in respect of each succeeding financial year, such sums as shall be apportioned by the guardians of the poor of the Hendon Union between the Hendon Union and the parish of Willesden according to the respective rateable values of the union and parish for the purposes of the poor-rate, according to the valuation lists in force on the 25th day of March next preceding the financial year in respect of which the payment is made, and the guardians of the poor of the Hendon Union shall forthwith pay to the guardians of the poor of the parish of Willesden the amount so apportioned to that parish." It was sought on behalf of the Hendon Union to quash this order on the ground, first, that the Local Government Board had no jurisdiction to apportion the sums to be received by the Hendon Union from the county council at all, because they were not "property held or enjoyed by such union for the use of the poor or the benefit of the ratepayers therein" within the meaning of section 32 of the Act of 1834, and on the ground, secondly, that, assuming the Board had such jurisdiction, they had exercised it improperly, because the mode of apportionment adopted by them did not, in the words of the Act, fix the amount to be received by the parish.

The Attorney-General and Mr. H. Sutton appeared to show cause on behalf of the Local Government Board; and Mr. Danckwerts, Q.C., on behalf of the Guardians of Willesden; Mr. Page, Q.C., and Mr. Bartley Dennis appeared in support of the rule on behalf of the Guardians of the Hendon Union.

The COURT discharged the rule.

MR. JUSTICE BIGHAM said that the first question was whether the Local Government Board had jurisdiction to make the order which was sought to be quashed. It appeared that the County Council of Middlesex in 1889 became, by virtue of the Local Government Act of 1888, liable to make to the old Hendon Union two fixed annual payments. Since then the parish of Willesden had been carved out of the Hendon Union, and now formed a separate Poor Law district. It then became necessary to apply the provisions of section 32 of the Act of 1834 in order to ascertain what should be paid by the union which retained the joint property to the parish which was severed from it. It was said that the two annuities payable by the County Council to the old union were not "property" within the meaning of section 32, and that the Board had therefore no jurisdiction to deal with them. He could not agree to that proposition. He could not see why a fixed sum paid annually by the County Council to the union was not property. It was money received as of right, and to be used in relief of the poor-rates and for the benefit of the ratepayers. It was as much property as the rents of any freehold land. If, then, these annuities were property of the kind indicated in section 32 it was the duty of the Board to ascertain their value. The order in question did not, however, deal with that duty, but with the subsequent duty of fixing the apportionment of the annuities between the two bodies. What the Board did was to say that the Hendon Union should retain the annuities and to lay down what amount out of the annuities should be paid by the Hendon Union to the parish of Willesden. They said that that amount should be ascertained from year to year by reference to the respective rateable values of the two bodies in each year. That was a reasonable arrangement, and it was

an order fixing the amount to be paid within section 32, for it ordered a payment year by year on a basis ascertainable in each year.

MR. JUSTICE CHANNELL said that section 32 of the Act of 1834 was intended to provide for all necessary adjustments between unions and parishes severed from them. The provision was put in general words because it was impossible to say beforehand what sort of property would have to be divided. The only serious question was whether the order of the Board could be said to be a fixing the amount to be received by the parish. If in fixing the amount of a yearly payment some outside basis of calculation were used, as when tithe rent-charges were fixed by reference to the price of corn or a rate of interest was fixed at 1 per cent. above the Bank rate, then there could be no doubt that that would constitute a fixing the amount of the payment. The difficulty here was that the Local Government Board had fixed the payments by reference to a matter which it was the object of the Act to put an end to, for one of the objects of the Act was to make the divided parishes independent of the increase or decrease in rateable value of each other. This consideration caused his Lordship to have doubts, but they were not such as to justify him in differing from his learned brother in discharging the rule.

[Solicitors—The Solicitor to the Treasury, for the Local Government Board; W. Greig, for the Guardians of Willesden; Sharpe, Parker, and Co., for the Guardians of Hendon.]

Court of Appeal (Lindley, M.R.,
 Rigby and Vaughan Williams,
 L.JJ.)

1900.
 April 9.

ALEXANDER V. THE AUTOMATIC TELEPHONE COMPANY
 (LIMITED).*

Company—Directors—Breach of duty—Liability
 to pay for shares.

Directors of a company who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain such benefits, and must account for them to the company.

This was an appeal from a decision of Mr. Justice Cosens-Hardy (reported in *The Times* of May 13, 1899). The appeal was heard on March 20 and 22 last, when judgment was reserved. The action was brought by Messrs. M. J. Alexander and J. D. Gibbs, "suing on behalf of themselves and all the other shareholders" in the defendant company, against the company and three of its directors—viz., Messrs. Max Margowski, J. Woolf Cohen, and H. G. Sworn. The other members of the board were the two plaintiffs. The company was incorporated on July 1, 1897, with a capital of £100,000 in shares of 5s. each. The eight signatories to its memorandum of association were Margowski for 19,400 shares, the same gentleman as managing director of the Honduras Government Banking and Trading Company (Limited) for 6,000 shares, the plaintiff Alexander for ten shares, the plaintiff Gibbs for ten shares, Baron Cohen for ten shares, Justin Mandelson for ten shares, the defendant Cohen for 200 shares, and the defendant Sworn for 800 shares. Clause 5 of the articles of association provided that the shares of the company should be "under the control of the directors, who may, subject to the terms of the company's memorandum of association, issue, allot, or otherwise dispose of the same to such persons, for such consideration, and upon such terms and conditions as the board may determine . . . and may

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid and in the time of payment of such calls." The last words of the clause are, it should be observed, justified by section 24 of the Companies Act, 1867. Article 13 provided that the directors might "(subject to any special terms made on allotment) from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit, provided that one month's notice at least is given of the time and place for payment, and that no one call shall exceed 20 per cent. of the nominal amount of the shares, and that such calls shall be made at intervals of not less than one month." The memorandum shares and a number of other shares were allotted, and on all of them, except those held by Margowski, J. W. Cohen, Sworn, and the Honduras Company, the sum of 3s. payable on allotment had been paid. In respect of the excepted shares the plaintiffs alleged that only £784 in all had been paid, and that on these shares there was still due and payable the sum of £3,176, and the plaintiffs complained that the three defendant directors, being a majority of the board, were able to, and did, control its action by their votes, and in breach of their duty as directors and against the interests of the defendant company prevented the passing of resolutions or taking steps to enforce payment by those defendants or the Honduras Company (in which they were said to be interested) of the amounts due on their shares and the shares held by the Honduras Company. This, however, the plaintiffs complained, did not prevent the defendant directors by means of their voting power making a further call of 1s. per share, and the plaintiffs' case was that the defendant directors were acting in furtherance of their own interests and in fraud of the rights of the other shareholders, and were using the powers entrusted to them as directors for their own ends, and not for the benefit of the company. It was also alleged that the defendant directors had control of the majority of the votes of the shareholders of the defendant company. The plaintiffs accordingly asked for a declaration that the holders of the memorandum shares were bound to pay up 3s. per share—viz., 6d. on application and 2s. 6d. on allotment, in the same way as the holders of other shares. For the defence it was pleaded that on June 30, 1897, before the company was incorporated, it was agreed at a meeting of the signatories that nothing should be payable by any of the defendant directors or the Honduras Company on application or allotment in respect of their memorandum shares, and that the memorandum was signed by them on this condition; that at a board meeting, after incorporation—viz., on July 5, 1897, two resolutions were passed (both plaintiffs being present and voting in their favour) for the allotment of shares; that by the first resolution the memorandum shares were allotted without requiring any payment on allotment, and that by the second resolution a payment of 2s. 6d. per share in respect of other shares was required on allotment, 6d. per share having been already paid on application for these shares. The defendant directors also said that they were acting under the articles and in the interests of the company, and had committed no breach of duty. Mr. Justice Cozens-Hardy thought that the action was misconceived, since it proceeded upon the fallacy that there was an immediate debt due from every member of the company in respect of uncalled capital. It was not correct to say that the signatories to the memorandum of association became debtors to the company to the full amount of the shares. Their position was that they became subject to article 13; but upon the true construction of that article it was for those who alleged any obligation to pay otherwise than on account of the calls made at due intervals and with due

notice to prove some other special terms or bargain. The allotment in respect of these signatories was made on the terms that nothing should be payable on application or allotment. The plaintiffs were attempting to alter the entire contract entered into between the company and the signatories, and to make members pay for shares otherwise than in accordance with the articles. The action failed, and must be dismissed with costs. The plaintiffs appealed.

Mr. Rawlinson, Q.C., and Mr. Harry Dobb were for the plaintiffs; Mr. Rufus Isaacs, Q.C., and Mr. Frank Russell for the company and Mr. Margowski; and Mr. Astbury, Q.C., and Mr. W. F. Hamilton, Q.C., for the defendant Mr. Sworn. The defendant Mr. J. W. Cohen appeared in person.

The COURT now allowed the appeal.

The MASTER of the ROLLS read the following judgment:—Subscribers to a memorandum of association of a company limited by shares are liable, and only liable, by virtue of their subscription to pay up the amount of their shares as and when called up. The times when payments are to be made and the amounts to be paid are not prescribed by statute, except by section 38 of the Companies Act, 1862, which only comes into operation when the company is being wound up. But until the commencement of the winding up of the company the times and amounts of payment depend, apart from express agreement between the company and the signatories, on the company's articles of association. In the absence of other articles, table A will be applicable. That this is the true position of those who sign the memorandum of association is perfectly plain from the Companies Act, 1862, sections 8, 11, 14, 15, 23, and 38, and table A, articles 4—7. A subscriber of a memorandum becomes by section 23 a member in respect of the number of shares subscribed for by him, without any further application by him or allotment of shares to him. But as by section 22 all shares have to be numbered, and the numbers must be entered in the register (see section 25), there must be an appropriation to each subscriber of the proper number of shares properly numbered, not to constitute him a member, but to enable a proper register to be kept, and proper certificates to be given and transfers made. See sections 22, 25, and 31, and table A, articles 2, 3, and 8—16. It follows from this that, in the absence of any special agreement or article requiring a subscriber of a memorandum of association to make some payment on subscription or allotment, nothing is payable by him as a subscriber in respect of his shares until calls are made upon them. This is the strength of the defendants' case. Further, if more shares than those taken by the subscribers of the memorandum are issued by the directors, there is nothing to prevent them from offering those shares on such terms as regards payment to the company on application and allotment as the directors may think expedient. Payments so required to be made are not calls, because the payments are to be made by persons who are not yet members; but, when made, those payments must be treated, unless otherwise agreed, as payments on account of the nominal capital of the company, and as reducing *pro tanto* the liability of those who pay. Such persons have nothing to complain of if they pay according to their bargain, and the subscribers of the memorandum pay according to theirs. This is the weakness of the plaintiffs' case. From this point of view the plaintiffs have no ground of complaint, and the decision appealed from is unimpeachable. But there is another point of view from which the case must be regarded. There are other elements in the case which have to be taken into consideration, and on which the plaintiffs strongly rely. The directors, who had subscribed the memorandum for an unusually large number of shares, issued shares

to other persons on the terms that 6d. per share should be paid on application and 2s. 6d. per share on allotment—i.e., 3s. per share had to be paid by the allottees, whilst the directors themselves paid nothing in respect of their own shares. The directors, in fact, so managed matters as to place themselves in a better position as regards payment than the other shareholders, and they did so without informing the other shareholders of the fact. This, the plaintiffs contend, was a breach of duty on the part of the directors to those who applied for and took shares upon the faith that the directors were not obtaining advantages at their expense. It is no answer to the plaintiffs' case so put to appeal to the contracts alone, for the charge is that the directors were guilty of a breach of duty in procuring those contracts and in taking advantage of them so as to benefit themselves at the expense of the other shareholders. In the statement of claim and in the Court below the defendants were charged with deliberate fraud; but this charge was ultimately abandoned in the Court below, and, having been abandoned, it cannot be brought forward again, or be listened to on appeal. But, apart from all fraud, and although the directors acted in the belief that they were doing nothing wrong, there may, nevertheless, have been a breach of duty such as is relied upon, and it is necessary to consider whether there was or was not. The company was registered on July 1, 1897. On June 30 the memorandum of association was signed and the subscribers had a meeting at which, it is said, they agreed that the defendants should pay nothing in respect of their shares on allotment. Such an agreement, if come to, could not, of course, bind the company, which was not then formed. But the defendants say that the plaintiffs Alexander and Gibbs were then told that the defendants were not to pay up anything on their shares on allotment, and that the plaintiffs assented to this arrangement. The plaintiffs emphatically deny that they knew of or assented to any such arrangement. On July 5 the first meeting of the directors was held, and on that day two resolutions were passed. One was that the shares subscribed for by those who signed the memorandum of association should be allotted to them. The resolution treats them as applying for 26,440 shares of 5s. each, and of having those shares allotted to them in the quantities applied for by each, "as per applications and allotment sheet marked A now signed by the chairman." This showed that three of those subscribers of ten shares each—viz., Alexander, Gibbs, and Baron Cohen, had paid up or were to pay up 3s. per share in respect of their 5s. shares. There was nothing to show that the other subscribers had paid or were to pay anything on their shares. There was a conflict of evidence at the trial as to whether the defendants did or did not explain to their co-directors that they did not intend to pay up 3s. on their shares. The plaintiffs Alexander and Gibbs distinctly deny that they were told anything of the sort. They deny that they saw the sheet A. The defendant Cohen and the secretary say that it was explained that the others did not intend to pay, and that the sheet A was produced. The learned Judge finds that Alexander and Gibbs knew of the resolution and concurred in it, but he does not say that these gentlemen are not to be believed when they deny that they were informed that the other directors were not going to pay. So far as it is necessary for the defendants to rely on any agreement exempting them from liability to pay 3s. like other shareholders, I am of opinion that they fail in proving such an agreement. The resolution of the 5th of July to which I am referring did not by itself, and apart from the conduct of the defendants as directors, either increase or diminish the defendants' liability as subscribers of the memorandum of association. It simply carried

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out what their subscription involved. The other resolution passed at the same meeting was to allot 9,560 shares to persons who had applied for them on payment of 2s. 6d. per share. This was in addition to 6d. per share already paid on application. Other shares have been issued on similar terms. Both the plaintiffs Alexander and Gibbs are holders of shares besides those for which they subscribed the memorandum of association; and they paid up 3s. per share for all of them on allotment. So far, therefore, they are in the same position as all the other shareholders except the defendants. The fact, however, that three subscribers of the memorandum paid 3s. on their shares whilst the defendants did not, is difficult to reconcile with the existence of any understanding that all the subscribers should stand on their strict legal rights. The defendants rely on Article 5 as entitling the directors to issue shares on any terms they think expedient, and to make differences between some shareholders and others. But this, I am satisfied, is an afterthought. The defendants were not in fact acting on this article at all. But, even if they did, this article would not, in my opinion, justify them in making a difference in their own favour without disclosing the fact to the shareholders and obtaining their consent to the arrangement. The Court of Chancery has always exacted from directors the observance of good faith towards their shareholders and towards those who take shares from the company and become co-adventurers with themselves and others who may join them. The maxim *caveat emptor* has no application to such cases, and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits and must account for them to the company, so that all the shareholders may participate in them. "Gilbert's case" (L.R., 5 Ch., 559) is only one of many instances illustrating this principle. In this case there is no question that, by obtaining 3s. a share from the other shareholders and paying nothing themselves, the defendants threw upon the other shareholders a burden which they did not share themselves. It is true that by Article 121 dividends were only payable in proportion to the amounts paid up on the shares; and as regards dividends, had there been any the defendants would have been at a disadvantage. But the advantage they obtained at the expense of the other shareholders was the advantage of deferring their own contributions to the funds of the company at the expense of the other shareholders. This, in my opinion, was a clear breach of duty, unless the other shareholders knew of it and sanctioned it. The defendants say that the memorandum and articles, which named the first directors, gave notice to all the shareholders that nothing was payable by the defendants except when calls were made on their shares. The defendants further say that, at all events, the plaintiffs Alexander and Gibbs knew and assented to what was done, and that this action, therefore, cannot be sustained by them. As regards the notice given by the memorandum and the articles to the shareholders generally, I am clearly of opinion that they give no notice of anything except what they expressly state; they give no notice at all that the directors would so exercise their powers, and so act towards their shareholders, as to benefit themselves at their expense. It is impossible to come to the conclusion that the applicants for shares knew of, or sanctioned the conduct of which they now complain. The next question is, whether the plaintiffs Alexander and Gibbs knew of and assented to any arrangement to the effect that the defendants should be in a better position than themselves and other shareholders as regards payment on allotment. As already stated, the plaintiffs emphatic-

ally deny that they knew anything of the sort, and they say that they first discovered in July or August, 1898, that the defendants had not paid up 3s. on allotment like other shareholders. They say that they were unable to see the books and ascertain the facts before that time. They say, and Rhodes, the solicitor, confirms them, that nothing was said when the memorandum of association was signed on June 30, 1897, about not paying like other shareholders; and the plaintiffs say that nothing was said about it when the allotment was made on July 5, 1897. Against this must be set the resolutions then passed, and the testimony of Mr. Cohen and Mendelson, the secretary of the company. I have already referred to the resolutions and the sheet A. Mr. Justice Cozens-Hardy was so struck by these that, before hearing Cohen's evidence, he intimated that he was in favour of the defendants. That would certainly not be my own view. But Cohen's evidence must be considered. [His Lordship reviewed the evidence and continued.] In this state of the evidence the only conclusion I can come to is that there was some understanding between some of the persons who signed the memorandum of association that Margowski and one or two of his friends should be treated differently from other shareholders as regards payment on allotment, but that neither the plaintiffs nor any of the other shareholders, except Margowski and his friends, ever knew of or assented to the use they made of their powers to secure for themselves advantages as to payment at the expense of their co-adventurers. Having carefully read the shorthand notes of the proceedings in the Court below, I cannot help thinking that Mr. Justice Cozens-Hardy placed too much stress on the resolutions, and treated them as conveying more information than they really were calculated to convey or did convey to the plaintiffs. If the learned Judge had said that he did not believe the plaintiffs, and believed Cohen and Mendelson rather than the plaintiffs, I should feel more difficulty than I do. But the learned Judge has not said that he disbelieved the plaintiffs, and I certainly see no reason for doing so. Upon the merits of the case I come to the conclusion that a breach of duty by the directors to the company and the other shareholders in it has been established. It is necessary, however, to consider the form of the act, and the relief which can be given. The breach of duty to the company consists in depriving the company of the use of the money which the directors ought to have paid up sooner than they did. I cannot regard the case as one of mere internal management which, according to "Foss v. Harbottle" (2 Hare, 461) and numerous other cases, the Court leaves the shareholders to settle amongst themselves. It was ascertained and admitted at the trial that, when this action was commenced, the defendants held such a preponderance of shares that they could not be controlled by the other shareholders. Under these circumstances an action by some shareholders on behalf of themselves and others against the defendants is in accordance with the authorities, and is unobjectionable in form. See "Menier v. Hooper's Telegraph Co." (L.R., 9 Ch., 350). An action in this form is far preferable to an action in the name of the company, and then a fight as to the right to use the name. But this last mode of procedure is the only other open to a minority of shareholders in cases like the present. Apart, however, from the form of the action, the defendants contended that, having regard to the pleadings and to the calls made and paid since the action was brought, and to what took place at the trial, no relief could now be given to the plaintiffs. I have looked very carefully at the pleadings, and have observed that Mr. Justice Cozens-Hardy gave the plaintiffs leave to amend their claim by introducing into it the facts stated in their reply to the defence put in by the defendants Margowski and Cohen.

Paragraph 6 of this reply raises the point proved at the trial—that the directors practically controlled the voting power of the company. Mr. Eve, who, in the Court below, placed the plaintiffs' case on its true equitable basis, gave up the charges of actual fraud, and, calls having been made and paid, he did not ask for an injunction or a receiver. But he pressed for a declaration to the effect that the defendants ought to have paid up 3s. per share on their shares on allotment. This was never abandoned. Having regard to the facts alleged in the plaintiffs' statement of claim and in their reply, and to the leave to amend, and to the mode in which the plaintiffs' counsel opened the plaintiffs' case, and urged the breach of duty of the defendants, I do not think that the defendants can successfully maintain that they have to meet on appeal a really different case from that which was made in the Court below. The plaintiffs' case was obscured by charges of fraud, and by being based in their pleadings, and to some extent in argument, on legal rather than on equitable grounds. But the facts which constitute the plaintiffs' case are set out in the pleadings, and were fully investigated in the Court below; and Mr. Eve more than once put the plaintiffs' case on its true basis. The plaintiffs' statement of claim is full of charges of fraud. These have been abandoned, and the plaintiffs must pay all the costs occasioned by them. But it does not follow that their action ought to be wholly dismissed. See "Hilliard v. Riffe" (L.R., 7 H.L., 39). The proper order will be:—Allow the appeal and reverse the judgment appealed from. Declare that the three defendants—Margowski, Cohen, and Sworn—were guilty of a breach of their duty as directors in not paying to the company in respect of the shares allotted to them on the 5th July, 1897, 3s. per share, being the amount which they obtained from the other members of the company in respect of shares allotted to them, and let the plaintiffs have liberty to apply for an order for payment if necessary. Order the three defendants to pay the costs of the appeal, and also the costs of the action, except such costs as have been occasioned by the charges of fraud, which costs are to be paid by the plaintiffs. The usual set-off as regards these costs.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS read judgments to the same effect.

[Solicitors—White and De Buriatte; Spyer and Sons; Haynes and Claremont.]

Court of Appeal (Collins and Romer, L.JJ.) } 1900.
April 10.

THE QUEEN V. BULLIVANT AND OTHERS.*

Practice—Discovery—Documents—Privilege—
Evading payment of probate duty—Communication to solicitor—Production of documents ordered.

This was an appeal from an order of Mr. Justice Mathew at Chambers for the production by one of the defendants of certain documents. The information was filed by the Attorney-General of Victoria, Australia, in the Supreme Court of that colony, against Stanley Austin, William Hose Bullivant, and Joseph Henry Grey, the executors of the will of James Austin, deceased, and Frank Austin to recover duty. The information alleged in substance that on November 9, 1894, James Austin, the testator, by two voluntary deeds conveyed to trustees certain lands in Victoria of which he was seised in fee simple upon the trusts declared by the deeds; that on November 9, 1894, the

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

testator by a voluntary deed assigned to trustees upon certain trusts a mortgage debt of £24,000, to which he was then absolutely entitled, secured on mortgage of certain real estate in Victoria; and that on March 20, 1895, the testator by two voluntary deeds conveyed to his two sons, the defendants Stanley Austin and Frank Austin, certain lands in Victoria, of which he was seised in fee simple, to hold as tenants in common. The information then alleged that the testator died on May 15, 1896, having by his will, dated May 8, 1895, appointed the defendant, Stanley Austin, executor thereof so far as regarded his property in Great Britain, and the defendant's, Bullivant and Grey, executors thereof so far as regarded his property in Australia and elsewhere out of Great Britain; that probate of the will was duly granted in England and Victoria respectively; and that each of the conveyances and the assignment above mentioned were wholly voluntary and were made and executed by the testator with intent to evade the payment of duty in Victoria under the Administration and Probate Act, 1890 (54 Vict., No. 1,060), of that colony. The information claimed a declaration that the conveyances and the assignment were made and executed by the testator with intent to evade the payment of duty under the above Act; and that, if necessary, an account might be taken as to the amount of duty under the Act payable in respect of the same, and that the defendants should be ordered to pay the amount of the duty. The defence denied the allegations contained in the information. It appeared that the conveyances and the assignment, which were, speaking generally, for the benefit of the testator's sons and daughters, had been prepared by a firm of solicitors named Bath and Austin, of Glastonbury, Somerset, on the instructions of the testator. Mr. Bath was the member of the firm who carried out the transactions. The defendant, Stanley Austin, became a partner in the firm in 1887, and Mr. Bath died in 1895. In 1896 the testator died at Glastonbury. Stanley Austin now carried on the business in partnership with another person under the style of Austin and Bath. A commission was issued from the Supreme Court of Victoria for the purpose of taking the evidence of, among others, the defendant, Stanley Austin, in this country. Mr. Austin was accordingly examined on commission at Bristol, and he was asked on behalf of the informant whether he had in his office any book in which Mr. Bath or his clerk had entered the instructions given to him by the testator with reference to the preparation of the conveyances and assignment. The witness said that he had, but he declined to produce it on the ground that it was held by him and his partner in their professional character as solicitors, and was a professional document containing entries of communications of a professional and confidential character for the purpose of obtaining legal advice. An application was thereupon made at Chambers for an order upon the witness to produce any books containing the instructions given by the testator to the late firm of Bath and Austin with reference to the preparation, execution, or carrying into effect of the conveyances or assignment, or any of them. Mr. Justice Mathew made the order. The defendants appealed. By section 115 of the Administration and Probate Act, 1890 (of the colony of Victoria), "if any person has made, or shall hereafter make, any conveyance or assignment, gift, delivery, or transfer of any estate, real or personal, or of any money or securities for money with intent to evade the payment of duty under this part of the Act, in case such person should die the property comprised in any such conveyance or assignment, or the subject-matter of any such gift, delivery, or transfer, shall upon the death of such person be deemed to form part of his estate for the purposes of

this part of the Act upon which duty shall be payable. . . ."

Mr. ERNEST POLLOCK, for the defendants, contended that the documents ordered to be produced were privileged from production.

Mr. S. A. T. ROWLATT appeared for the informant. "*Minet v. Morgan*" (L.R., 3 Ch., 361); "*Wheeler v. Le Marchant*" (17 Ch.D., 675); "*Lowden v. Blakey*" (23 Q.B.D., 332); "*In re Postlethwaite*" (35 Ch.D., 722); "*Reg. v. Cox*" (14 Q.B.D., 153); "*O'Shea v. Wood*" ([1891] P., 237, 286); "*Calcraft v. Guest*" ([1898] 1 Q.B., 759) were referred to.

The COURT dismissed the appeal.

LORD JUSTICE COLLINS said that the question was whether the documents were privileged on the ground that they came into existence in the process of asking legal advice of a solicitor. The information was against the defendants, as executors of a testator, and the ground upon which the information was filed was that the deceased executed certain settlements with intent to evade the payment of duty imposed by the Administration and Probate Act, 1890, of Victoria. That was the basis of the information. The issue was whether or not the settlements were made with intent to evade the payment of the duty. It was elicited upon the examination of one of the defendants over here that he had a document in his possession which he must be taken to admit was relevant to the issue, because he took the objection that it was privileged upon the ground above named. Raising the question in that way came to this, that the document was relevant but privileged. Relevant to what? Relevant to the issue whether what was done was done with intent to evade payment of the duty under the Act. If so, in his opinion the document was not privileged from production by reason of its having come into existence as a consequence of advice sought from and given by a solicitor. The privilege, which was that of the client, did not cover documents which came into existence with a view to evade the statute. But, though the document which the defendant refused to produce came into that category, he might show that any particular document ordered to be produced was not relevant to the issue, and any such document he need not produce. As to such documents as were relevant to the issue, it was not a ground for refusing to produce them that they came into existence in consequence of advice being sought from and given by a solicitor as to how to evade the Act.

LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—Freshfields, for the informant; Crowders, Vizard, and Oldham, for the defendants.]

Q.B. Div. (Ridley } 1900.
and Darling, JJ.) } April 10.

ROBERTSON V. HARRIS.*

Adulteration—Warranty—Milk—Written contract for delivery over a period of time.

Held, no warranty to satisfy sec. 25 of the Sale of Food and Drugs Act, 1875.

This was a special case stated by the stipendiary magistrate of Sheffield on the hearing of an information laid by the appellant against the respondent, under section 6 of the Sale of Food and Drugs Act, 1875, charging the respondent with selling, as pure milk, milk to which water had been added. The defence was that the respondent had purchased the milk as pure milk and with a written warranty to that

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

effect, that he had no reason to believe, at the time when he sold it, it was otherwise, that he had sold the milk in the same state as when he purchased it, and that he was accordingly protected by section 25 of the Act. In support of this defence the respondent relied on the contract under which he bought the milk, which was in the following terms:—"January 20, 1899. Hall Farm, Duffield, I, Sarah Sheldon, of the above address, agree to sell to William Harris, of 682, Attercliffe-road, Sheffield, 1,000 gallons of milk weekly in such quantities as arranged, the milk to be pure, new milk, delivered at Attercliffe, Masborough, and Swintown stations on the Midland Railway, carriage paid, at 7½d. per imperial gallon from January 21 to March 31, 1899, both inclusive, 7½d. per imperial gallon from April 1, 1899, to September 30, 1899, both inclusive, and 7½d. per imperial gallon from October 1, 1899, to January 20, 1900, both inclusive." The learned magistrate held that this agreement had in it a written warranty within section 25 of the Act. And, as it was proved that the respondent had no reason to believe at the time when the milk was sold it was otherwise than pure, new milk, and that it was sold in the same state as when it was purchased, he dismissed the information subject to the present case.

Mr. Reginald Brown, Q.C., appeared for the appellant; and Mr. Frankau for the respondent.

In the course of the argument the following cases were cited:—"Rook v. Hopley" (L.R., 3 Ex.D., 209); "Harris v. May" (L.R., 12 Q.B.D., 97); "Farmers' Co. v. Stevenson" (60 L.J., M.C., 70); "Hotchin v. Hindmarch" (L.R. [1891], 2 Q.B., 181); "Elder v. Smithson" (57 J.P., 809); "Laidlaw v. Wilson" (L.R. [1894], 1 Q.B., 74); "Lindsay v. Rook" (63 L.J., M.C., 231); "Iorns v. Van Tromp" (64 L.J., M.C., 171); and "Hawkins v. Williams" (59 J.P., 533).

The COURT allowed the appeal and remitted the case to the magistrate with directions to convict.

MR. JUSTICE RIDLEY said he thought judgment must be for the appellant. The question was whether there had been on behalf of the defendant a written warranty put forward sufficient to satisfy section 25 of the Sale of Food and Drugs Act, 1875, which provided thus:—"If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution." The defendant had satisfied the section in this respect, that he had no reason to believe that the article at the time when he sold it was other than of the nature, quality, and substance demanded, but the question was whether he had shown that he had purchased it with a written warranty. He had produced an agreement under which the milk was to be pure, new milk. That was no doubt a written warranty. In "Laidlaw v. Wilson" (L.R. [1894], 1 Q.B., 74) Mr. Justice Charles said:—"It is enough if the language of the document imports a warranty and shows an intention on the part of the vendor to warrant." In the present case, though the word warrant was not used, the document did import a warranty. So far the respondent was right. But the statute required more, it required that the defendant should show that he had purchased the article with a written warranty; and after the decision in "Harris v. May" (L.R., 12 Q.B.D., 97), notwithstanding that that case had been distinguished in "Laidlaw v. Wilson," it was not enough to produce a general

agreement like that in the present case, without showing also that the article was bought with it. There was no evidence that such was the case in "Harris v. May," which was in other respects very like the present case. No doubt the document there did not contain the words to be pure milk, but a mere description of the milk as good and pure milk; but it was clear that the Court held that those words amounted to a warranty; Lord Coleridge, indeed, said that an action for breach of warranty could have been brought on the contract. Again, the words of Mr. Justice Charles in "Laidlaw v. Wilson" showed what he understood to be the ground of the decision in "Harris v. May." He said that, looking at the judgment of Lord Coleridge as a whole, he thought that what Lord Coleridge really meant was that it was not such a warranty as would cover the specific delivery of milk on April 12, in the absence of some written evidence that that specific delivery was made under the contract. That amounted to saying that you must have more than a written warranty in a general agreement; you must have something written to show that the warranty covers the particular article. In "Laidlaw v. Wilson" there was such evidence. In the present case if there had been something to show that the general agreement for the delivery of milk covered the particular milk in question there would have been enough to satisfy the statute. In the absence of that the magistrate had come to the wrong conclusion.

MR. JUSTICE DARLING delivered judgment expressing his concurrence with the judgment of Mr. Justice Ridley, and further, though without deciding the point, expressing grave doubt whether to satisfy section 25 of the Sale of Food and Drugs Act, 1875, the written warranty must not refer to an article already in existence when the warranty is given.

[Solicitors—Richard Smith and Sons, for H. Sayer, Town Clerk, Sheffield, for the appellant; Geare and Pease, for Fairbairn, Sheffield, for the respondent.]

Q.B. Div. }
(Kennedy, J.) }

1900.
April 11.

GEDGE AND OTHERS V. THE CORPORATION OF THE
ROYAL EXCHANGE ASSURANCE.*

Insurance—Marine—"P.P.I." policy—Illegality
—19 Geo. II., c. 37, sec. 1.

When, upon the trial of an action, the plaintiff's case discloses that the transaction which is the basis of his claim is illegal, the Court cannot ignore the illegality, even if the defendant has not pleaded such illegality.

This action was brought upon a policy of marine insurance, and the case raised an important question as to the right of an assured to recover in a Court of law upon what is known as a "p.p.i." policy. The facts of the case are fully stated in the judgment.

Mr. Rufus Isaacs, Q.C., and Mr. J. A. Hamilton appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. Scrutton for the defendants.

MR. JUSTICE KENNEDY read the following judgment:—This action is brought by the plaintiffs, who are insurance brokers suing really on behalf and for the benefit of a Mr. Rouse and certain other gentlemen associated with him, against the defendants on an alleged policy of marine insurance dated November 14, 1898, upon the British steamship Radnorshire belonging to the Shire Line. The policy, as pleaded by the plaintiffs, is a policy for £400 on the said steamship at and from London to Yokohama, to pay a total loss in the event of the vessel's not

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

arriving at Yokohama on or before midnight on December 31, 1898. It is pleaded by the plaintiffs that the vessel did not arrive at Yokohama on or before midnight December 31, 1898, and the amount insured is claimed by the plaintiffs. In fact, as appeared when the document was produced by the plaintiffs in evidence, the alleged policy is what is known as a "p.p.i." or honour policy, one of its terms being that, in the event of loss, "it is hereby agreed that this policy shall be deemed as full and sufficient proof of interest." The defendants, in the points of defence, do not plead the invalidity of the alleged policy, under the provisions of the 19 George II., c. 37, section 1. Their pleaded defences, in addition to a refusal to admit the correctness of the statement of the plaintiffs as to the terms of the alleged policy, are (1) concealment of material facts; (2) that the persons on whose behalf the plaintiffs effected the alleged policy had no insurable interest in the subject-matter insured. The alleged policy was, in truth, so far as regards the purpose of Mr. Rouse and certain other gentlemen for whom it was effected, a mere wager or wagering speculation. It appears that some time before November 14, 1898, the Government of Japan had made an ordinance whereby goods imported into Japan after December 31, 1898, should be liable to a higher duty than had previously been levied. This was known to Mr. Rouse, who was employed in the London office of a Japanese insurance company, called the Nippon, and he had a conversation with a Mr. Pound (who was an insurance clerk in the plaintiffs' office) upon the subject of insurances being, in consequence of the ordinance, effected in regard to the arrival in Japan of vessels carrying goods to that country. It occurred to Mr. Rouse that there was an opportunity of having what he called "a spec." He asked Mr. Pound if he thought he would be able to do a "spec." for him. Pound said he thought he might be able. They then parted. Mr. Rouse returned to his office and read in Lloyd's *Shipping Gazette* that the Radnorshire was the vessel of the line of steamships running between London and Japan under the management of Messrs. Jenkins and Co., which had last sailed for Japan; and that she was reported to have passed the Downs on October 30. Believing that a vessel of that type might be expected to take, roughly, about two months on the voyage, he saw from her reported position that, to use his own words, her arrival before January 1, 1899, was obviously a close thing, and what he wanted for a "spec." He mentioned his project to certain other gentlemen in the Nippon office, and they agreed to share with him in the speculation. In the result, through Mr. Pound, acting as their agent to procure an insurance, Mr. Rouse and his fellow-speculators carried out their project by obtaining from the defendants the policy in question, the slip for which was initiated by Mr. Toulmin on behalf of the defendant company. Had Mr. Toulmin known the real nature of the transaction—namely, that it was a mere bet or speculation without any interest on the part of those for whom in reality the insurance was effected—he would have declined the risk altogether. It is at the same time only just to Mr. Rouse and his friends to add that they appear to have desired throughout the transaction to act in a candid and straightforward manner. It was not through any fault of theirs that the purely speculative nature of the transaction was not disclosed to Mr. Toulmin. It appears to me that, when upon the trial of an action the plaintiff's case, as happens here, discloses that the transaction which is the basis of the plaintiff's claim is illegal, the Court cannot properly ignore the illegality and give effect to the claim. Here the insertion of the "p.p.i." clause taints the whole of the plaintiffs' case. The 19 George II., c. 37,

section 1 expressly forbids the making of an assurance upon a British ship without further proof of interest than the policy, and goes on to declare that every such assurance shall be null and void to all intents and purposes. It has been suggested by the plaintiffs that the present policy is not a policy "on a ship" within the meaning of this section. I am clearly of opinion that it is. An assurance whereby the assured is entitled to be indemnified against loss in respect of the non-arrival of the ship at a certain port by a certain date may, I think, be correctly described as an insurance on the ship. If authority is wanted I think that it appears in the case—very similar indeed in its circumstances—of "*Kent v. Bird*" decided on the same statute in 1777 (Cowper, 583). There the defendant undertook that a vessel should save her passage to China that season, and, in the action brought upon the document of insurance, judgment was given for the defendant on the ground that the transaction was the making of a gaming or wagering policy on a ship within the meaning of the statute. Attempts to narrow the section when it speaks of an assurance on "goods, merchandises or effects," similar to the attempt of the defendants in this case in regard to an assurance "on ship," were unsuccessfully made in "*Smith v. Reynolds*" (1 H. and N., 221), "*De Mattos v. North*" (L.R., 3 C.P., 185), "*Berridge v. Man On Insurance Company*" (18 Q.B.D., 346). These cases show that assurances on profits, commission and advances are covered by the section, when it speaks of assurances on "goods, merchandises or effects." This policy, then, being an illegal instrument—an assurance which, in the language of Mr. Justice Grove in "*Allkins v. Jupe*" (2 C.P.D., at p. 389), is contrary to the direction of the statute, and so unlawful in all its incidents that the law will not countenance any part of it—I cannot give judgment upon it in favour of the plaintiffs. Then counsel argued that the illegality was not pleaded by the defendants. In my opinion that makes no difference—*ex turpi causa non oritur actio*. This old and well-known legal maxim is founded on good sense, and expresses a clear and well recognized legal principle which is not confined to indictable offences. No Court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. (Per Lord Justice Lindley, "*Scott v. Brown, Doering, McNab, and Co.*" [1892], 2 Q.B., at p. 728.) "If," said Lord Mansfield in his judgment in "*Holman v. Johnson*" (Cowper, 343) (to which Lord Justice Lindley refers as an authority immediately after the passage which I have just quoted), "from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the Court says he has no right to be assisted. It is upon this ground the Court goes, not for the sake of the defendant, but because they will not lend their aid for such a plaintiff." Order 19, rule 16 of the rules of the Supreme Court, upon which Mr. Hamilton for the plaintiffs laid much stress, does not touch (as the judgment of Lord Justice Lindley, which I have quoted, clearly indicates) a case like the present in which the illegality of the transaction appears upon the face of the plaintiffs' case. The purpose of that rule, as it appears to me, is to prevent the injustice which might arise from a litigant, without notice to his opponent, adducing evidence to show that

a transaction which apparently is perfectly legal is really illegal—as for example that an apparently good deed was really fraudulent under 13 Eliz., c. 5; or the similar injustice which might arise if a litigant, who would otherwise have been prepared with evidence to surmount them, was suddenly called upon at the trial for the first time to meet objections to the pursuit of a legal remedy based upon the Statute of Limitations or the Statute of Frauds, or was called upon to deal with issues of which he had no notice. The rule does not affect a case like the present. There is, I think, only one other point in the argument of the plaintiffs' counsel upon this part of the case which I have to notice. It was urged that the defendants themselves were wishful that the policy should not be held void on account of its having been made in terms prohibited by the statute. Certainly the defendants' counsel did so state their attitude. But I hold that my judgment ought not to be affected by this consideration. I was referred to the course taken by Mr. Justice Bigham in the recent case of "*Buchanan v. Faber*" (4 Com. Cas., 223). In that case the policy sued on contained the "p.p.i." clause. In a note to the report it is stated that my brother Bigham, after consultation with Mr. Justice Mathew, intimated that he would, with the consent of the parties, hear the case as if the policy did not contain the "p.p.i." clause. I need not say that I should be very slow not to adopt a course which they had approved, and if I ever felt impelled by my own conviction to take a different view from them I should have very great misgiving as to the correctness of my own view. But what I am invited to do here is something quite different from that which was asked by the parties and permitted by my brother Bigham in that case. That was, in effect, to treat the vitiating clause as deleted. What I am invited to do is to treat the policy as valid with the vitiating clause retained as part of it. If that were done here which the Court did in "*Buchanan v. Faber*"—viz., if I dealt with this policy as if it contained no "p.p.i." clause—the plaintiffs, so far from being helped, would obviously be involved in a fatal difficulty. They, admittedly, never had any insurable interest; the absence of such an interest has been pleaded by the defendants; and the only possible reply to this defence lies in the presence in the policy of the "p.p.i." clause. If that is treated as gone, the plaintiffs' case goes with it. Deciding this case, as I do, upon the grounds which I have stated, I feel, nevertheless, in view of the care bestowed upon it by the learned counsel on both sides, that I ought not to let pass unnoticed another aspect of the case which was presented for my consideration. The defendants argue that, even if the policy can be treated as not invalidated by the "p.p.i." clause, they have a good defence to the action, because it was obtained by the concealment of a material fact—a fact, that is to say, "which if communicated would affect the judgment of a rational underwriter in considering whether he would enter into the contract at all, or enter into it at one rate of premium or another" (see per Lord Justice Brett, "*Rivaz v. Gerusai*," 6 Q.B.D., at p. 229). The fact referred to is the purely speculative character of the transaction. That it was not expressly communicated by Mr. Pound to Mr. Toulmin is indisputable; but the plaintiffs say to the defendants, "You are not entitled to rely on this non-disclosure; you knew perfectly well that we were negotiating for a policy with a 'p.p.i.' clause, and you contracted to give us such a policy. Mr. Pound was justified in assuming that Mr. Toulmin knew all he had to tell, and in the circumstances you must be taken to have waived being informed of the purely speculative nature of the risk" (see "*Carter v. Boehm*," 3 Burr., 1,907). It

appears to me that there is much to be said for this view, but upon the whole, if it was open to me to treat the policy as a valid policy and I had to decide the case upon this point, I should feel myself, upon the evidence given before me, obliged on this point also to decide in favour of the defendants' contention. On the materiality of the fact of this being purely a speculative or wagering venture on the part of Mr. Rouse and his friends Mr. Toulmin is clear and emphatic. He would not have entertained the risk if he had known of it. As I understand his evidence, "policy proof of interest" in the ordinary understanding of underwriters means at least the possible existence of a business interest—an interest which may be hard to prove or may not admit of legal proof as an insurable interest, but still some business interest. The facts in the case of "*Buchanan v. Faber*," to which I have had occasion to refer, afford an illustration, I think, of a class of risk of this latter sort. In fact the clause is sometimes stipulated for in policies which are intended to cover substantial interests such as disbursements and advances. It is not understood, if I follow Mr. Toulmin's evidence correctly, to cover a mere wager. The only case, according to Mr. Toulmin, in which he has accepted a purely speculative or wagering risk—and that he has done only on rare occasions—is in the particular case of "overdue" vessels, and then only at specially agreed rates of premium. The defendants' evidence is substantially confirmed, I think, by the conduct and by the evidence of Mr. Rouse. Mr. Rouse is himself a clerk in an insurance office, and he expressly enjoined Mr. Pound to state in negotiating for the insurance the speculative nature of the transaction. The idea was, he says, that they could not be too careful. He says, no doubt, elsewhere in his cross-examination that he did not see the materiality of a "spec." or real interest, but he goes on to admit that the underwriters would probably quote a higher rate of premium in the case of a "spec." Mr. Pound's excuse for not obeying Mr. Rouse's instructions on this point as given to him by Mr. Rouse was that he had not got the chance of making the disclosure. It was quite an insufficient excuse, as I understood what took place between Mr. Pound and Mr. Toulmin; but I believe that Mr. Pound did not at all mean to do anything improper or unfair. I think he possibly drew an unwarranted inference from Mr. Toulmin's words and manner that Mr. Toulmin either knew or was willing to waive inquiry about the circumstances of the insurance. Upon the whole, as I have already said, upon the evidence before me, if I had to decide on this issue I should feel obliged to decide it in favour of the defendants. It is not, however, necessary for me to do so, and I give judgment for the defendants on the grounds which I have previously stated. Under the circumstances of the case, including those to which I need not refer, except for this purpose—namely, that, as appears by Mr. Toulmin's letter of November 14, 1898, the defendants repudiated the policy for reasons which the facts do not warrant, and which implied an unjust imputation upon the plaintiffs' representative—I give judgment for the defendants without costs.

[Solicitors—Thomas Cooper and Co.; Hollams, Sons, Coward, and Hawksley.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) 1900. April 24.

THE QUEEN V. THE CHIEF REGISTRAR OF FRIENDLY SOCIETIES—EX PARTE EVANS.*

Friendly Society—Friendly Societies Act, 1896, sec. 80—Jurisdiction of Chief Registrar.

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

In this case a Divisional Court had refused to grant the applicant, Evans, a rule *nisi* for a writ of prohibition to the Chief Registrar of Friendly Societies. Proceedings were being taken before the Chief Registrar for the dissolution of a society, of which Evans was the managing director. Evans had certain claims against the society, and the society had certain claims against him. Evans sought for a writ of prohibition to restrain the Chief Registrar from adjudicating upon these claims. He renewed his application by way of appeal to this Court, and obtained a rule *nisi*. The Chief Registrar now showed cause against the rule.

Mr. Sutton appeared for the Chief Registrar; Mr. Stutfield for the applicant.

The COURT discharged the rule.

LORD JUSTICE A. L. SMITH said that, in his opinion, under the circumstances of the case the writ of prohibition ought not to be issued. Proceedings had been commenced for the dissolution of a friendly society under the provisions of section 80 of the Friendly Societies Act, 1896. The manager, Evans, had claims against the society, and the society had cross-claims against him. By section 80 the Registrar had power to make an award for a dissolution, and he had power to investigate the affairs of the society. By subsection 3, if upon the investigation it appeared that the funds of the society were insufficient to meet the existing claims thereon, the Registrar might award that the society be dissolved. By subsection 5, "Every award under this section, whether for dissolution or distribution of funds, shall be final and conclusive on the society in respect of which the award is made, and on all members of the society, and on all other persons having any claim on the funds of the society, without appeal, and shall be enforced as a decision on a dispute under this Act." In his opinion, the Registrar was not proposing to do anything in this case except what he had jurisdiction to do under the section. The rule must therefore be discharged.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER delivered judgment to the same effect.

Q.B. Div. }
(Darling, J.) }

1900.
April 24.

REED V. FRANKS.*

Bill of Sale—Bills of Sale Act, 1878, secs. 8 and 10—Consideration—Defeasance.

This was an action brought by Mr. John H. Reed, the plaintiff, against Mr. Edwin Franks, a money-lender, trading as Edwin Franks O'Toole, the defendant, for damages for breaking and entering his premises and for wrongfully taking possession of his goods.

Mr. Frank Mellor appeared for the plaintiff; and Mr. Tudor Howell for the defendant.

On December 9, 1898, the plaintiff, who is a nurseryman and market-gardener, executed a bill of sale in favour of the defendant upon his furniture, then about to be moved to 44, Jewel-road, Walthamstow, by way of security for the payment of the sum of £30 and interest thereon at the rate of 60 per cent. per annum. The principal sum of £30 was repayable under the bill of sale by 12 monthly instalments of £2 10s. each, with the interest due at the time of payment. On the same day as that on which the bill of sale was executed, the defendant signed and gave to the plaintiff the following note:—"I beg to say I will accept 25 shillings interest per month for the loan of £30 made to

you this day by me." The plaintiff, accordingly, paid £3 15s. per month. A portion of the June instalment being overdue on June 30, and again on July 3, the defendant's agents entered the plaintiff's premises and took possession of the furniture, under the powers granted by the bill of sale. The plaintiff afterwards sold some of the furniture and with the proceeds, through his solicitor, paid to the defendant £25 5s., receiving in return a receipt expressed to be in "full settlement on both sides of the bill of sale." He paid a further sum of £1 17s. 6d. for possession expenses. The plaintiff's case was that the entry into his premises was unlawful, because it was effected forcibly by breaking a pane of glass, and, further, because the bill of sale was bad. The grounds on which the bill of sale was said to be bad were (1) because the agreement to accept 25 shillings per month interest was a defeasance of the bill which ought to have been set forth in the bill, as it is required to be done by section 10 of the Bills of Sale Act, 1878, and (2) because the consideration in the bill was incorrectly stated, a sum of 30 shillings having been deducted from the £30 for expenses.

The plaintiff said that towards the end of 1898 he was in want of money, and a judgment summons for £20 had been issued against him. He received a letter from the defendant and entered into negotiations for a loan. Two sums of 7s. 6d. each were charged for preliminary expenses. It was arranged that the defendant should advance £30 on a bill of sale on the witness's furniture, but the defendant undertook not to register the bill. The witness looked at the bill of sale, and observed that the interest was too high. The defendant then agreed to sign the note in which he agreed to accept 25s. per month interest. The bill was afterwards signed. The defendant demanded a further sum of 30s. for expenses, and threatened to register the bill unless this was paid. The sum was accordingly paid. Afterwards the defendant drew a cheque for £30, which the plaintiff cashed. On July 2 he noticed that a pane of glass had been broken in one of the windows of his house. The defendant's men were in possession from July 3 to July 5.

The defendant, in his evidence, denied that any sum was paid to him by the plaintiff for expenses. There was never any question of not registering the bill of sale. The document by which he undertook to accept 25s. per month interest was signed at the plaintiff's request and for his convenience. He preferred to pay an even amount rather than to trouble himself with calculating amounts which would gradually decrease as the instalments were paid off. The bill of sale was registered six days after execution.

Mr. MELLOR submitted that the bill of sale was bad, and cited "Edwards v. Marcus" ([1894] 1 Q.B., 587) and "Firth v. Cowburn" (19 Ch.D., 419).

HIS LORDSHIP withdrew the case from the jury. He said that the entry on to the plaintiff's premises was justified unless the bill of sale were bad. With regard to the first point on which it was impugned, he did not think that the agreement signed by the defendant amounted to a defeasance of the bill of sale within section 10 of the Act of 1878. It was not an agreement to alter the rate of interest, but merely an arrangement as to the manner in which the interest should be paid. The bill was, therefore, not void on the first of the grounds set up, nor was there evidence that it was void on the ground that the consideration was incorrectly stated; for, even assuming that the 30s. was paid after the payment of the £30, it was paid, on the plaintiff's own evidence, not as a deduction, but in order to prevent the bill of sale being registered.

Judgment was accordingly entered for the defendant, with costs.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Court of Appeal (Lindley, M.R.,)
Rigby and Collins, L.JJ.) }

1900
April 25.

NATIONAL COMPANY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS (LIMITED) V. GIBBS.*

Patent—Joint patentees—Interest of survivor—
Covenant to assign—Joint and several covenant—Agreement—Construction.

Decision of Cozens-Hardy, J. (15 *The Times* L.R., 336), reversed.

This was an appeal from a decision of Mr. Justice Cozens-Hardy's, reported in 15 *The Times* L.R., 336. It raised a question as to the construction of an agreement to assign a patent granted to two patentees. By an agreement under seal dated May 25, 1883, and made between Lucien Gaulard and John Dixon Gibbs (hereinafter called "the vendors") of the one part and the plaintiff company of the other part, after reciting that the vendors were the inventors of certain inventions in connexion with the manufacture and construction of secondary generators for the distribution of electricity and other apparatus connected with electrical lighting for which they had obtained her Majesty's letters patent and of which they had filed specifications and that the vendors had also obtained certain foreign patents, it was agreed that (1) the vendors should sell and the company should purchase the exclusive privilege of using, exercising, and vending all the inventions within the United Kingdom and the other countries named, with the full benefit of all extensions, &c.; (2) that "the vendors and each of them" should from time to time and at the request and cost of the company do all such acts and things as by the company might be considered necessary or expedient for procuring confirmation of any of the patents, and for obtaining extensions and prolongations, and that the vendors would communicate all improvements and other inventions and at the request and cost of the company patent the same and execute assurances for vesting the new patents in the company; (3) that in the event of infringement the company should "be at liberty to commence, carry on, and prosecute in their own name, or in the name of the patentees or any of them or the executors or administrators of any of them or otherwise, all such actions and proceedings" as the company might think fit; (4) that "the vendors and each of them" should at all times thereafter give the company advice as to the use of the inventions. Clause 5 stated the consideration payable, and Clauses 6 and 7 were as follows:—(6) The vendors shall without delay, at the expense of the said company and to the satisfaction of the solicitors of the said company, establish a title to all the said inventions and letters patent and privileges hereby agreed to be sold, and assign and transfer the same to, and cause the same to be legally vested in, the said company or such person or persons as the said company shall appoint for the purpose. (7) The assignment and transfer of the said letters patent and other premises sold shall be prepared by and at the expense of the said company and shall be expressed to be made in pursuance of this agreement and in consideration of the payment of the said sum of £220,000, to be paid in fully paid-up shares and cash as before mentioned, and the said vendors and all other necessary parties, if any, shall at the cost of the said company execute such assignments to the said company or as they shall direct, and such assignments respectively shall contain a covenant by the said

vendors that all the letters patent thereby assigned or any letters patent which may thus have been obtained in substitution for the same or in respect of such invention as is protected thereby are valid and in nowise void or voidable, and also such other covenants and provisions as may be reasonably required by the said company for giving effect to the sale hereby agreed to be made. Provided that the consideration money may be apportioned among two or more assignments as the said company shall think fit." All the patents referred to in the agreement were granted to Gaulard and Gibbs and not to either of them separately. Amongst others was an English patent of September 13, 1882 (4,362 of 1882), which was in the usual form of a grant to two patentees. After reciting that Gaulard and Gibbs had presented their petition to the Crown that they were in possession of an invention for a new system of electricity for the production of light and power, believed to be of great public utility, and that they were the first and true inventors thereof, &c., and that the petitioners had prayed for a grant "unto them, their executors, administrators, and assigns" of letters patent for the sole use, benefit, and advantage of the said invention within the United Kingdom for 14 years, it proceeded as follows:—"Know, therefore, that we . . . by these presents for us, our heirs and successors, do give and grant unto the said Lucien Gaulard and John Dixon Gibbs, their executors, administrators, and assigns, our special licence, full power, sole privilege, and authority that they the said "Gaulard and Gibbs, "their executors, administrators, and assigns, and every of them by themselves or by their deputy, or deputies, servants, or agents, or such others as they, the said "Gaulard and Gibbs, "their executors, administrators, and assigns shall at any time agree with and no others and from time to time and at all times hereafter during the term of years expressed, shall and lawfully may make, use, exercise, and vend their said invention" within the United Kingdom "in such manner as to them the said "Gaulard and Gibbs, "their executors, administrators, and assigns or any of them shall in their discretion seem meet, and that the said "Gaulard and Gibbs, "their executors, administrators, and assigns shall and lawfully may have and enjoy the whole profit, and benefit," &c., coming by reason of the invention for the period therein mentioned, "To have, hold, exercise, and enjoy the said licences, powers, privileges, and advantages . . . unto the said "Gaulard and Gibbs, "their executors, administrators, and assigns" for the term of 14 years; "and to the end that they the said "Gaulard and Gibbs, "their executors, administrators, and assigns, and every of them, may have and enjoy the full benefit and sole use and exercise of the said invention." Gaulard died in 1888, and Mme. Henriette Unesime Ruelle, one of the defendants, was his administratrix. In the present action, which was brought against Gibbs and Mme. Ruelle, the company alleged that the consideration for the sale of the patents had been paid, that the patents had not been assigned to the company, and were entirely or in part void or voidable, that in some countries the patents had been declared void, and that the company had suffered damage by having to pay costs and by the value of the patents having been reduced. The company, accordingly, claimed (1) that the defendants might be ordered to assign the patents; (2) damages for breaches of agreement and warrants; and (3) repayment of a portion of the purchase money. As against Gibbs the action was compromised. The defendant Mme. Ruelle alleged by her defence that the plaintiff company had taken proceedings in France against her and others to enforce the agreement of May 25, 1883, and that by an order of the Paris Court

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

of Appeal of June 2, 1897, the plaintiff company were ordered to pay to her under the agreement the sum of £2,581 3s. with interest, and that this sum still remained unpaid, and she counterclaimed for payment of that amount with interest. At the trial of the action it was objected that the grant of letters patent was to Gaulard and Gibbs jointly, and that on the death of Gaulard the joint interest passed to Gibbs by survivorship, and further, that the obligation created by Clause 7 of the agreement was merely a joint covenant, and that the survivor Gibbs was the only person who could be sued upon it. Mr. Justice Cozens-Hardy upheld these objections and came to the conclusion that the plaintiffs were not entitled to any relief against Mme. Ruelle, and he dismissed both the action and the counterclaim. Mme. Ruelle appealed from this decision, so far as it related to the counterclaim, and the plaintiffs served a cross notice of appeal on Mme. Ruelle, so far as the judgment related to the action.

Mr. Eve, Q.C., and Mr. Rowden, Q.C., were for the defendant, Mme. Ruelle; Mr. Gore-Browne (Mr. Moulton, Q.C., with him) appeared for the plaintiff company.

The COURT allowed both appeals.

The MASTER of the ROLLS said that he was unable to adopt the view taken by the learned Judge. Gaulard and Gibbs were two patentees who were entitled to various patents and, amongst others, to a patent for the distribution of electricity by secondary generators. It was obvious that they were not mere co-owners of these patents and that they took them out for the purpose of making money, and they agreed to sell them to the plaintiff company by an agreement under seal of May 25, 1883. After referring to this agreement, and particularly to Clause 7, his Lordship said that that clause distinguished the case from the decision of the House of Lords in "*White v. Tyndall*" (13 App. Cas., 263), upon which the learned Judge had mainly proceeded. The learned Judge treated this agreement as being in substance a joint covenant by Gaulard and Gibbs to assign the patents, and a joint covenant by them that the patents were valid. He, the Master of the Rolls, could not think that that was the true construction of this agreement, and the learned Judge had himself admitted that the proper form of covenants for title in an assignment by two joint tenants was to make them joint and several. The learned Judge had taken a short cut in dealing with the rights of the parties, and had held that this was a joint covenant, and that consequently on the death of Gaulard there was no remedy against his personal representative, and it followed from that view that the counter-claim also failed. In their Lordships' opinion that order ought to be reversed and there ought to be a declaration that upon the true construction of the agreement the right of the plaintiff company to relief against Mme. Ruelle ought to be ascertained upon the footing that Gaulard and Gibbs had jointly covenanted to assign the patents mentioned in the agreement to the plaintiff company, and that such assignments should contain joint and several covenants by Gaulard and Gibbs with the company that such patents were valid and in no wise void, and, further, that the amount due from the company to Mme. Ruelle ought to be ascertained upon the footing of the judgment of the French Court of Appeal. The action and the counter-claim would be remitted to the learned Judge for trial and all the costs would be reserved to be dealt with by him.

LORDS JUSTICES RIGBY and COLLINS concurred.

[Solicitors—E. Betteley; Campbell, Reeves, and Hooper.]

Court of Appeal (A. L. Smith, }
Vaughan Williams, and Romer, } 1900.
L.J.J.) April 25.

THE QUEEN V. SHIEL AND OTHERS.*

Practice—Appeal—Police magistrate—Application to state a case—Summary Jurisdiction Act, 1879, sec. 33.

A magistrate cannot be made to state a case on the ground that his decision is erroneous in point of law where he is following a decision of the High Court by which he is bound.

This was an appeal by the London County Council against a judgment of a Divisional Court, Mr. Justice Channell and Mr. Justice Bucknill, reported in *The Times* of February 2. Proceedings had been taken before a magistrate under section 150 of the London Building Act, 1894, by the County Council against Shewin Brothers and Co. Section 74 of that Act requires that when a building exceeding ten squares in area is used in part for the purposes of trade or manufacture, and in part as a dwelling-house, the two parts shall be separated by walls and floors constructed of fire-resisting materials, and all passages, staircases, and other means of approach to the part used as a dwelling-house shall be constructed of fire-resisting materials. The present proceedings were taken in respect of a building which was intended to be used as a fully-licensed publichouse, part of which was to be used for living in, and the question proposed to be raised was whether a publichouse was within section 74. The magistrate decided against the London County Council. The County Council asked the magistrate to state a case for the opinion of the Court, but the magistrate declined to do so on the ground that the same point was considered and decided in "*Carritt v. Godson and Son*" ([1899] 2 Q.B., 193), in which Mr. Justice Day and Mr. Justice Lawrance, sitting as a Divisional Court, held that a publichouse was not within the section. "*Carritt v. Godson and Son*" was a case decided under a criminal section of the London Building Act, and there was, accordingly, no right of appeal from that decision to the Court of Appeal. The County Council had taken these proceedings under a different section in order, if possible, that they might take the matter to the Court of Appeal. They obtained a rule calling upon the magistrate to show cause why he should not state a case. Shewin Brothers and Co. appeared to show cause against the rule, and the Divisional Court discharged it.

Mr. Horace Ivory appeared for the County Council in support of the appeal; Mr. Danckwerts, Q.C., appeared for Shewin Brothers and Co.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that this was an application which in his experience was unprecedented. The London County Council, with full knowledge that the law upon the matter had been laid down in "*Carritt v. Godson and Son*" ([1899] 2 Q.B., 193), and that that decision was binding on the magistrate, took proceedings before the magistrate under the London Building Act, 1894. At the hearing the magistrate was referred to the case of "*Carritt v. Godson and Son*," and it was his duty to administer the law as laid down in that case. It was conceded that the present case was on all fours with that case and that it could not be distinguished from it. Thereupon the County Council applied to the magistrate to state a case for the opinion of the Court under section 33 of the Summary Jurisdiction Act, 1879. By that section a magistrate could only be asked to state a case upon the ground that his decision was erroneous in point of

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

law, or was in excess of jurisdiction. The magistrate said that his decision was not erroneous in point of law, because he was bound by the decision in "*Carritt v. Godson and Son*." It seemed to him (the Lord Justice) that the magistrate was perfectly right, and it would have been wrong for him in the circumstances to have stated a case. The magistrate refused to state a case. It was said that the County Council desired to get rid of the decision in "*Carritt v. Godson and Son*," though the Legislature had said that that decision was to be final and without appeal. By means of this application the County Council hoped to get rid of that decision, and if the Court ordered the magistrate to state a case the County Council might carry the matter to the House of Lords. The Divisional Court refused to order the magistrate to state a case on the ground that the decision of the magistrate was not erroneous in point of law as the law stood. The County Council then appealed to this Court. The magistrate was not in error in law, because he could only have done what he did. If there was any civil proceeding by which the case of "*Carritt v. Godson and Son*" could be questioned he did not know, but he would be no party to establishing a practice which seemed to him to be quite new.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER agreed.

[Solicitors—W. A. Blaxland, for the appellants; Percy Gates, for the respondents.]

Chan. Div. } 1900.
(Cozens-Hardy, J.) } April 26.

IN RE THE HAYCRAFT GOLD REDUCTION AND MINING COMPANY (LIMITED).*

Company—Winding up—Compulsory order—
Petition for compulsory winding up after resolution for voluntary winding up.

This was a petition for a compulsory winding up on which his Lordship reserved judgment on the 5th inst.

His LORDSHIP delivered judgment as follows:—This is a petition for the compulsory winding up of a company by fully-paid shareholders. It is opposed by the company and by a large body of fully-paid shareholders on the ground that the company is being wound up voluntarily and that this is an absolute bar to the petition; and, alternatively, on the ground that no fraud has been proved in passing the resolution to wind up voluntarily, which, it is said, is the only state of facts which justifies the Court in making a compulsory order after a voluntary winding up at the instance of a shareholder. The facts of the case are very peculiar. The company was incorporated in 1896 with a nominal capital of £200,000, divided into 200,000 shares of £1 each. It appears that 95,000 shares have been issued, and £88,000 or thereabouts has been paid up or treated as paid up on these shares, and the balance is said to be due in respect of shares held by an insolvent company from which nothing can be recovered. The company has not been successful. It is alleged that there are circumstances connected with the promotion and formation of the company which bring the case within the settled rules of the Court, of which the recent decision in the *Olympia* case is but an instance, and that considerable sums of money are recoverable from all or some of the directors and from the vendors. On January 30, 1899, the second ordinary general meeting of the company was held, at which the chairman pro-

posed that the directors' report and the accounts to October 31, 1898, be and are hereby passed and adopted. After considerable discussion an amendment was proposed and carried that the directors' report and statement of accounts submitted to this meeting be not received and not adopted, and that, having regard to such report and accounts, it is necessary to take prompt action to protect the interests of the shareholders, and that a committee consisting of three shareholders, with power to add to their number, be and is hereby formed for the purposes following (*inter alia*)—to investigate all matters and things touching the formation and promotion of the company and the carrying on of its business; to call for and obtain the production of all books, papers, and documents in the possession, custody, or power of the directors and other officers and the solicitors of the company and others relative to the affairs of the company and its promotion; to report to the shareholders as to such investigations; to obtain such legal advice and other professional assistance as it may be deemed necessary for any of the above purposes; and that the proper costs and expenses incurred by the said committee be paid by the company. It was decided to adjourn the meeting for two months or until such time as the committee should have completed their investigation. The committee thus appointed prepared a report, the accuracy of which has not been fully investigated or established before me. It is sufficient, however, to say that if one-half of the allegations in the report can be made good a case of gross fraud involving serious pecuniary liability towards the company will apparently be established. In July, 1899, the committee, having completed their report, authorized their solicitors to supply the directors with a copy. The directors declined, as they were at perfect liberty to do, to meet the committee for the purpose of discussing the report, and suggested that as the adjourned annual meeting of the company was to be held in October it would be better to wait till then. The adjourned annual meeting was not held in October, but on December 20, 1899, two notices were issued purporting to be signed "by order of the Board, R. Gordon, secretary," one of which gave notice that the adjournment of the second ordinary general meeting from January 30 last would be taken at the Queen's Hotel, Manchester, on Friday, December 29, at 3 o'clock in the afternoon, and the other gave notice that an extraordinary general meeting of this company would be held at the same place on the same day at 3.30 o'clock in the afternoon for the purpose of considering, and, if deemed expedient, passing, the following extraordinary resolution:—"That it has been proved to the satisfaction of this meeting that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same, and accordingly that the company be wound up voluntarily and that Mr. Robert Gordon, of St. Lawrence-house, King-street, Cheapside, London, be appointed liquidator for the purpose of such winding-up." These two meetings were held. The report of the committee had not been printed or circulated among the shareholders, and so far as appears the only persons aware of the contents were the members of the committee and the directors. It appears from the minute-book that at the adjourned general meeting the directors' report and the accounts were received and adopted, and that at the extraordinary general meeting the resolution of which notice was given was declared duly carried. No mention is made in the minutes of the report of the committee. Proxies to a very large number were held by the persons incriminated or their nominees, who were in a position to carry any resolution. Mr. Gordon, the liquidator, proceeded with most unusual rapidity to arrange for the dissolution of the company and the destruction of all its books. On

*Reported by D. PRITCHARD, Esq., Barrister-at Law.

February 20, 1900, notice was given by the liquidator that a general meeting of the members would be held on March 1, following the words of section 142 of the Companies Act, 1862. This led to the presentation of the petition on February 27. On March 1 the meeting was held. The liquidator produced accounts showing that a sum of less than £5 had been received and expended by him and the following resolutions were passed:—“(1) That the account submitted to this meeting and showing the manner in which the winding-up has been conducted and the property of the company disposed of be received and adopted; (2) That the books, accounts, and documents of the company and of the liquidator thereof be retained by the said liquidator, he undertaking not to destroy the same until after the disposal of the petition presented to wind up the company or until the order of the Court, the books, accounts, and documents not under any circumstances to be destroyed before the dissolution of the company.” Assuming everything to be regular, the result will be that the company will be dissolved at the end of three months (section 143). On referring to the directors’ minute-book it appeared that there was no trace of any board meeting after January 20, 1899. Mr. Gordon, who gave evidence in the box, and who was the secretary of the company, admitted that in fact there was no meeting of the board authorizing the notices for the meetings on December 29. He says, however, that he spoke through the telephone to one director, had a conversation with the chairman, in whose office he is a clerk, and wrote letters to the other directors. I have seen some of their replies, which in substance left the secretary to fix his own day. There is, however, nothing to show that any single director was asked to approve of the resolution as proposed which involved the appointment of Mr. Gordon as liquidator. Under article 56 the directors may, whenever they think fit, convene an extraordinary general meeting. By article 97 two directors are a quorum, and by article 101 a meeting of directors at which a quorum is present shall be competent to exercise all or any of the authorities, powers, and discretions by or under these presents vested in or exercisable by the directors jointly. Under these circumstances, the question arises whether the resolution to wind up voluntarily was validly passed. It was laid down by the Court of Exchequer in “*D’Arcy v. the Tamer Kit Hill, &c., Company*” (2 L.R., Exch., 158) that directors must act together as a board and that it is not sufficient to procure the separate authority of a sufficient number of directors to constitute a quorum. That case turned upon the Companies Clauses Consolidation Act, 1845, but it seems to me to be equally applicable to a limited company under the Act of 1862. In Collee’s claim (12 Eq., 246), Vice-Chancellor Bacon seems to have treated the decision of the Court of Exchequer as turning upon a common law rule of pleading, and, although it was not perhaps necessary to the decision of the case before him, he certainly regarded an agreement which on the face of it was signed by four directors at different dates and not as a board, as a contract binding the company. I cannot follow the criticisms of the Vice-Chancellor, and I prefer the view of the law taken by the Court of Exchequer. My attention was, however, directed to the case of “*Southern Counties Bank (Limited) v. Rider*,” decided by the Court of Appeal in 1895 (73 L.T., 374). [After stating the facts of decision in that case, his Lordship continued.] I do not think the decision in that case can be taken as laying down any general principle which I am bound to follow. Neither the case in the Court of Exchequer nor this case before Vice-Chancellor Bacon was cited. It does not touch the question whether a notice given without any kind of

board meeting having been held is valid. In the present case I cannot regard the omission to convene a board meeting to consider matters of such vital moment as a winding up of the company and the appointment of a liquidator as a mere irregularity. I believe that one or more of the directors, with the deliberate purpose of screening themselves from the investigation suggested by the report of the committee, ingeniously devised and carried out a scheme by which the chairman’s clerk should be appointed liquidator and the company should be dissolved and the books destroyed at the earliest possible moment. I think the attempt has failed, and as there was, in my view, no voluntary winding up in existence there is no reason why I should not now make a compulsory order. I may observe that there has been no subsequent meeting of the board ratifying and confirming what was done by Mr. Gordon in the name of the board, and it is not for me to consider what might be the effect of such a ratification or confirmation of an unauthorized act. I do not, however, wish to decide this case solely on the ground of the invalidity of the extraordinary general resolution. I shall, therefore, now assume that there is a valid voluntary winding up. It is clear that such a voluntary winding up is not a legal bar to the jurisdiction of the Court to make a compulsory order on the application of a shareholder. That was decided by Sir John Romilly in 1863 in “*In re Fire Annihilator Company*” (32 Beav., 561). It is true that the company was there being wound up under the Act of 1856 and not under the Act of 1862, but I do not think the difference is material. That decision was recognized by the Lords Justices in “*In re Gold Company*” (11 Ch.D., 701). If, therefore, the Court has jurisdiction to make the order, I cannot hold that this jurisdiction ought to be fettered in the manner suggested in argument. The existence of a voluntary winding up is a strong reason why the Court should decline to interfere, but circumstances may justify interference. The most common instance, no doubt, is where the Court holds that the resolution to wind up voluntarily has been passed fraudulently, but that is not exhaustive. I cannot regard the resolutions which have been passed as an honest exercise of the wishes of the shareholders with regard to the winding up of the company. No plausible reasons for objection on the part of a shareholder to a compulsory winding up can be suggested. Unless I make the order, the company will be dissolved, the books will be destroyed, and the directors, promoters, and others will escape the risk of being called upon to pay large sums into the coffers of the company. If I make the order no further call can be made upon the shareholders who are fully paid up. They cannot be required to find money to prosecute the litigation which the allegations in the report invite. I am driven to the conclusion that the shareholders objecting to the order are either persons directly implicated in the charges or persons desirous of screening those who are so implicated. I regard the whole proceedings connected with the winding up and the attempted dissolution of the company with grave suspicion. There is nothing in the Gold Company’s case or in any other case which prevents me, in circumstances such as these, from exercising the jurisdiction which I possess. I think it is eminently just and equitable that this company should be wound up by the Court, and such inquiry and investigation be made as is contemplated by the statute. The petition must be amended by alleging alternatively that the extraordinary resolution to wind up was not validly passed. And upon the petition so amended I make the usual compulsory order, with the usual order as to costs.

Mr. Herbert Reed, Q.C., Mr. George Hart, and Mr. Nepean were for the petition; Mr. E. C. Macnaghten,

Q.C., and Mr. Stewart Smith for the company and opposing shareholders.

[Solicitors—Michael Abrahams, Sons, and Co.; E. T. Hargraves.]

Court of Appeal (A. L. Smith, }
Vaughan Williams, and Romer, }
L.J.J.) April 27. 1900.

VIZETELLY V. MUDIE'S SELECT LIBRARY (LIMITED).*

Defamation—Libel—Publication—Liability for—
Circulating library.

This was an application by the defendants for judgment or a new trial in an action tried before Mr. Justice Grantham and a special jury, reported in *The Times* of March 7. The action was brought to recover damages for the publication of a libel. The plaintiff, Mr. Edward Vizetelly, was a newspaper correspondent and journalist, and in the year 1889 he was employed by Mr. James Gordon Bennett, of the *New York Herald*, to proceed to Africa for the purpose of undertaking a rescue expedition to find Mr. (now Sir H. M.) Stanley, the explorer, and to furnish matter for Mr. Bennett's publications. Mr. Stanley was then engaged in looking for Emin Pasha. The plaintiff met Mr. Stanley on November 30 at Msura, when he was returning to the coast after having relieved Emin Pasha. The plaintiff sent off letters, for which he received from Mr. Bennett a sum of £2,000. In October, 1898, a work entitled "Emin Pasha: His Life and Work," was published by Messrs. Constable and Co., which contained the following passage, purporting to be an extract from the diary of Emin Pasha for November 30, 1889:—"Vizetelly sent off three messengers to-day to the coast, each with a bulky letter. However, as he is not yet sober, he cannot, surely, have written them himself, and the solution of the problem is, as Dr. Parke tells us, simply that Mr. Stanley had the correspondence ready and knocked it down to the highest bidder—Vizetelly—i.e., Gordon Bennett—and quite right, too." The book was given to the plaintiff by the *Illustrated London News* to review, when he discovered the passage complained of. He brought an action against Messrs. Constable and Co., the publishers, which was settled by payment of £100 and a promise to recall the book. A notice appeared in the *Publishers' Circular* to the effect that Messrs. Constable requested that all copies of Vol. I. of "Emin Pasha: His Life and Work" might be returned to them immediately, as they wished to cancel a page and insert another one in its place. A similar notice appeared in the *Athenæum*. Some months later the plaintiff discovered that the defendants were selling copies of the book containing the incriminated passage. It appeared that the defendants had not seen the notice in the *Publishers' Circular* or the *Athenæum*. The plaintiff wrote a letter of complaint to the defendants, and subsequently commenced this action. The plaintiff alleged that the defendants had published the above words by selling and circulating the book containing them, and had continued to do so after notice that it contained them. The defendants denied that they had acted with negligence, saying that what they had done was in the ordinary course of business, and that, immediately on receiving notice that the book contained a libel, they withdrew it from circulation and sale. At the trial the jury returned a verdict for the plaintiff for £100.

Mr. ASQUITH, Q.C., and Mr. SCRUTTON (Mr.

McCall, Q.C., and Mr. J. K. F. Cleave with them) appeared for the defendants in support of the application for a new trial or judgment. The grounds of the application were that there was no evidence in support of the plaintiff's case, and that the learned Judge had misdirected the jury and that the verdict was against the weight of the evidence. The question was whether the defendants were responsible as publishers of this libel. The defendants were merely vendors of the book in question, and it was clear that they did not, in fact, know that the book contained a libel. If a man who circulated a book did not in fact know that it contained a libel, he was not to be held liable unless the circumstances were such that he ought to have known it. That was held to be the law in "*Emmens v. Pottle*" (16 Q.B.D., 354). It could not reasonably be said that the defendants ought to have known that this was a publication which was likely to contain a libel. It was impossible for the defendants to read through all the enormous number of books which were submitted to them every year. They were justified in relying to a great extent on the publishers. The publishers here were admittedly a very high-class firm, the author was a scientific writer, and the book was in the nature of a scientific work. The true inference to be drawn from the facts in this case was that the defendants did not publish this libel. An accidental publication was not a publication at all—see "*Regina v. Munslow*" ([1895] 1 Q.B., 758) and "*Mallon v. W. H. Smith and Son*" (9 *The Times* L.R., 621).

Mr. CYRIL DODD, Q.C. (Mr. Bassett Hopkins with him), for the plaintiff, said that the action was fought at the trial upon the question whether the defendants had taken proper care to ascertain whether the books they circulated contained libels. "*Emmens v. Pottle*" introduced an exception to the general law. That was the case of a newspaper vendor, which was a very different case from that of a circulating library. In the former case newspapers were sold off almost as soon as they were received; in the latter case there was an opportunity to inquire into the nature of the book. There was evidence to justify the finding of the jury.

Mr. R. B. D. Asland held a watching brief on behalf of Messrs. W. H. Smith and Son.

The COURT dismissed the application.

LORD JUSTICE A. L. SMITH said that the defendants applied for judgment upon the ground that they did not publish the libel, and in the alternative for a new trial upon the grounds that the verdict was against the weight of the evidence, and that there had been misdirection. He wished to state at the outset that he based his judgment on the special facts of the case, and he did not intend to lay down the law applicable to every case of a circulating library, because, in his opinion, the jury were justified in the circumstances in saying that the defendants did "publish" the libel. The circumstances of the case were these:—The book in question was published in 1898 by Messrs. Constable and Co., the well-known publishers, and the title of the book on the outside of the cover was "The Life and Work of Emin Pasha." On the title page inside the book appeared the words "Emin Pasha, his life and work: compiled from his journals, letters, scientific notes, and from official documents, by Georg Schweitzer, with an introduction by R. W. Felkin, M.D., F.R.S.E." The defendants took copies of the book from the publishers, and in due course they circulated the book among their subscribers, and also sold some copies of it. The plaintiff received the book from the *Illustrated London News* for the purposes of review, and he then discovered the passage complained of. It was clear that this passage was a libel on the plaintiff. He took proceedings against Messrs. Constable and Co..

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

who paid him £100, apologized, and undertook to withdraw the book. The plaintiff on October 29, 1898, wrote a letter to the *Athenæum*, and it was not denied that that paper was taken in by the defendants, though they did not see the plaintiff's letter. On November 5, 1898, Messrs. Constable and Co. wrote to the *Athenæum* a letter as to the withdrawal of the book from circulation. On November 12, 1898, a notice appeared in the *Publishers' Circular*, a well-known trade publication in which a publisher would usually insert a notice of the withdrawal of a book on account of a libel in it. The notice was to the effect that Messrs. Constable and Co. desired all copies of the book to be returned to them in order that they might cancel a page. On the same day the same notice appeared in the *Athenæum*. On March 10, 1899, the plaintiff went to the defendants' establishment and bought a copy of the book, and he found that the page containing the passage complained of was unexpurgated. What defence had the defendants to the action? None at all, unless they could bring themselves within the case of "*Emmens v. Pottle*." In that case the defendants were newsvendors, and they sold a newspaper containing a libel on the plaintiff. The jury in that case found—first, "that the defendants did not nor did either of them know that the newspapers at the time they sold them contained libels on the plaintiff." In the present case also the defendants did not know that the book contained a libel on the plaintiff. The second finding in "*Emmens v. Pottle*" was "that it was not by negligence on the defendants' part that they did not know there was any libel in the newspapers." Where was there any finding of the jury in the present case that it was not by negligence on the defendants' part that they did not know there was any libel in the book? The third finding in that case was "that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so." Upon those findings the Judge who tried the case (Mr. Justice Wills) entered judgment for the defendants. When that case went to the Court of Appeal Lord Esher said:—"I agree that the defendants are *prima facie* liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to show some circumstances which absolve them from liability, not by way of privilege, but facts which show that they did not publish the libel. . . . I am not prepared to say that it would be sufficient for them to show that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and still more, that they ought not to have known this, which must mean that they ought not to have known it, having used reasonable care—the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel." Applying the law so laid down to the facts of the present case, Mr. Mudie, who was the only witness called for the defendants, in his evidence stated in effect that there was no one in the establishment to exercise supervision over the books except himself and his co-director, and that they could not do it properly as the books were too numerous. Mr. Mudie also stated that on one or two occasions they had books that contained libels, but no action for libel had been brought against them before the present one. He admitted that it was cheaper to run the risk of an action than to employ readers. Was it surprising that the jury came to the conclusion that the defendants did not exercise due care to see that the

book did not contain a libel? The defendants did not get from the jury a finding similar to that in "*Emmens v. Pottle*." Out of the mouth of Mr. Mudie himself there was ample evidence to justify the jury in coming to the conclusion that the defendants had failed to prove their plea. There was another point. The defendants took in the *Athenæum* and the *Publishers' Circular*. They knew that they were trade publications. They never looked to see what was advertised in those papers, nor did they employ any one to do so. They did not see the notices in those papers respecting this book, and the jury might well say that the defendants did not take due care in their business. There was therefore evidence upon which the jury might find that the defendants had failed to prove the plea as in "*Emmens v. Pottle*," and, in his opinion, the verdict of the jury was quite right. With regard to the summing up of the learned Judge, it was based upon the case of "*Emmens v. Pottle*," and, in his opinion, there was no misdirection. The application must be dismissed with costs.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER delivered judgment to the same effect.

Mr. SCRUTTON asked for a stay of execution to enable the defendants to consider whether they would take the case to the House of Lords. The plaintiff had been paid the £100.

The COURT refused a stay.

[Solicitors—Neon and Clarke, for the plaintiff; Clapham, Fitch, and Co., for the defendants.]

Chan. Div. }
(Cozens-Hardy, J.) }

1900.
April 28.

IN RE LINOTYPE COMPANY'S TRADE MARK APPLICATION.*
Trade Mark—Registration—Capacity for—Invented word—"Tachytype."

This was a motion on the part of the Monotype Company, made under the direction of the Board of Trade in the usual manner to an appeal to them, for the purpose of reversing a decision of the Comptroller of Trade Marks who allowed the Linotype Company to register as a trade mark the word "Tachytype" in connexion with the manufacture of a machine, the English patent for which the Linotype Company purchased from an American company called the Tachytype Company. There are patented labour-saving rival machines, called respectively the linotype and monotype, well known in the newspaper and printing trades, by which type making and composing are performed at one operation at great rapidity. The machine patented by the Tachytype Company is of a similar class.

Mr. THOMAS TERRELL, Q.C., and Mr. J. W. GORDON argued in support of the motion that the word "Tachytype" was not capable of being registered as a trade mark as "an invented word" within the meaning of the definition of a trade mark contained in the Patent Designs and Trade Mark Act, 1883, section 64, as amended by section 10 of the Act of 1888.

Mr. Moulton, Q.C., Mr. Bousfield, Q.C., and Mr. Sebastian for the Linotype Company were not called upon.

MR. JUSTICE COZENS-HARDY said:—The section which alone I have to consider is section 64 of the Patent Code, subsections (d) and (e), and in substance the question is whether this is an invented word within the meaning of the section. It has been decided by the House of Lords that the subsections (d) and (e) are separate and distinct, and that there is no justification for incorporating into (d) the limitation

*Reported by D. PITCAIRN, Esq., Barrister-at-Law.

found in (c). Hence there may be a perfectly good invented word, although it has some reference to the quality of the goods with respect to which it has been used. In reading this section I do not find anything whatever to lend colour to the suggestion that the applicant must be the first inventor, and although it is true that almost every word in use once was invented, we must have regard to what is commonly known at the time application for registration is made. Tachytype is a word which comes within the meaning of the phrase an invented word. I doubt whether any one who is not a scholar more or less could have an idea of attaching any meaning to it. I had my attention called to certain dictionary words in which "tachy" is used as a prefix. All I can say is there is not a single one of those words that I can recall ever having heard before. I must confess such ignorance. I think if I were to hold that the word tachytype is not a word falling within the term invented word I should be disregarding what was said by the Law Lords in the "Solia" case. The Linotype Company, who are the applicants for the trade mark, have taken an assignment of certain letters patent and also leave and licence to use this name so far as the Tachytype Company are concerned, and have got an assignment of such goodwill as the Tachytype Company had. I have come to the conclusion that they never had any substantial business in this country, and that greatly assists the applicants. I cannot find anything in the statute to show that the applicant must be the first and true inventor of the name to be used as a trade mark, still less that there was no prior user. For these reasons I must dismiss this motion with costs.

[Solicitors—Wilson, Bristows, and Carpmæl; Hays, Schmettau, and Dunn.]

Court of Appeal (Lindley, M.R.,
Rigby and Vaughan Williams, }
L.JJ.) 1900.
April 30.

IN THE GOODS OF CATHERINE EUPHRASIE MARTIN,
OTHERWISE GUILLARD—LOUSTALAN V. LOUSTALAN.*

Domicil—Married woman—Frenchman residing
in England—*Animus revertendi*—Will—Revo-
cation by marriage—French law.

This was an appeal against a decision by the President of the Probate Division (reported in *The Times* of August 7 last). The plaintiff, Marie Loustalan, claimed by the action probate of the will of Catherine Euphrasie Martin, otherwise Guillard, as contained in a notarial copy, the will being dated January 16, 1870, being executed according to French law, and being expressed in the French language. The testatrix was then unmarried. She died on January 2, 1895, in a fire at a laundry in the Edgware-road, of which she was the proprietress. The plaintiff alleges that the deceased by the will named her universal legatee, or heiress, or residuary legatee. She alleges that the holograph original is now deposited at Pau, in France, in accordance with an order of the Civil tribunal at Pau, made on April 3, 1895. On October 23, 1896, the Court at St. Nazaire declared that the deceased was the wife of Louis Guillard and was domiciled in the arrondissement of St. Nazaire, and that by the will the plaintiff was put in possession of the estate in the capacity of universal legatee, and she accordingly claimed that that judgment was binding on the defendant, who was and always had been a French subject. The defendant, Jean Loustalan, in his defence traversed the plaintiff's allegations and claimed

that on March 22, 1895, the English Court had granted him letters of administration to the estate prior to the legal proceedings in the Courts at Pau and St. Nazaire, which had been instituted without notice to him. The Loustalan family were peasants living on a farm at Vigneux, near Pau, in the arrondissement of St. Nazaire. The plaintiff was the sister of the deceased and the defendant was her brother. The two sisters started life as lay helpers in a convent near to their home, but subsequently the elder of the two, Catherine, had herself trained as a finisher in laundry work. Shortly afterwards she came to England, obtained a situation with a widow lady, and travelled about with her as her companion. In 1870, when at Lascelles-hall, near Huddersfield, she wrote to her sister for some *papier timbré*, on which she executed a holograph will and sent it to her sister to be lodged with a notary at Pau. In 1874 she married a Frenchman named Louis Guillard, of the commune of St. Nazaire, who afterwards assumed the name of Martin, the ceremony taking place in London. After 1866, her sister Marie joined her, and they set up the laundry in Edgware-road, which in January, 1895, was burnt down, and in that catastrophe the testatrix and a number of French girls in her employment lost their lives. The husband was brought up to be a teacher of French, but, owing to a serious offence, a sentence amounting to ten years' penal servitude was passed upon him, and he thereupon fled to England until the period of proscription of 20 years under French law had run out against him, and he did not return to France until 1890. The questions were (1) what was the domicile of the testatrix and her husband; (2) whether the marriage was celebrated according to English or French law; (3) whether the will was revoked by the marriage. The President held that the husband's domicile, and therefore that of the testatrix, was in France at the time of her death. But he did not think there was enough to show that the parties had been married according to the matrimonial law of their nationality. He did not think there was sufficient to show that they did not intend their marriage to be according to the English law and that that law should govern their matrimonial relations. By English law when two persons married the marriage revoked the wills of both. This was not so under French law. His Lordship could not suppose that the parties intended that that provision of English testamentary law should affect them, though they had been married according to the English law. His Lordship therefore held that the will had not been revoked by the marriage. He accordingly granted administration with the will annexed to the plaintiff. The defendant appealed.

Mr. Inderwick, Q.C., and Mr. Grazebrook were for the defendant.

Mr. H. J. H. Mackay was for the plaintiff.

The appeal was heard on March 29 and 30 last, when the Court reserved their judgment.

The COURT allowed the appeal, the Lords Justices differing from the Master of the Rolls.

The MASTER of the ROLLS read the following judgment:—The will which is in question in this case was made in this country by a Frenchwoman before her marriage, and was not attested as required by English law. By English law, by which I mean English law irrespective of all foreign law, the will is therefore clearly invalid. But foreign law must be taken into account. Those principles of private international law which are recognized in this country are part of the law of England, and on those principles the validity of the will, so far as it affects movable property, depends on the law of the domicile of the testatrix when she died. The domicile of the testatrix must be determined by the English Court of Probate according to those

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

legal principles applicable to domicile which are recognized in this country and are part of its law. Until the question of the domicile of the testatrix at the time of her death is determined the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a Frenchwoman, but it would be contrary to sound principle to determine her domicile at her death by the evidence of French legal experts. The preliminary question by what law is the will to be governed must depend in an English Court on the view that Court takes of the domicile of the testatrix when she died. If authority for these statements is wanted, it will be found in "*Bremer v. Freeman*" (10 P.C., 306; see pp. 359, &c.); "*Doglioui v. Crispin*" (L.R., 1 H.L., 301); and "*In re Trufort*" (36 Ch.D., 600). In each of the last two cases a foreign Court had determined the domicile and the English Court had also to determine it, and did determine it, to be the same as that determined by the foreign Court. But, as I understand those cases, the English Court satisfied itself as to the domicile in the English sense of the term and did not simply adopt the foreign decisions. The course universally followed when domicile has to be decided by the Courts of this country proceeds upon the principles to which I have alluded. But, further, the validity of a will of movables made by a person domiciled in a foreign country at the time of such person's death not only may, but must, depend on the view its Courts take of the validity of the will when made and on its subsequent revocation if that question arises. These questions may or may not turn on the domicile of the testator as understood in this country. For example, in this case it is agreed on all hands that by the law of France the will in question, being a holograph will made by a French subject, was valid when made, whatever her domicile may have been when she made it. It is also agreed on all hands that by French law marriage does not revoke the prior wills of the spouses. But the testatrix married a Frenchman in this country after she made her will, and the question whether her will was thereby revoked as to her movables is the real question on which this case turns. By whatever Court this question is to be decided, the English law of marriage which in such a case involves and, indeed, turns on English views of domicile must be considered. If this view be ignored the effect of the marriage will be inadequately and, indeed, erroneously ascertained. If the domicile of the testatrix is to be treated as English when she became a married woman her will was revoked by her marriage, for such is the law of England whatever the intentions of the parties may be (1 Jarm. on Wills, c. 7), but if her domicile was French her will would not be revoked by English law and still less by French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him. The effect of her marriage must therefore depend on the English view of his domicile. It would be useless and indeed entirely misleading to ask a French expert what effect the French law would give to an English marriage without explaining the English law to him, and no explanation of that law would be adequate or correct if it excluded the English view of the domicile of the parties. Having thus stated the principles which, in my opinion, ought to be applied to the case, I proceed to consider the facts and the evidence of the experts called at the trial. As already stated, the will was made in England by a Frenchwoman in the French language and was a holograph will valid by the law of France whether she was then domiciled in England or France. It was made in 1870. She was in service in England, and this by French law rendered her domicile (in the French sense) English at that time. She afterwards set up a laundry business in London. Her prin-

cipal establishment was therefore here, and, according to French law, she was clearly domiciled (in the French sense) in England. In May, 1874, she married a French refugee known by the name of Martin. He came over to this country in 1868 and made a living by teaching languages. There was no settlement or anything in the nature of a settlement. The marriage was celebrated by a French Roman Catholic priest in a Roman Catholic church in the presence of a registrar. At the time of the marriage both the man and the woman signed a declaration stating that they were both *domiciliés* in London. They lived together in London for some years and carried on the laundry. In 1881 and 1884 leases of the laundry house were granted to the husband. In 1890 the husband and wife separated; he assigned the leases to her and returned to France, where he has ever since lived and lives now. His wife remained here and continued to carry on the laundry business until her death in January, 1895. It was believed that she had died intestate, and her brother obtained letters of administration to her estate. The will, which had been sent to France in 1870 and had been deposited with a notary, was brought forward recently by the testatrix's sister who was constituted by it her residuary legatee. At her instance the letters of administration have been revoked, and probate of the will has been granted. The will has been judicially recognized as valid in France. But as the proceedings there were *ex parte*, I attach little importance to this fact, although no appeal has yet been made to set aside the order so obtained. The learned President decided, and, in my opinion, rightly decided, that the domicile of the testatrix in the English sense was French when she died. It became necessary, therefore, to determine whether by the law of France her will was valid when she died. Experts were called and examined and cross-examined at great length on a number of points, many of which are not now, at all events, material or in controversy. The experts all agree that the will was valid when made. They also all agreed that according to French law the testatrix was domiciled (in the French sense) in England when she made her will and when she married. They also all agreed that, according to French law and in the French sense, her husband was domiciled in England when he married. Treating the husband and wife as domiciled in England when they married they differed as to the consequences. M.M. Guastalla, Gorostaeze, and Measil think that the marriage revoked the will. M. Mesnil is quite clear upon the point; the others are less so, but they, I think, take the same view. M. Astone, when first called, stated that the marriage did not revoke the will, that it depended on nationality, not domicile, in the French sense. When recalled he apparently adhered to his opinion, but considered that the revocation might depend on the intention of the parties and on the adoption of the matrimonial *régime* by the spouses. All these experts based their opinion on their view that at the time of the marriage the parties were domiciled in England and they applied the English law of marriage to that state of things. But, as I have already pointed out, the English law of marriage, when considered with reference to its effect on property involves, and in a case like this cannot be severed from, English views of domicile. The learned President came to the conclusion that the domicile of the husband at the time of the marriage was in France, not in England. But he also came to the conclusion that both husband and wife intended to marry according to English law and that the English matrimonial law should and would govern their future property. He further considered that the law by which wills are revoked by marriage was not part of the English matrimonial law but part

of the English testamentary law, and that this law did not apply to the case. I confess I have great difficulty in adopting this view of the case. If, as the President considered, the parties were (according to English views) domiciled in France when they married, their marriage would not revoke their previous wills; and the French experts should have been told so and should have been directed that their assumption of an English domicile was inadmissible. It is plain from their evidence that, according to French law, the domicile in the French sense of both husband and wife was in England and not in France both when the marriage took place and when the testatrix died. I have no doubt that this conclusion was quite correct, but for the reasons I have already given I consider it necessary to examine the effect of the marriage according to English views of domicile. I proceed, therefore, to inquire whether the President was right in his view that the husband was domiciled (in the English sense) in France and not in England when he married. We start with the fact that the husband had a domicile of origin in France. According to English law the burden of proving that he lost that domicile and acquired an English domicile is on those who assert that he did so. Further, the domicile to be acquired must be not domicile in the French sense but in the English sense. The experts all tell us that he lost his French domicile in the French sense by coming to England and setting himself up as a teacher of languages here. But to acquire an English domicile in the English sense not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently or for an indefinite period. See the authorities collected in "Dicey's Conflict of Laws," pages 104 *et seq.* I cannot come to the conclusion that this intention is proved. I see no proof of any intention to abandon France as his domicile in the English sense, and to acquire a domicile in the English sense in this country. I do not say there is no evidence tending to establish a change of domicile in the English sense, but such evidence in my opinion falls short of proof, and is, in fact, outweighed by evidence on the other side. The circumstances tending to show an abandonment of an intention to return to France are that the husband came over here and taught here; that he married a woman in business here; that he and she described themselves as then *domiciliés à Londres*; that he intended to settle here until he could safely return; that he lived here with his wife for some years, and after it was safe to return to France: that he took leases in his own name; and that (whether he knew it or not) he had lost his French domicile in the French sense. Against this must be set the facts that he was a French subject and had a French domicile of origin, that he came here to avoid imprisonment, that he dared not go back to France for many years, but that he could safely do so at the end of 20 years from the time he fled from his own country, that he does go back a few years after it is safe to do so, and that he has ever since been and is now settled in his native country and living with his own relatives. If we look at all the facts as we now know them they, in my opinion, point to a retention of his domicile of origin (in the English sense of the word domicile) rather than to an abandonment of such domicile and a subsequent re-acquisition of it when he went back to France. What has happened since marriage throws a great deal of light on what was obscure at the time of marriage. But if we carry our minds back to the time of marriage and disregard all subsequent events (which I do not think we ought to do) the fact that he was then a criminal fugitive who dared not go back to France for a definite number of years but could safely go back when they had

elapsed would prevent me from inferring an abandonment of an intention to return to France when he could safely do so. (See Dicey, 142.) I should not arrive at the same conclusion if he had fled from his country for life unless pardoned as an English criminal fugitive would have done to escape from the operation of the laws of his own country. The definite period after which he could safely return is to my mind all important. As to the declaration made by husband and wife when they married that they were *domiciliés à Londres*, I have no doubt that *domicilié* was used in the French sense, i.e., in the sense of residence and not in the sense of what we mean by "domiciled," which has a very different signification. Upon the question of domicile (in the English sense) my own conclusions are that the domicile of the testatrix was French when she made her will; French up to the time she married; French by her marriage; and French when she died. Her domicile was French by and after marriage because, in my opinion, her husband's domicile was French. The domicile of the testatrix being French when she made her will and when she died it became necessary to ascertain the effect of her will on her movable property according to the French law. The husband being, in my opinion, domiciled in France when she married, it became necessary to ascertain the effect of such marriage by French law upon her will; and, if in order to ascertain this it became necessary for the French experts to be told what the English law was, they should have been told that it depended on the view which an English Court would take of the domicile, in the English sense, of the husband; and if I am right in my view of his domicile, the experts should have been told that by English law the marriage in this case did not revoke the wife's will. It was not necessary or, indeed, proper on this occasion to pursue the inquiry further and to see what matrimonial régime the parties intended to adopt. It is not necessary to cite authorities to show that it is now settled that according to international law as understood and administered in England the effect of marriage on the movable property of spouses depend (in the absence of any contract) on the domicile of the husband in the English sense. The authorities will be found collected in "Foote's International Law," edition 2, pp. 315-321, and "Dicey's Conflict of Laws," 648 *et seq.* This being clear the will was not revoked; and if not revoked it was clearly valid as regards the wife's movable property. Section 18 of the Wills Act does not apply to the wills of foreigners who die domiciled abroad (Deane's Wills Act, note to section 18, cites an authority for this) and the effect of the marriage was not to vest the wife's property in the husband. French law did not so vest it, neither did international law as understood and administered in this country. The English law applicable to English people and according to which a woman's personal property formerly vested in her husband on marriage and according to which her will was revoked by marriage even before the Wills Act could not on principle apply to French spouses married in England, but (according to English views) domiciled in France when they married. In my opinion the will has been properly admitted to Probate, but it will not apply to leasehold property, for that is not regarded as movable property, to which the *lex domicilii* is applicable (Dicey, 72). A great quantity of expert evidence was taken on the difficult question whether the French law of *communauté des biens* was to be applied to the property of these persons. As I understand the expert evidence the question turns not only on the marriage but on the effect of what the husband and wife did afterwards. This question may arise hereafter but it does not arise now, and I purposely, therefore, say nothing more about it.

LORD JUSTICE RIGBY read the following judgment :— I see no sufficient reason to differ from the President's conclusion that the mutual rights of the spouses as to movables were to be determined by English law. If it is necessary, in order to support this conclusion, to hold that the husband's domicile at the date of the marriage, or, at any rate, the matrimonial domicile, was English, I should not hesitate to hold that it was. The husband had been brought up to be a teacher or professor of French, and at first, and down to the time of the marriage in 1874, had no other means of gaining his livelihood than by teaching French. His departure from France was brought about by his fear of a prosecution for an offence alleged to have been committed by him whilst he was a professor of French and in connexion with his exercise of his professorship. Over and above the punishment to be imposed for the offence, if proved, it is obvious that conviction for such an offence would have an extremely prejudicial and not improbably a prohibitive effect on his subsequent exercise of his profession in France. As he did not elect to abide his trial in France, his evasion of a trial was almost, if not quite, equivalent to a renunciation for all his life of his profession in France. He went in the first place to Belgium, and was in his absence convicted and sentenced. The precise date of this conviction I cannot find, but it must have been before his coming to England, which was in 1868 or 1869. He might at any time have gone back to France and submitted to trial, but he did not elect so to do. It appears that 20 years after the date of his conviction he would have been safe from punishment, but he would then have been advanced in years, and if it is suggested that he formed from the first the intention of going back after the 20 years and becoming again a professor in France, such an intention would, in my opinion, be so irrational that, in default of the strongest evidence, it ought not to be imputed to him. Nor could he have had the intention of going back without having the means of supporting himself. Evidence of any such intention does not exist. I take it that the proper conclusion is, not that he had the intention of returning to France at the end of an interval however long, but that he had no intention of returning at all. He adopted the name Martin, which might pass for an English name, and at any rate would have the effect of keeping in the background the discredited name of Guillard. He was supporting himself as a teacher of French at the time of the marriage in 1874, when a prospect opened of gaining a probably easier living by means of his wife's laundry. He married (being 51 years old) with the clearly-formed intention of living by the laundry business, whether or not he assisted with money or by his personal exertions in carrying it on. I consider the reasonable inference to be that he intended to remain in England, and was domiciled there according to English, as he certainly was according to French, law. It is his intention that governs, not that of the wife, in the absence of any marriage settlement, and I conclude that he intended English law to apply, and that law gave him immediately on the marriage the exclusive right to all the wife's movables, that is, to everything that could pass by the holograph will of 1870. As by the marriage she would become incapable of making another will, the will of 1870 would be revoked. It matters not that she might subsequently, by an alteration in the law, become entitled to personal property which she could dispose of by will. Such a new testamentary power would not, in my opinion, revive the will which had already been revoked. I have considered the question of the husband's domicile exclusively with reference to the facts as they existed previously to and at the date

of the marriage. The subsequent events do not, in my judgment, throw any light upon the question adverse to the conclusion which I have arrived at. The taking of leases for terms of years of various lengths would tend rather to show that his connexion with England was permanent than otherwise, though probably it is not of much importance. True it is that at length, not before 1890, when he was already about 67 years old, he returns to France, but in the circumstances that does not give any ground for supposing that he always, from the time when he left France, had the *animus revertendi*. One of the reasons for returning was the state of his health, another probably the unsatisfactory state of his relations with his wife. But probably the most important thing to notice is that his residence in France was rendered possible by his having acquired a considerable fortune from his wife's property which he had no reason to count upon before the marriage. True it is that the 20 years the expiration of which brought immunity from punishment for the offence for which he had been condemned had run, but it was not on the expiration of that period, but at least several years later that he returned. I am not disposed to hold this evidence of an intention throughout to return which would prevent his acquiring an English domicile. The fact that he took steps for vesting in his wife all his interest in the laundry business would be strong evidence of his intention to remain out of England, and I agree with the Master of the Rolls that in 1895 he, and therefore his wife at her death, had a French domicile.

LORD JUSTICE VAUGHAN WILLIAMS read a judgment to the same effect as that of Lord Justice Rigby. He grounded his judgment on the change of the husband's domicile, from a French to an English domicile, at the time of the marriage, and his Lordship thought that, if he did change it then, his subsequent reversion to a French domicile would not prevent English law continuing to govern the matrimonial property. In his Lordship's opinion the decision of the Court below ought to be reversed and the grant of letters of administration with the will annexed revoked.

[Solicitors—Blount, Lych, and Petre; A. Herbelot.]

Court of Appeal (Lindley, M.R.,)
Rigby and Collins, L.J.J.)

1900.
April 30.

VIDITZ V. O'HAGAN.*

Infant—Settlement—Repudiation—Reasonable time—Husband a domiciled Austrian.

Decision of Cozens-Hardy, J. (15 *The Times* L.R., 416), reversed.

This was an appeal against a decision of Mr. Justice Cozens-Hardy's (reported in 15 *The Times* L.R., p. 416). In November, 1864, Mrs. Viditz, the only child of an Irish peer, was at the age of 18 married to Mr. Viditz, who was then and still is a domiciled Austrian. The marriage took place in Switzerland. Prior to the marriage, marriage articles, dated November 24, 1864, were executed at Berne, at the British Embassy, between Mr. Viditz of the first part, Mrs. Viditz of the second part, trustees of the third part, and the lady's father of the fourth part, and it was thereby declared and agreed by and between the parties thereto, and Mr. Viditz covenanted with the trustees, that in case the intended marriage should take place all such personal property as Mrs. Viditz was then entitled to in possession, reversion, remainder, or expectancy, and also all such sums of money, stocks, funds, or other personal property, whether in possession, remainder, or expectancy, as

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

might at any time during the joint lives of the husband and wife come to the lady or to her and her husband in her right under any will, settlement, or by gift or otherwise (save and except pecuniary legacies), should be vested in the trustees upon the usual trusts for the benefit of the lady for life for her separate use, with a restraint upon anticipation, and after her death upon trusts for the issue of the marriage, with an ultimate trust for the father absolutely. There was one very unusual provision empowering the father to alter and vary any of the provisions, clauses, matters, or things therein contained, and to add or supply any other provisions, clauses, matters, or things which might be deemed necessary or proper. This could not, as the learned Judge held, enable the father to enlarge or extend the scope of the settlement so as to bring in fresh property. These articles were duly executed by the lady, who attained 21 in 1867. The settlement was in English form, and the Court treated it as a good settlement and governed by English law, without reference to the formalities or the substantial provisions which would have been required either by the law of Austria or by the law of Switzerland. In 1870, on the death of the lady's mother, she became entitled to a sum of £6,000, which was paid over to the trustees of the deed of 1864 and invested in Consols. In 1880 a deed in English form was executed in Paris, which purported to be a settlement made in pursuance of the articles. Mr. and Mrs. Viditz, the trustees, and her father were all parties to this deed. It recited the investment of the Consols and declared trusts of that sum similar, so far as material, to the trusts in the articles, and it contained a covenant to settle after-acquired property differing from the covenant in the articles, inasmuch as pecuniary legacies were not excepted. In 1882 the father died, and Mrs. Viditz thereupon became entitled in possession to a sum of £2,000, which was received by the trustees of the settlement and invested. This £2,000 and the £6,000 were sums to which Mrs. Viditz was at the date of her marriage entitled in reversion contingently upon attaining 21. The father by his will left all his property to set aside the will. The result was that a compromise was effected in March, 1884, under which a sum of £13,000 was to be settled upon her and her children, and a sum of £5,000 was to be paid to her. No part of this sum had been received, however. In 1892 Mrs. Viditz became entitled under the will of an aunt to a legacy, which also had not yet been received. In the same year the trustees informed Mrs. Viditz that the £5,000 payable to her under the compromise would have to be paid to the trustees of her marriage settlement. This led to advice being taken, and on November 18, 1893, a document was executed by Mr. and Mrs. Viditz in Austria by which they purported to annul and put an end to the settlement. There was evidence that according to Austrian law it is competent to a husband and wife to revoke a marriage contract, notwithstanding the birth of issue. Mr. and Mrs. Viditz and their children, who have attained 21, brought this action claiming a declaration that the settlement created by the deeds of 1864 and 1880 had been got rid of by the transaction of 1893, or, alternatively, they asked for rectification of the settlement so far as it went beyond the articles, and in particular they asserted that the settlement, if binding at all, was only binding to the extent of the funds actually in the hands of the trustees, and that it was competent to the lady to repudiate the settlement so far as the £5,000 and the legacy were concerned. Mr. Justice Cozens-Hardy held that the marriage articles of 1864 were valid and were governed by English law, and that, the lady not having repudiated

them within a reasonable time after she attained 21, she was absolutely bound by them, and that she could not therefore elect from time to time during the joint lives of her husband and herself as property fell in whether she would affirm the articles. Consequently, the £5,000 was bound by the settlement. His Lordship also held that, if ratification were needed, there had been sufficient ratification. But, as to the £2,000 legacy, his Lordship held that the settlement of 1880 must be rectified so as to accord with the articles and to expressly exclude pecuniary legacies, and that the £2,000 was not bound by the settlement. The plaintiffs appealed.

Mr. Dicey, Q.C., and Mr. Micklem, Q.C., were for the plaintiffs; Mr. Hughes, Q.C., and Mr. Ingpen, Q.C., were for the trustees; Mr. G. D. Lynch was for some mortgagees of the £5,000.

The COURT allowed the appeal.

The MASTER of the ROLLS said the first question was as to the construction of the articles—whether the £5,000 was comprised in the settlement or not. In his Lordship's opinion this sum must be considered as having arisen from the real estate of the lady's father, and it was not included in the covenant as to her after-acquired personal property, but in another covenant relating to real estate which was not binding on her. Consequently the £5,000 was not bound by the settlement. The second and more difficult question was whether the settlement had become binding on the lady. Under English law it was a voidable contract. By Austrian law she was unable to ratify the contract, or to place it out of her power to revoke it. She executed documents which by English law would have amounted to a ratification, but by Austrian law those documents were invalid so far as they purported to ratify the settlement. She had neither before nor after the marriage power to make an irrevocable contract. Mr. Justice Cozens-Hardy held that the settlement was an English one and governed by English law; that under that law it became binding on the lady, unless she repudiated it within a reasonable time after she attained 21, and that, as she did not repudiate it within a reasonable time, it had become binding on her. In the view of the Master of the Rolls that was not sound reasoning. The point now raised did not arise in "*Van Grutten v. Digby*" (31 Beav., 561) on which the learned Judge relied. In the present case the difficulty arose on the capacity to contract. What was the effect of English law as expounded by the House of Lords in "*Edwards v. Carter*" ([1893] A.C., 360)? Some contracts by infants were held to be absolutely void on the ground that they could not possibly be for the benefit of the infant. But the great bulk of contracts by infants were voidable—i.e., the infant when he came of age could elect whether he would affirm or repudiate the contract. If the infant did nothing to repudiate within a reasonable time after attaining 21 the contract would bind him. It would be an entire mistake to apply this part of the English law to such a case as the present. Could the doctrine as to a reasonable time be applied? It seemed to his Lordship that it would be contrary to good sense to do so, for the result would be that the contract would be binding when the infant had never had capacity before or after the marriage to make or to affirm it. In his Lordship's view the effect of the infant's change of domicile by the marriage was that the English doctrine had no application, because of her incapacity to confirm the contract. It might be put in another way by saying that the effect of the change of domicile was to enlarge the time for repudiation. His Lordship did not see how it could be said that a reasonable time had elapsed. The result was that the settlement must be considered as annulled.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS expressed their concurrence.

[Solicitors—Kearsey, Hawes, and Co.; Blount, Lynch, and Petre.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } April 30.

ROBERTSON V. THE MAYOR, &C., OF BRISTOL.*

Local Government—Streets—Alteration—Jurisdiction of local authority.

When a street has been laid out and subsequently taken over by a local authority they have no power under sec. 150 of the Public Health Act, 1875, to deal with it as they think best in the public interest by altering the proportions of footway and roadway.

This was the plaintiff's appeal from a judgment of Mr. Justice Grantham's in an action tried before him without a jury at Bristol on February 23, 1899. The plaintiff claimed an injunction to restrain the defendants from removing certain kerbing and paving laid by the plaintiff in Robertson-road, St. George's, a suburb of Bristol, and formerly under the jurisdiction of an urban district council. The plaintiff was owner of a building estate in St. George's, upon which he had laid out a wide road called after him Robertson-road. The by-laws of the urban district council prescribed that an owner laying out a building estate should submit plans showing roads of a width of 36ft. in all, including the carriage-way and two footways, each of the footways being one-sixth of the total width; in other words, that the carriage-way should be 24ft. wide and each of the footways 6ft. wide. The plaintiff deposited plans marking out Robertson-road, and showing it to be of greater width than 36ft. Part of that road was in fact designed to be of a width of 45ft., having a carriage-way of 30ft. and two footways of 7ft. 6in. each, and the remainder of a width of 40ft., having a carriage-way of 27ft. and footways of 6ft. 6in. each. These plans were submitted to the urban district council in 1891 and 1892, and were approved by the council. The road was laid out and dedicated to the public, but had not been taken over by the highway authority. On October 31, 1897, the Bristol Extension Act came into operation, and by that Act the district of St. George's became part of the City of Bristol and came under the jurisdiction of the defendants, who were minded to take over the roads in that district and to make them repairable by the public under section 150 of the Public Health Act, 1875. They accordingly served notices on the owners of houses fronting Robertson-road, but not on the plaintiff, annexing to the notices plans which showed their intention of turning part of the footways into the carriage-way. Having served these notices, the defendants commenced the work and began to alter the footway as notified. The plaintiff thereupon threatened proceedings, and subsequently issued a writ claiming the injunction as above stated. The defendants justified their action under section 150 of the Public Health Act, asserting that the right and duty of deciding how much of a public road should consist of footway and how much of carriage-way were vested in them as the highway authority. Section 150 of the Public Health Act, 1875, enacts that, where any street within an urban district (not being a highway repairable by the inhabitants at large), or the carriage-way, footway, or any other part of such street, is not sewered, levelled, paved, or made good to the satisfaction of the urban authority, such authority may, by notice to the respective owners or occupiers of premises fronting

such parts as may require to be made good, require them to make good the same within a time specified in such notice. If the notice is not complied with the urban authority may execute the necessary works themselves. The case was tried before Mr. Justice Grantham, who gave judgment for the defendants, holding that when a local authority takes over a street they have power under section 150 of the Public Health Act, 1875, to deal with the carriage-way and the footways as they think best in the public interest. From this decision the plaintiff appealed.

Mr. J. A. FOOTE, Q.C., Mr. DUKE, Q.C., and Mr. WEATHERLY, for the plaintiff, contended that there was no power given to the defendants by the Public Health Act to change a footway or any part thereof into a carriage-way. The road must be taken over as it was dedicated. The soil of the road was still vested in the plaintiff as owner, and if an owner chose to dedicate a footway there was no power, except by an order of quarter sessions, to convert it into a carriage-way. There was no power given by section 150 of the Public Health Act, under which the defendants purported to act, to annihilate the distinction between footway and carriage-way and thus alter the dedication.

Mr. JOSEPH WALTON, Q.C., and Mr. CLAVELL SALTER contended that the highway authority had power to alter roads under their general jurisdiction over highways. The works done by the defendants were merely incidental to paving the street.

Counsel for the plaintiff were not called upon to reply. The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH, in giving judgment, said that the plaintiff had an undoubted right to dedicate a footpath 7ft. 6in. wide; but the corporation contended that section 150 of the Public Health Act, 1875, justified them in altering the road as dedicated and enabled them to dedicate to passengers by carriage what the plaintiff had already dedicated to foot passengers. Section 150 gave no such power as the defendants claimed, or in any way enabled them to change a footway into a carriage-way, or a carriage-way into a footway. Mr. Justice Grantham had held that when a street had been laid out and taken over by a local authority that authority had power to deal with it as they might think best for the public interest. But no such power was to be found conferred by section 150. Under that section the local authority must deal with the street as they found it. That was the street which they were empowered to sewer, metal, pave, and make good. In this case plans had been deposited showing the relative proportions of footways and carriage-way, and these plans had been approved. It was the street laid out in accordance with those approved plans that the corporation had power to make good, and no section gave them power to alter the respective proportions and make good a street different from that which they had approved. The appeal must therefore be allowed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—Ford and Ford, for Wansbrough, Dickinson, Robinson, and Taylor, Bristol, for the plaintiff; Robins, Hay, and Co., for D. T. Burgess, Bristol, for the defendants.]

Q.B. Div. } 1900.
(Mathew, J.) } April 30.
TURNBULL, MARTIN, AND CO. V. HULL UNDERWRITERS' ASSOCIATION (LIMITED).*

Insurance—Marine—Freight—"Warranted free from any claim consequent on loss of time"—Delay in repairing refrigerating machinery.

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

*Reported by F. O. ROBINSON Esq., Barrister-at-Law.

Judgment was delivered in this case, which was an action brought to recover a total loss on a policy of insurance on freight. The facts are fully stated in the judgment.

Mr. Carver, Q.C., and Mr. J. A. Hamilton appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. Theobald Mathews for the defendants.

MR. JUSTICE MATHEW read the following judgment:—This was an action to recover a total loss on a policy on freight on a cargo of frozen meat. The insurance was on the outward voyage of the steamship Buteshire for freight expected to be earned on the homeward voyage, and the risk was described in the following terms:—"At and from London to any port or ports and (or) place or places in any order or rotation in Australia and (or) Tasmania and (or) New Zealand, risk to continue until steamer sails from final loading port on homeward voyage." The subject-matter was described as follows:—"Upon freight of frozen meat, chartered or as if chartered, on board or not on board, full interest admitted." The policy also contained the following special clause:—"Chartered freights and freights are warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." It was not disputed that the words "or otherwise" meant other perils insured against. The evidence showed that at the time when the vessel sailed no contracts had been secured by the plaintiffs for the shipment of frozen meat from the colonial ports, but such contracts were made, and the homeward cargo was booked at Newcastle, Melbourne, and New Zealand ports while the vessel was making her outward voyage. Frozen meat must be shipped at the times specified in the contracts with shippers, and the shipments cannot be delayed. Where the vessel is disabled from fulfilling her engagements frozen meat would in the ordinary course be forwarded in another vessel. A delay involving no great length of time due to damage by perils insured against, either to ship or machinery, would prevent the vessel from earning freight contracted for, and would thus defeat the object of the adventure. The risk would therefore seem to be one which underwriters would be cautious about accepting. The Buteshire was fitted with refrigerating machinery of a special kind in three of her five holds. The other holds were used for ordinary cargo. The ship arrived at Sydney on October 15, 1898, and discharged her outward cargo. On October 18 a fire occurred on board, and so damaged her refrigerating machinery that she was disabled from carrying a cargo of frozen meat. Materials for the repair of the refrigerating machinery could not be procured, and must have been brought from England, and the owners properly determined to send the vessel home with such ordinary cargo as she could procure and to have the damage repaired in England. The earning of the freight was in this way rendered commercially impossible. It was argued for the plaintiffs upon the authority of "*Jackson v. Union Marine Insurance Company*" (L.R., 10 C.P., 125) that a delay due to a peril insured against which frustrated the object of the voyage and prevented the vessel from earning her homeward freight entitled the plaintiffs to recover as for a total loss. For the defendants reliance was placed on the terms of the warranty and upon the decision in the case of "*Bensaude v. Thames and Mersey Marine Insurance Company*" (2 Com. Cas., 33, 238; [1897] A.C., 609). The loss, it was argued, was due not merely to the fire, but to the time which the repairs must have taken. The argument for the plaintiffs, on the other hand, that the claim was consequent not upon loss of time but upon the disablement of the vessel by a peril insured against was rejected by the Court of Appeal and the House of Lords

in that case. The damage in both cases was of such a character that it became impossible to prosecute the voyage within the necessary time. An attempt was made to distinguish the present case from the decision in "*Bensaude v. Thames and Mersey Marine Insurance Company*" on the ground that this was not chartered freight; but the warranty applies not only to chartered freight but to all freights; and the several contracts of affreightment made with the shippers had the same operation as if they were grouped in a charterparty. In each case the result of the peril insured against would have been the same—viz., to disable the ship from fulfilling her engagements in proper time. It seems to me that no such distinction can be reasonably made. The ship was damaged by a peril insured against; and its capacity to carry frozen meat was suspended until her machinery had been repaired. If she could have been repaired promptly there would have been no loss of freight. The loss, therefore, was "consequent on loss of time" within the meaning of the warranty. I give judgment for the defendants.

[Solicitors—Hollams, Sons, Coward, and Hawksley; Waltons, Johnson, Bubb, and Whetton.]

Chan. Div. }
Byrne, J. }

1900.
May 1.

IN RE THE ESTATE OF EGMONT'S SETTLED ESTATES—
EGMONT V. LEFROY.*

Settled Land Acts—Improvements and Reparation—Payment out of capital moneys—Jurisdiction—Settled Land Act, 1882, sec. 57, subsec. (2).

The Court has jurisdiction under sec. 15 of the Settled Land Act, 1890, to direct capital moneys to be applied in payment for improvements unauthorized by the Act of 1882, but authorized by a settlement made prior to the Act of 1890.

This was an application on the part of the Earl of Egmont, the tenant for life under a settlement dated August 15, 1889, for a direction to the defendants, the trustees of the settlement, for the purposes of the Settled Land Acts, 1882 to 1890, to pay to the Earl the sum of £3,997 12s. 6d. out of capital moneys in their hands subject to the settlement, being the amount claimed to have been expended by him in works of reparation and improvement on the Cowdray estate from September 5, 1897, to June 30, 1899. The settlement, which is dated August, 1889, provided (*inter alia*):—(1) The trustees and trustee for the time being of these presents whether several or only one are and is hereby appointed and declared to be the trustees of this settlement for all the purposes of the Settled Land Act, 1882, or any Act or Acts altering or amending the same, and also for the purpose mentioned in section 42 of the Conveyancing and Law of Property Act, 1881. (4) For the like purpose (that is, for the purpose of that settlement) section 25 of the Act last aforesaid (the Settled Land Act, 1882) shall be read and take effect as if, in addition to the works or purposes of improvements therein enumerated, there were inserted therein the words rebuilding, reparation, or permanent improvement or additions of or to building of any description whether used or occupied for residential, farm, or other purposes.

Mr. Ingpen, Q.C., and Mr. Bateman Napier appeared for the plaintiff; and Mr. Levett, Q.C., and Mr. Gurdon for the defendants.

MR. JUSTICE BYRNE, in giving judgment, said:—

*Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

No scheme for any portion of the work done in respect of which the claim is now made was ever submitted to the trustees, and the tenant for life asks for an order under the powers conferred on the Court by section 15 of the Act of 1890. So far as the expenditure by the tenant for life has been for improvements actually authorized by the terms of the Settled Land Act, 1882, it is not disputed that the Court has a discretion to allow it; but it is argued on behalf of the trustees that the Court has no jurisdiction under section 15 of the Act of 1890 to make an order directing capital money to be applied in or towards payment for improvements unauthorized by the terms of the Act of 1882, although authorized by the settlement, having regard to the fact that the settlement is dated prior to the Act of 1890. Having regard to the terms of section 57, subsection (2), of the Act of 1882, I am of opinion that this argument is not well founded. The tenant for life has had conferred upon him by the settlement a power additional to and larger than those conferred by the Act, and, if the matter had rested there, I think that there would have been a power exercisable by virtue of the settlement independently of the Act, and that probably section 15 of the Act of 1890 would have had no application to the additional power; but section 57, subsection (2), expressly provides that any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in the Act, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by the Act, unless a contrary intention is expressed in the settlement. In the present case I find no contrary intention expressed. Section 15 of the Act of 1890 is not a repealing section, nor is there any question of divesting or altering any right accrued prior to the passing of the Act of 1890. So that neither section 38 of the Interpretation Act, 1889, nor any doctrine as to repeal not affecting rights or liabilities accrued, appear to have any application. The Act of 1890 expressly provides that it is to be read as one with the Act of 1882, and it contains no saving in respect of settlements made between the respective dates of the passing of the two Acts. I think that the additional powers are to operate with all the like incidents as if they were conferred by the original Act, and, if they had been conferred by the original Act, section 15 of the Act of 1890 would have applied. One of the incidents is that the Court has power to authorize payment, although no scheme has been first submitted. Upon the construction of the settlement, I am of opinion that I have power to allow, beyond the works of improvement enumerated in the Acts of 1882 to 1890, reparations or repairs to buildings for residential, farm, or other purposes which, but for the terms of the settlement, might otherwise have fallen upon the tenant for life or have remained undone; but I do not think that such reparations extend to decorative or fancy repairs or to what may be termed casual repairs, such as whitewashing or painting, or putting in panes of glass to broken windows. I think the reparations or repairs intended are repairs of a substantial nature. It must also be borne in mind that the Court does not, under section 15 of the Act of 1890, as a rule, allow everything which would have been allowed as proper expenditure had a scheme been submitted. I may also add that I should not allow general expenses of the establishment for doing estate repairs; but I think that a reasonable payment for work done by the permanent staff in and about the allowed repairs may be allowed, as though outside labour had been made use of. With these observations, I think the right course to take will be to adjourn the matter back to Chambers with liberty to adduce fresh evidence before the Master.

No. 23.—VOL. XVI.

Court of Appeal (Lindley, M.R., } 1900.
Rigby and Collins, L.JJ.) } May 2.

IN RE W. H. GLADSTONE, DECEASED—GLADSTONE V. GLADSTONE.*

Settled Land Acts—Tenant for life—Lease of surface reserving minerals—Settled Land Act, 1882, secs. 6 and 17.

The Settled Land Act, 1882, enables the tenant for life to grant a lease of the surface reserving the minerals.

"*In re Newell and Nevill's Contract*" ([1900] 1 Ch., 90) overruled.

This appeal against a decision of Mr. Justice Cozens-Hardy's raised a question of importance upon the construction of the Settled Land Act, 1882—viz., whether the power of leasing, given by the Act to a tenant for life, enables him to grant a lease of the surface of land (e.g., a building lease) reserving the minerals. In the recent case of "*In re Newell and Nevill's Contract*" ([1900] 1 Ch., 90) Mr. Justice Kekewich held that a tenant for life is not enabled to grant such a lease; and in the present case Mr. Justice Cozens-Hardy simply followed that decision, without expressing any opinion of his own. The present case related to the Hawarden estates, settled by the will of the late Mr. W. H. Gladstone. Under an order of the Court the trustees of his will have been authorized to exercise on behalf of his infant son the powers which the Act confers on him as a *quasi-tenant* for life of the estates. The question was whether the trustees could grant a building lease of part of the estates, reserving the mines and minerals under the land comprised in the lease. Mr. Justice Cozens-Hardy answered this question in the negative. The trustees appealed.

Mr. Warrington, Q.C., and Mr. O. Leigh Clare were for the trustees; Mr. A. Lyttelton, Q.C., was for the infant; Mr. Eustace Smith was for the reversioner.

The COURT allowed the appeal.

The MASTER of the ROLLS said that in the absence of authority he should have thought it reasonably clear that the tenant for life had power to grant the lease in question. The governing section of the Act was section 6, which conferred on a tenant for life power to "lease the settled land or any part thereof, or any easement right, or privilege of any kind, over or in relation to the same, for any purpose whatever" for the respective terms specified. His Lordship could not agree in the view of Mr. Justice Kekewich, which Mr. Justice Cozens-Hardy had followed. Section 6 was very wide and strong in its terms. It applied to building leases and to mining leases and other leases. Looking at the words alone one could not see how there could be any doubt about their meaning. If Mr. Justice Kekewich was right, a tenant for life could not grant a lease of minerals reserving the surface. Such a construction of section 6 would cut down the powers conferred by it in a manner which did not appear to be justified by the words. This was his Lordship's conclusion independently of any authorities or of any other section of the Act. Section 13 confirmed this view. Section 17 looked a little the other way, but his Lordship did not think that the doubt raised by it was sufficient to override the clear words of section 6. Apart from the decision of Mr. Justice Kekewich the Master of the Rolls did not think the authorities which had been referred to afforded any assistance to the Court. They were all before the Act, which was intended to get rid of a number of authorities and to enable a tenant for life

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

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to do what he could not have done under the old law of real property. The decision in "*Dayrell v. Hoare*" (12 A. and E., 356), on which Mr. Justice Kekewich had relied, was plainly right both under the old law and the new law. A power to lease land did not authorize the lessor to lease part of the land and impose a burden upon the rest of it. The decision had been misunderstood by Mr. Justice Kekewich. It appeared to his Lordship that under section 6 there was ample power to grant the lease in question.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS concurred.

[Solicitors—Farrar, Porter, and Co., for Barker and Rogerson, Chester.]

Q.B. Div. } 1900.
(Mathew, J.) } May 2.

VALLÉE V. BUCKNALL NEPHEWS.*

Charter-party—Liability of shipowner—Exceptions—Construction of charter-party.

The plaintiff in this case claimed damages for breach of a contract for the carriage of a cargo of 164 cattle and 954 sheep in defendants' steamship *Merida* from Buenos Ayres to this country. The contract, which was in the form known as a "live-stock charter-party," provided that water for the cattle and sheep on the voyage was to be provided by the steamer in accordance with the Argentine Government regulations. For the cargo in question these regulations required a daily supply of 11½ tons of water. The plaintiff's case was that the water supplied was both insufficient in quantity and bad in quality, being muddy and rusty, and frequently full of salt, and that in consequence four bullocks died on the voyage and the remainder of the cattle and sheep were, when landed, in such poor condition as to be much depreciated in value. The defendants denied that the water supplied was either insufficient or bad, and they also relied on certain exceptions in the charter-party and bill of lading as, in any event, exonerating them from liability. A considerable body of evidence was given, the trial lasting nearly three days, and at the conclusion of the case his Lordship reserved his judgment.

Mr. Carver, Q.C., and Mr. T. E. Scrutton appeared for the plaintiff; Mr. Joseph Walton, Q.C., and Mr. Lewis Nood for the defendants.

MR. JUSTICE MATHEW, in delivering judgment, said that, with regard to the question of law arising on the construction of the charter-party, the effect of the exceptions in the charter-party was that the shipowners were not to be liable for damage resulting from the unseaworthiness of the vessel or from any negligence on the part of the captain or crew. It was said on behalf of the defendants that if the cattle had suffered damage, it arose either from unseaworthiness of the vessel or from the captain's negligence and that the defendants were therefore protected by the exceptions. But there was another very significant clause which provided that water was to be provided by the steamer in accordance with the regulations of the Argentine Government. The defendants said that the effect of the exceptions was to strike out that clause; but his Lordship did not accept that contention. The two clauses were independent of each other, and clause 15 was introduced for a very obvious and necessary purpose. The defendants were therefore bound to supply an adequate quantity of drinkable water. As to the question of fact, there was no doubt that the cattle did arrive at Deptford in a thin and shrunken condition. The carrying capacity of the water tanks on board the *Merida* was 490 tons, and the

total amount of water required by the regulations for the voyage was 437 tons. If, then, the tanks had been full at the start, there would have been an ample supply. The plaintiff's witnesses said that there was nothing of the sort, and there was this very significant fact that at Las Palmas 68 tons more of water were shipped, and if that were added to 490 tons a most extraordinary quantity of water must have been used on the voyage. The learned Judge proceeded to review the evidence at length, and he stated that he was unable to accept as correct the statements of the captain, who was the chief witness in support of the defendants' case, as to the quantity of water on board, which, in his Lordship's opinion, was not 490 tons, but something over 200 tons. As to the quality of the water, on two occasions it was found to contain salt, and the animals refused to drink it, but there had been no evidence that they had suffered damage from the salt. Rust and mud had, after leaving Las Palmas, been found in the water. It was said this was due to the bad weather and that if the water had been allowed to stand in the tubs it would have been quite right, but that was not easy to do when the vessel was rolling. In conclusion, his Lordship held that the plaintiff had made out his case; that the condition of the cattle and sheep on arrival was due to an insufficient supply of water and to its bad quality. There would, therefore, be judgment for the plaintiff, with costs, the amount of the damages to be agreed upon by the parties, or, in the event of difference, to be settled by his Lordship.

Chan. Div. } 1900.
(Farwell, J.) } May 3.

CITY OF LONDON ELECTRIC LIGHTING COMPANY
(LIMITED) V. MAYOR, & C., OF LONDON.*

Metropolis—Lighting—Contracts—Validity—
City of London Sewers Acts, 1848 and 1851—
Construction.

In this action, which was before the Court on April 27 and 28, the plaintiffs claimed a declaration that three several agreements—(1) an agreement dated May 19, 1890, and made by and between the Brush Electrical Engineering Company (Limited) and the Commissioners of Sewers of the City of London; (2) an agreement dated May 28, 1890, and made by and between the Laing, Wharton, and Down Construction Syndicate (Limited) and the said Commissioners; and (3) an agreement dated February 5, 1891, and made by and between the Brush Electrical Engineering Company (Limited) and the said Commissioners—were valid and subsisting. The three agreements were transferred to the plaintiffs by two indentures, dated August 21, 1891. The defendants, who are the successors in title and office of the Commissioners of Sewers, alleged against the plaintiffs' claim that, at the respective times when the contracts and indentures were made and thereafter, persons being Commissioners of Sewers and persons being members of the Court of Aldermen, and persons being members of the Common Council of the City of London were, or became, directly or indirectly, interested or concerned in the said contracts, and that by reason thereof, and by virtue of section 42 of the City of London Sewers Act, 1848, the said contracts were and became null and void. On the conclusion of the arguments, his Lordship reserved judgment.

Mr. Cripps, Q.C., and Mr. Roskill appeared for the plaintiffs; Mr. Swinfen Eady, Q.C., Mr. Danckwerts, Q.C., and Mr. A. J. Walter for the defendants.

MR. JUSTICE FARWELL delivered the following

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

judgment:—By three contracts dated respectively May 19, 1890, May 28, 1890, and February 5, 1891, the Commissioners of Sewers of the City of London contracted with the Brush Company and the Laing, Wharton Syndicate respectively for lighting the City by electricity. On August 21, 1891, the said contracts were assigned to the plaintiff company with the consent of the Commissioners, such consent being necessary to the assignment. At the date of the said contracts and indentures the sole power of (amongst other things) lighting the streets of the City was vested in the Mayor and Corporation of the City, to be executed by persons nominated by them under their common seal and constituted Commissioners of Sewers of the City. By the City of London Sewers Act, 1897, the Commissioners ceased to exist, and all their property, debts, duties, and liabilities were vested in the Mayor and Corporation of the City. The City has been lighted under the said contracts since 1891, but in consequence of certain facts which came to the knowledge of the defendants during last year, they have repudiated the contracts. The plaintiffs thereupon commenced this action for a declaration that the said agreements were and are valid and subsisting and binding on the defendants. The question, in my opinion, depends on the construction of the City of London Sewers Acts, 1848 and 1851. The Act of 1848, after repealing certain earlier Acts and vesting the power of lighting in the Commissioners, as before stated, and providing for the appointment of the Commissioners and their meetings, quorum and the like, enacts in section 33 as follows:—"And be it enacted that it shall be lawful for the Commissioners, or any committee appointed by them, to enter into and contract in the name of the Commissioners with any persons for the execution of any works directed or authorized by this Act to be done by the Commissioners, or for furnishing materials or labour, or for any other matters or things whatsoever necessary for enabling them to carry the purposes of this Act into full and complete effect, in such manner, and upon such terms, and for such sums of money, and under such stipulations, regulations, and restrictions as the Commissioners or such committee shall think proper; and every such contract shall be in writing, and shall specify the several works to be done, and the materials or labour to be furnished, and the prices to be paid for the same, and the times within which the said works are to be completed, and the penalty to be incurred in case of the non-performance thereof; and every such contract may also specify the persons to whose satisfaction the same are to be completed or finished, and the mode of determining any dispute which may arise concerning or in consequence of such contract." The Act then provides by section 41 that "the Commissioners are not to be personally liable on such contracts, and engrafts on that by way of proviso section 42 as follows:—"That no person, being a Commissioner, or a member of the Court of Aldermen or of the Common Council of the City, shall be directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever, upon pain that every such contract shall be null and void, and that the person who, being a Commissioner, or a member of the said Court of Aldermen or of the Common Council, shall be so interested or concerned therein shall for every such offence forfeit and pay the sum of £100 to any person who shall sue for the same, to be recovered in any of the superior Courts by action of debt or on the case." It is admitted that at the date of the contracts in question certain Commissioners, Aldermen, and Common Council-

men were shareholders in the Brush Company and also in the plaintiff company; it has not been proved, and I therefore hold it not to be the fact, that any Commissioner, Alderman, or Common Councilman who was a shareholder in either of the said companies took part in the negotiations for or settlement of any of the contracts or conveyances. The defendants contend that the mere fact that any Commissioner, or Alderman, or Common Councilman is at the date of the contract, or afterwards becomes, the holder of one share in the contracting company renders that contract absolutely void, and, if the Act of Parliament has said this in plain terms, I am bound so to decide. The Court has no power to depart from the plain words of an Act of Parliament on any ground of supposed hardship or the like. I respectfully adopt the Lord Chief Justice's judgment in "*Attorney-General v. Carlton Bank*" ([1899] 2 Q.B., at p. 164):—"The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject—namely, to give effect to the intention of the Legislature as that intention is to be gathered from the language employed, having regard to the context in connexion with which it is employed. The Court must, no doubt, ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained it is not open to the Court to narrow or whittle down the operations of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the Legislature has said." But there is another principle applicable to the construction of Acts of Parliament and all other documents—namely, that if there are two possible constructions and one will lead to an unjust and unreasonable result and the other will not, the Court will prefer the latter. To adopt Lord Blackburn's words in "*Roths v. Kirkcaldy, &c.*" (7 App.Cas., 702)—"I quite agree that no Court is entitled to depart from the intention of the Legislature as appearing from the words of the Act because it is thought unreasonable. But when two constructions are open the Court may adopt the more reasonable of the two." There are many other authorities to the same effect; it is sufficient to refer to "*Railton v. Wood*" (15 App.Cas., at p. 366) and "*Plumstead Board of Works v. Spackman*" (13 Q.B.D., at p. 888). I have, first, therefore, to see whether the Act of Parliament is absolutely clear or is fairly susceptible of two constructions. Now the Act contemplates that the Commissioners will enter into contracts of two sorts—(1) for the construction of works or supply of materials to the City which will become their own property, and which I hereafter refer to as "construction contracts"; and (2) for the supply of water for cleansing or of gas or other illuminant for lighting the City by companies or persons owning waterworks or gasworks or the like—*e.g.*, section 52 vests all existing sewers and buildings, &c., connected therewith, and all other sewers to be thereafter made, in the Commissioners, and section 53 authorizes the Commissioners to make such sewers; section 54 enables them to deepen and alter sewers. These all fall under the first class of contracts to which I have referred. Then, section 55 enables the Commissioners to contract for the supply of water and compels every present and future water company having mains within the City to supply water for public purposes, and section 116 enables the Commissioners to contract with gas companies and other persons to supply gas or light the City by any other mode. Both these fall under the second class of contracts. Returning to the consideration of sections 33 and 42, counsel on both sides are agreed, and I concur, that "null and void" in section 42 means null and void, and not voidable,

and that the words in section 42, "or for any other matter or thing," correspond to and are no wider than the words in section 33, "or for any other matters or things whatsoever necessary for enabling them to carry the purposes of this Act into full effect." It is said by the defendants that these words are perfectly general, with nothing to restrict their generality; but, if this be so, the three preceding lines of the section, "for the execution," &c., are superfluous. It is idle to specify two particular sets of contracts if you follow them up with "all contracts." In my opinion the words must be confined to matters *ejusdem generis*, and I come to this conclusion not merely for the reason first stated, but on the true construction of the whole Act. Thus the latter part of section 33, "every such contract shall be in writing," &c., points clearly to the fact that the Legislature was dealing with contracts containing such particulars as are specified in that section. Again, section 34 is the only section that enables seven of the Commissioners or their clerk to execute contracts on behalf of the Commissioners; and the contracts which they or he are so authorized to execute are to be executed also by the person contracting to perform the work or to supply the materials or labour mentioned therein. It would indeed be strange if the words in section 33, "any other matter or thing," had the wide meaning attached to them by the defendants, that all reference to them should be omitted from this section. Further, the whole set of clauses from 33 to 42 appear to me to form a *fasciculus* of clauses relating to construction contracts only; see especially sections 35, 38, and 39. And I am confirmed in this view by finding, when I come to section 116 (for the better lighting of the streets), that a fresh power of contracting is given to the Commissioners. If the defendants were right in their contention that every form of contract within the powers of the Commissioners is authorized by section 33, it would have been needless to create by section 116 a further power to enter into contracts with gas companies and other persons for lighting the City. In my opinion the distinction between the power to enter into construction contracts, contained in sections 33 to 42, and the power to contract for a supply of light under section 116, or for water under section 55, is reasonably plain. The Act contemplates that certain works may have to be done by the Commissioners—*e.g.*, making sewers, drains, &c. (sections 53 and 54)—and it also contemplates that the Commissioners, without constructing works, may obtain a supply of light for the City (section 116) and may obtain a supply of water for flushing, scouring, and cleansing sewers and drains (section 55). The sets of sections are entirely distinct, and, in my opinion, section 42 relates only to the contracts specified in section 33, and those contracts are limited to the class that I have already stated. But then it is said that the contracts in this case contain clauses which make them construction contracts within sections 33 and 42. In my opinion this is not so. They are in terms contracts to light the City by electricity. The supply is obtained and supplied by virtue of the powers given by permanent orders under the Electric Lighting Acts. It is true that the Commissioners have required the insertion of certain provisions which compel the works to be done in a particular manner and enable the defendants to require alterations and the like to be made, but the works are to remain the property of the plaintiffs, and all the provisions relied on relate only to the regulation and efficiency of supply. The mere fact that under the public Act of Parliament and section 35 of the contract the defendants have at a future date an option of purchasing the plaintiffs' undertaking, so far as it relates to the public lighting of the City, cannot, in my opinion, make the contracts construction contracts

within the meaning of the Act of 1848. But there is a further point on which, in my judgment, the plaintiffs also succeed. Section 42 forbids a Commissioner or Alderman or Common Councilman to be "directly or indirectly interested or concerned in any contract," &c. Now I have not to consider the words of this section standing alone, because the Act of 1851, section 53, enacts as follows:—"That no person, being a Commissioner, who is a shareholder in, or surveyor, solicitor, or agent for any gas company, water company, paving company, or any work, undertaking, or speculation the contracting with or the promotion or carrying out of which shall be discussed at any meeting of the Commissioners, shall be eligible to sit or vote as a Commissioner while such subject is under the discussion of the Commissioners." This Act, the defendants' counsel stated, was passed in order to continue the earlier Act, which would otherwise have expired, with such variations and additions as the experience of two years had shown to be necessary, and the two Acts are to be construed as one, the later Act overriding the first, if repugnant. Now, if a shareholder in the contracting company is a person indirectly interested in that contract under section 42, no such contract could ever be entered into, because the Act renders it null and void *ab initio*. It would be idle, therefore, to enact that a Commissioner who is a shareholder in any company so contracting shall not be eligible to vote on the contract, if the mere fact of his interest as a shareholder renders it impossible that any contract at all could be entered into. In saying this I am following the reasoning on which the Court of Appeal proceeded in "*Todd v. Robinson*" (14 Q.B.D., at p. 745), although in this case the reasoning leads to the opposite conclusion. Further, this view is consistent with the opinion that I have already expressed on the construction of sections 53 and 42, and confirms me in that opinion, for in 1851 a company (one man or otherwise) incorporated to carry out contracts for work was quite unheard of. The Legislature, therefore, in 1851 treated shareholders as persons who could not possibly be directly or indirectly interested in construction contracts, and therefore excluded them by necessary implication from the provisions of section 42. In my opinion this is the true construction of the two Acts, but if I had more doubt than I have on this point I should prefer this construction on the principle of avoiding injustice to which I have already referred. The defendants press on me the desirability of removing all possibility of temptation from Commissioners, Aldermen, and Common Councilmen, and, without casting any imputation on gentlemen who occupy these positions, I agree that it is desirable that no man should be placed in a position in which his interest may conflict with his duty. But the defendants have, without the clause in question, all the rights of ordinary persons to compel their fiduciary agents to account for secret profits or to enforce the disability of voting pointed out in "*Dimes v. Grand Junction, &c.*" (3 H.L.C., 759). The clause in question, if construed as the defendants contend, would create a novel and far-reaching disability, affecting not only innocent third persons, but the Corporation and citizens themselves. For example, I am told that the Commissioners are 91 in number and the Common Councilmen more than 200, and there are besides several Aldermen. According to the defendants' contention, if any one of this numerous body, either at the date of the execution or at any time during the subsistence of a contract to supply gas, held a single share in the supplying gas company, the whole contract becomes *ipso facto* and irremediably void. Now the number of gas companies having access to the City is necessarily limited, and the result might well be an

absolute prohibition of the use of gas for public purposes in the City. This would be even more serious if it applies also to water companies, but I do not call these companies in aid, because it is possible that the provisions for assessing payment in section 55 might be held to exclude them from section 42. Again, assume that a company has, on the faith of a contract with the Commissioners, expended a large sum on works for the supply of gas or (as in the present case) electricity to the City, and one single Common Councilman, unknown to both parties, held one share in the company at the date of the contract, or subsequently purchased one single share in the company; the whole contract would be or become void, and this would be the case even if he was interested as a *cestui que trust* only and his name did not appear at all, so that no reasonable care could guard against the avoidance of the contract. If there are two alternative constructions reasonably possible, it cannot be right that the Court should adopt that which forfeits the money of innocent shareholders for the act of a third person over whom they have no control, and which may prevent the City from the use of gas or electricity unless and until they can, at their own expense, erect their own works and themselves supply gas or electricity. In the view that I take it is unnecessary for me to consider the other points made by Mr. Cripps or to draw any distinctions between the three contracts. I therefore make a declaration as asked by the plaintiffs, and order the defendants to pay the costs of the action.

On behalf of the defendants counsel then intimated that the Corporation had no desire to avoid the contracts, but had felt it their duty to adopt the course which they had adopted.

[Solicitors—Ashurst, Morris, Crisp, and Co., for the plaintiffs; The City Solicitor, for the defendants.]

Court of Appeal (Lindley, M.R.,) 1900.
Rigby and Collins, L.J.J.) } May 4.

IN RE A. B. AND CO.*

Bankruptcy—Dismissal of bankruptcy petition—
Funds in hands of receiver—Deduction of all
proper expenses.

This was an appeal in bankruptcy from an order of the Registrar's. The appeal raised an interesting and important question of bankruptcy law—viz., as to the right of the Official Receiver while acting as Interim Receiver during the pendency of a bankruptcy petition which is ultimately dismissed to be recouped all proper expenses incurred in so acting before handing over the receipts to the debtor. On January 18, 1900, a bankruptcy petition was presented against A. B. and Co., an American firm who carried on business in Baltimore and also in England and in other parts of Europe. Before the petition was heard the Official Receiver was appointed Interim Receiver and he obtained the leave of the Court to appoint a special manager of the business in England. The special manager was duly appointed and by the terms of his appointment he was to pay over to the Official Receiver all moneys coming to his hands from the business, and any moneys which might be required for current expenditure and disbursements were to be paid out of moneys to be provided by the Official Receiver from time to time not exceeding the amount paid in by the special manager. The special manager carried on the business for about five weeks and he effected sales and got in moneys and incurred expenses and liabilities. When the petition came on to be heard it was dismissed

on the ground that A. B. and Co. were an American firm resident in America and were not debtors within the meaning of the Bankruptcy Act, but the receiver was continued pending an appeal. The appeal was heard on February 28 and was dismissed, and the Court discharged the order appointing the Official Receiver to be Interim Receiver. On April 2, 1900, the Registrar made an order that the sum of £409, which represented the gross receipts paid by the special manager into the hands of the Official Receiver, should, after deducting certain official fees, be paid to the debtors. The special manager and the petitioning creditors appealed against this order. The ground of the appeal was the special manager in the course of carrying on the business of the firm had paid out of his own pocket large sums for wages and other necessary expenses which he had not been recouped; and the appellants asked that an account might be taken of those expenses and that the £409 might be applied in reimbursing the special manager the amount found due on the account. On behalf of the debtors it was contended that inasmuch as the bankruptcy petition was dismissed for want of jurisdiction the whole of the £409 belonged to them and that the special manager must look to the petitioning creditors for any loss he might have sustained.

Mr. Muir Mackenzie appeared for the appellants; and Mr. C. A. Russell, Q.C., and Mr. Carrington for the firm.

The COURT allowed the appeal.

The MASTER of the ROLLS said that the question on this appeal was what order the Court ought to make in respect of a sum of £409 which was in the hands of the Official Receiver. After referring to the facts, his Lordship observed that the petition was dismissed on the ground that the alleged debtors were not debtors within the meaning of that expression in the Bankruptcy Act and that in that sense there was no jurisdiction to make a receiving order against them. But it was obvious that the Court which made the order had a general jurisdiction to make receiving orders against debtors and in his Lordship's opinion this order was an erroneous order rather than an order without jurisdiction. No doubt the distinction was very fine, but in the view which he took of this case it was not necessary to go into that question minutely. The petition having been dismissed, whether for want of jurisdiction or because the debtors did not owe the petitioning creditors any debt within the meaning of the Bankruptcy Act, the receiver had no authority to carry on this business, neither had the special manager. But it did not follow that everything which had been done by the receiver before the dismissal of the petition should be wholly disregarded. As receiver he must pass the accounts which were usually passed by receivers and in accounting he must bring into the account what were usually regarded as just allowances. The money in question in this case was money paid over to the receiver by the special manager, who had not deducted any expenses which in passing his account he would have had a right to deduct. In other words these receipts were gross receipts and were not in any sense a balance in the hands of the receiver. The Registrar had treated this money as belonging to the debtors. In his Lordship's opinion that was wrong in principle. It was said that if the Court allowed these deductions it would be robbing the debtors; but if the Court refused to allow them it would be robbing its officers. The duty of the receiver was to account and pay over the balance and it would be a gross injustice not to deduct all just allowances. Even if the appointment of the receiver were without jurisdiction, in the proper sense of the word, the Court would not compel its officer to pay more than the balance due from him on taking the accounts. This would involve no injustice to any one because no one could get the money claimed from the receiver without

*Reported by H. B. HENNING, Esq., Barrister-at-Law.

making just allowances. The appeal should be allowed.

LORD JUSTICE RIGBY concurred. He said that the money paid over to the receiver represented the gross profits and could not be called in any correct sense the profits or produce of the business. It was the duty of the Court to protect its officers—the Official Receiver and his duly appointed agents.

LORD JUSTICE COLLINS agreed. He thought that the question really turned upon whether the debtor was entitled to treat the special manager as a wrong doer. In his opinion he was not so entitled. It was clear that the Court had a general jurisdiction over the subject matter, though it had come to an erroneous conclusion. Anything done under the order of the Court was good till it was set aside, and the persons who so acted were not wrong doers. The only account against them was on the footing that what was done was done for the benefit of the debtor, and that involved the obligation on the part of the debtor of reimbursing the expenses incurred in so doing.

[Solicitors—Bentwich, Watkin-Williams, and Gray; J. H. Moggridge.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } May 4.
WALTERS V. LE BLANC.*

Frauds, Statute of—Memorandum in writing—
Sufficiency of—Reference to another document.
Decision of Darling, J. (15 *The Times* L.R.,
426), reversed.

This was an appeal by the defendant from the judgment of Mr. Justice Darling, reported in 15 *The Times* L.R., 426. The action was brought to recover damages for breach of contract to purchase a house belonging to the plaintiff, and known as Caryll Hurst, West Grinstead. In July, 1898, the defendant, having seen the house, made the plaintiff's agents a verbal offer. On July 7, 1898, the plaintiff's agents, John Churchman and Sons, wrote to the defendant as follows:—

“ Horsham, July 7, 1898.

“ Dear Sir,—Re Caryll Hurst, West Grinstead. The owner of the above writes us, ‘ I was not here this morning until too late to telegraph. I could not entertain for a moment the offer of £2,050 for the whole property; my lowest price would be £2,600. The land, building, planting, road-making, &c., have cost me out of pocket £200 more than this, but I will make some sacrifice (but not more than this) if I had an offer to purchase outright. The house and grounds up to the iron fence is what I offer to let for £110, or to sell for £2,200. This is what I have spent on it. The additional four and three-quarter acres I purchased for £850, and it has cost me, including draining, planting, legal expenses, &c., over £700, and I cannot think of selling it for appreciably less.’ Trusting you will see your way to increase your offer,

“ We are, yours, &c.,

“ JOHN CHURCHMAN AND SONS.

“ C. W. Le Blanc, Esq.”

On July 11 the defendant went to the offices of Messrs. Churchman and Sons and signed the following document:—“ I, the undersigned, agree to purchase Caryll Hurst, West Grinstead, Sussex, at the sum of £2,450, dated July 11, 1898.—C. WILLOUGHBY LE BLANC.” On the same day Messrs. Churchman and Sons sent the defendant the following letter:—

“ Dear Sir,—Caryll Hurst, West Grinstead. Referring to your call of this morning, as promised we wired

the owner, saying you had offered £2,450 for above, and we, as agents for the owner, accept this offer. The contract to be prepared by vendor's solicitors: will you kindly let us have the name and address of your solicitor, and oblige,

“ Yours,

“ JOHN CHURCHMAN AND SONS.

“ C. W. Le Blanc, Esq.”

A difficulty arose about the title, and on July 23 the defendant wrote to his solicitors as follows:—

“ The Black Horse Hotel, Horsham, July 23, 1898.

“ Dear Sirs,—Caryll Hurst. We thank you for your letter just received, and have carefully weighed the contents. My wife and self, after much deliberation, have come to the conclusion that, considering the somewhat complicated nature of the title, the good price we contemplated paying, the further outlay that would be necessary—indeed, absolutely essential, in the near future—we would sooner withdraw from the purchase. With regard to the small charge that may be made by the vendor's solicitor, if you think it fair, I shall be glad if you will settle the same on my behalf.

“ Yours very truly,

“ CLAUDE W. LE BLANC.

“ Messrs. Brooks, Jenkins, and Co., Doctors' Commons.”

The plaintiff claimed damages for the defendant's refusal to complete.

Mr. Justice Darling held that the document of July 7 was sufficiently connected with that of July 11 as to form a memorandum in writing within section 4 of the Statute of Frauds, and he accordingly gave judgment for the plaintiff, assessing the damages at £300.

Mr. ROMER MACKLIN (Mr. Duke, Q.C., with him) for the defendant, contended, first, that the letters of July 7 and 11 did not contain the terms of any contract. There were only negotiations all through, and no final agreement was arrived at. Secondly, there was no document signed by the defendant which incorporated another document containing the name of the vendor. The letter of July 7 was not incorporated by reference or otherwise in the document of July 11 signed by the defendant. There must be something on the face of the document signed by the defendant so referring to the other document as to sufficiently connect them together. “ *Pierce v. Corf* ” (L.R., 9 Q.B., 210).

Mr. S. H. DAY, for the plaintiff, argued that the learned Judge was right in holding that there was a sufficient memorandum in writing to satisfy the Statute of Frauds.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said this was an action by a vendor against a vendee for not completing the purchase of a property, and the learned Judge at the trial had given judgment for the plaintiff for £300 damages. The defendant appealed, and said, in the first place, that there was no contract, and, in the second place, that there was no memorandum to satisfy the Statute of Frauds. The question as to the Statute of Frauds was so overloaded with decisions that it was impossible to draw on one's common sense with regard to it. But, in his opinion, independently of the statute, there was no contract at all in this case. The parties seemed to him to have been merely negotiating all through, and neither of them appeared ever to have thought that a binding contract had been arrived at.

LORD JUSTICE VAUGHAN WILLIAMS said he agreed that there was no binding contract between the parties. He also thought that the memorandum in writing on which the plaintiff relied was not sufficient to satisfy the Statute of Frauds. It was deficient in not mentioning the name of the vendor, and it also left the subject matter of the purchase unascertained. It was im-

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

possible to tell from it whether what the defendant proposed to buy was the house alone or the house together with 4½ acres of land.

LORD JUSTICE ROMER was of the same opinion.

[Solicitors—A. W. Rixon, for the plaintiff; Brooks, Jenkins, and Co., for the defendant.]

Q.B. Div. }
(Mathew, J.) }

1900.
May 4.

GERALD T. ANDERSON AND CO. V. BEARD.*

Stock Exchange—Failure of broker—Liability of broker's client to jobber.

This action, which raised a point of great importance as to the extent of the liability of members of the public to jobbers on the Stock Exchange upon contracts effected with the jobbers through a broker on the Stock Exchange where the broker has become a defaulter, was brought by the plaintiffs, a firm of jobbers on the Stock Exchange, to recover £227 9s. 4d., the amount of the difference between the price at which the defendant had bought certain shares and the amount for which the plaintiffs had sold them after the broker's default. The defendant paid into Court, with a denial of liability, £102 9s. 4d., the amount of the difference between the contract price and the "hammer" price at which the transaction had been closed between the plaintiffs and the broker. The facts are fully stated in the judgment of the learned Judge.

Mr. Rufus Isaacs, Q.C., and Mr. Spencer Bower appeared for the plaintiffs; Mr. Herbert Reed, Q.C., and Mr. Norman Craig for the defendant.

MR. JUSTICE MATHEW, in giving judgment, said this was an action brought to recover damages for the refusal of the defendant to take delivery and pay for certain shares which it was alleged had been purchased by him of the plaintiffs. The plaintiffs were dealers in shares on the Stock Exchange, and on November 28, 1899, the defendant instructed Mr. Beasley, who was a broker and a member of the Stock Exchange, to purchase for him 200 East Rand Extension shares. In accordance with these instructions 200 of these shares, neither more nor less, were purchased of the plaintiffs through Beasley for the mid-December account. On December 11 the shares were, on the instructions of the defendant, carried over by the plaintiffs to the end-December account. On December 14 Beasley became a defaulter, and, in accordance with the rules and regulations of the Stock Exchange, ceased to be a member of the House. The usual process of liquidation, which was explained in the evidence given in "*Ex parte Grant, in re Plumby*" (13 Ch.D., 667), was followed. The accounts between Beasley and different dealers were closed at the "hammer prices," prices ascertained in accordance with the regulations of the Stock Exchange, and the differences which Beasley would be entitled to receive were balanced against the differences which he was bound to pay. It was clear that that process had no operation outside the Stock Exchange: the regulations were not intended to affect and did not affect the outside public. As between Beasley and the plaintiffs this transaction and his other transactions were closed on December 14. When that took place the plaintiffs, in accordance with the established course of business and usages of the Stock Exchange, applied to Beasley for the name of his principal, and they were furnished with the name of the defendant. One of the plaintiffs then had an interview with the defendant and pointed out to him the three courses open to him—

namely, he might either take up the shares and complete the transaction with the plaintiffs direct, or might appoint another broker in the place of Beasley, or might treat the transaction as closed at the hammer price. The last course would have involved him in a loss of £102 9s. 4d. The defendant took none of those courses. Time was given to him, and, after a considerable interval, the plaintiffs received from him an intimation that he did not consider himself responsible to the plaintiffs on the transaction, and in point of fact he repudiated the transaction. The plaintiffs immediately treated the transaction as at an end and sold the shares at the best price obtainable, which, the market having gone down in the interval, involved a loss of £227 9s. 4d., the amount claimed. The case was ably argued by counsel for the defendant. They intimated that they proposed to raise hereafter the question whether there was privity of contract between the plaintiffs and the defendant, but they did not ask him (the learned Judge) to differ from the opinion expressed by Mr. Justice Kennedy in the recent case of "*Beckhussen and Gibbs v. Hamblet*" (5 Com. Cas., p. 217, and *ante*, p. 278), where Mr. Justice Kennedy held that in a transaction like the present there was privity of contract between the dealer and the customer. Mr. Justice Kennedy gave judgment for the customer in that case because there the broker had bought a block of shares, part only of which he intended to apply to the particular contract. His Lordship entirely agreed with the opinion expressed by Mr. Justice Kennedy. Upon the evidence laid before him he could not possibly come to any other conclusion than that the contract was binding between the plaintiffs and the defendant. The first point argued in this case was that the contract was made in accordance with the usages of the Stock Exchange, and that, in accordance with those usages, the account had been closed and the contract brought to an end, and that the utmost liability of the defendant was to pay the difference arrived at upon the hammer price. There was no trace in the rules of any such intention. Suppose that the shares were bought for the purpose of investment; why should such a transaction be closed and the client called upon to pay differences because his broker had been in default? There was neither reason nor evidence to lead to such a conclusion. It was said, why should the shares be kept open after the settlement at the hammer price? The answer was given by the evidence as to the perfectly reasonable course of business followed in such cases—namely, that the dealer was entitled to be told the name of the client and to ascertain from him which of the three practicable and sensible courses open to him he proposed to adopt. From that it seemed clear that the contract was kept alive, and the only question that remained was what damages ought to be paid in the event of the client ultimately failing to pay for the shares. What happened was that the plaintiffs were in doubt as to whether the defendant would take up the shares or not. It was argued that there was no obligation on the defendant to exercise any option, and that he could never be responsible for more than the difference upon the hammer price. But time was given to the defendant, and there was an expectation to the last that the defendant would settle the matter. But on December 21 he intimated to the plaintiffs that he would be in no way responsible for the transaction, and subsequently raised a further defence that he had never had any notice or knowledge that Beasley ever carried over any shares for him. The plaintiffs were entitled to treat the defendant's repudiation as a rescission of the contract. The market was going down; they took the only reasonable course and sold the shares, with the result that there was a loss of the amount claimed in

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

the action. There was no reason why they should not recover that sum, and there must be judgment for that amount.

Judgment accordingly.

[Solicitors—Morley, Shireff, and Co.; Edwardes and Cohen.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } May 5.

DANIEL V. THE OCEAN COAL COMPANY (LIMITED).*

Master and Servant—Master's liability to servant—Compensation, to whom payable—Money invested in Registrar's name for benefit of children—Workmen's Compensation Act, 1897, Sched. I., secs. 4, 5, 6, and 7.

This was an appeal from an award of the Judge of the Pontypridd County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was Mary Daniel, the widow of a workman who had met with his death in consequence of accidental injuries sustained by him in the course of his employment. The applicant had taken out letters of administration to her deceased husband's estate, and had thereby become his legal personal representative. The County Court Judge by his award ordered that the respondents, the Ocean Coal Company (Limited), should pay the sum of £246 7s. to the dependants of the deceased workman as compensation, and he declared that the persons entitled to share in such compensation as dependants were Mary Daniel, the widow, and Evan David Daniel and William John Daniel, the infant sons of the deceased. And he ordered that the said sum of £246 7s. be apportioned as follows, viz.:—£146 7s. to and for the benefit of the widow and £100 to and for the benefit of the sons in equal shares; and he ordered that the sum of £146 7s. apportioned to and for the benefit of the widow should be paid to her, and that the sum of £100 apportioned to and for the benefit of the sons should be paid to the Registrar of the County Court and should be invested by the registrar in his name in the Post Office Savings Bank for the benefit of the sons. The applicant appealed from this award, and it was contended on her behalf that the County Court Judge had no power to make an order in these terms, but that, inasmuch as she was the legal personal representative of the deceased, the County Court Judge was bound, by section 4 of the First schedule to the Act, to order the whole of the compensation to be paid to her.

Mr. CRIPPS, Q.C. (Mr. Rhys Williams with him), appeared for the applicant, and said that the words of section 4 were express:—"The payment shall, in case of death, be made to the legal personal representative of the workman." This was not qualified by section 6, which provided for the sum allotted as compensation being invested for the benefit of the person entitled thereto. [LORD JUSTICE VAUGHAN WILLIAMS.—Mr. Minton-Senhouse, in his book "Accidents to Workmen," in a note to section 4, says:—"He"—that is, the legal personal representative—"does not, however, receive it as personal representative of the deceased workman, nor is it part of the workman's estate or liable for his debts. He holds it as a trustee under the statute."]

Mr. Ruegg, Q.O., and Mr. Anton Bertram, for the respondents, were not called upon to argue.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, sections 4, 5, 6, and 7 of the first schedule to the

Workmen's Compensation Act must be read together. By section 4, "The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependants or other persons entitled thereto under this Act." By section 5, "Any question as to who is a dependant, or as to the amount payable to each dependant, shall, in default of agreement, be settled by arbitration under this Act." By section 6 "The sum allotted as compensation to a dependant may be invested or otherwise applied for the benefit of the person entitled thereto as agreed, or as ordered by the committee or other arbitrator." By section 7 "Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the County Court in his name as registrar." Reading all those sections together he had no doubt that the County Court Judge had power to make the order which he had made in this case. The appeal would, therefore, be dismissed, but, as the question raised on the appeal did not concern the respondents, it would be dismissed without costs.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

[Solicitors—Walter Morgan, Bruce, and Co., Pontypridd, for the applicant; H. P. Becher, agent for Simons and Sons, Pontypridd, for the respondents.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } May 5.

RENDALL V. HILL'S DRY DOCK AND ENGINEERING COMPANY (LIMITED).*

Master and Servant—Master's liability to servant—Time within which claim must be made. Held, no waiver by employers.

This was an appeal from an award of the Judge of the Cardiff County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was a shipwright who sustained accidental injuries in the course of his employment on December 19, 1898. The applicant did not make any claim on his employers or send in any request for proceedings under the Workmen's Compensation Act until more than six months after the date of the accident. During that period weekly payments of £1 were made to him by an insurance company with whom his employers had insured their liability under the Act, and he gave receipts, which were expressed to be on account of compensation which might be or become due to him under the Workmen's Compensation Act. When this case was before the County Court Judge the case of "Powell v. Main Colliery Co." (*ante*, p. 282) had not been decided. In that case the Court of Appeal held that, on the construction of section 2 of the Act, proceedings under the Act were not maintainable unless a request for proceedings was filed within six months of the accident. The County Court Judge made an award in favour of the applicant for a weekly payment of 18s. The employers appealed.

Mr. MONTAGUE LUSH (Mr. Albert Parsons with him), for the employers, contended, on the authority of "Powell v. Main Colliery Co.," that the proceedings were not maintainable.

Mr. BAILHACHE, for the applicant, argued that the

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

weekly payments, coupled with the taking of the receipts from the applicant, estopped the employers from setting up the defence that the applicant had not made a claim for compensation within six months. He relied on the case of "*Wright v. John Bagnall and Sons*" (*ante*, p. 327).

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in this case the applicant had not, so far as appeared by the evidence, given any notice of accident as required by section 2, subsection 1, of the Act, and he certainly had not made any claim for compensation by filing a request for arbitration within six months of the accident. The employers were insured, and they sent in to the insurance company particulars of the accident, in which they stated that the workman's wages were £2 a week. The insurance company did what good masters would have done, that was to say, they made him payments of £1 a week on account, and they took receipts. The Court could not hold that that amounted to a waiver or estoppel so as to preclude the employers from now raising the defence that the applicant had not made a request for proceedings within six months. This case was quite different from that of "*Wright v. Bagnall*." In that case there was an absolute agreement between the parties as to liability of the respondents to pay compensation under the Act, and the only matter which remained in question was the amount. In the present case there was no evidence of such a state of things as that. The appeal must therefore be allowed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.J.J.) 1900.
May 7.

TURNBULL V. LAMBTON COLLIERIES (LIMITED).*

Master and Servant—Master's liability to servant—Employment "on, in, or about a mine"—
—"Adjacent to and belonging to a mine"—
Workmen's Compensation Act, 1897.

This was an appeal from the award of the Durham County Court Judge under the Workmen's Compensation Act, 1897. The respondent on the appeal, Frances Turnbull, was the widow of a deceased workman, John Thomas Turnbull, who was killed by an accident arising out of, and in the course of, his employment. The appellants, the Lambton Collieries (Limited), owned a number of collieries, among them being one called the Burnmoor Colliery. They also owned a private railway called the Lambton railway, about 12 miles in length, which connected the various collieries with the North-Eastern Railway Company. The deceased man was an engine driver in the employment of the appellants, and upon the day of the accident he was engaged in driving a train containing coal from the Burnmoor Colliery to the coal depôt belonging to the appellants next the North-Eastern Railway Company, where the coal from the collieries was stored, and from which the coal was distributed to purchasers. When the train arrived at a point three-quarters of a mile from the pit's mouth of the Burnmoor Colliery, near the junction of a siding belonging to the appellants and leading to the coal depôt, the deceased man, who was standing on the footboard of the engine, leaned too far out from the engine, and in consequence his head struck against some wagons standing on the siding, and he was killed. The railway at the place where the accident happened ran parallel with the North-Eastern Railway Company. The accident occurred on the through run-

ning line of the Lambton railway. The Lambton railway was held and maintained by the appellants, under wayleave leases granted to them by the owners of the land upon which the railway stood, and was not constructed or carried on under the powers of any Act of Parliament, or used for the purposes of public traffic. It was under the sole control of the appellants, and was used only for the conveyance to its place of delivery of mineral traffic belonging to them and arising at their various collieries, and not for the purposes of any one colliery only. It was the sole means by which coals were conveyed away from the collieries. The depôt to which the train which the deceased was driving was conveying coals was used for selling coals produced at the appellants' collieries to the public in the neighbourhood, and also for supplying such coals to workmen employed at the various collieries belonging to the appellants. The County Court Judge decided in favour of the respondent on the ground that, in his opinion, the accident occurred "on" the appellants' works and adjacent to their Burnmoor mine. By section 7, subsection 1, of the Workmen's Compensation Act, 1897, "This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a railway, factory, mine" By subsection 2, "Railway" means the railway of any railway company to which the Regulation of Railways Act, 1873, applies. . . . "Mine" means a mine to which the Coal Mines Regulation Act, 1887, . . . applies." By section 75 of the Coal Mines Regulation Act, 1887, "In this Act, unless the context otherwise requires, 'Mine' includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine."

Mr. SCOTT FOX, Q.C., and Mr. H. MANISTY for the appellants, contended that there was no evidence upon which the County Court Judge could find that the accident occurred "on" the mine as defined by section 75 of the Coal Mines Regulation Act, 1887.

Mr. ROBSON, Q.C., and Mr. DANCHEWITS, Q.C., for the respondent, contended that the siding where the accident happened was by section 75 of the Act of 1887 made part of the mine, and therefore the accident happened "on or in or about" the mine.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the place where the accident happened was not a "railway" within the definition in section 7, subsection 2, of the Act of 1897. It was said that the accident happened "on or in or about" a mine. To find the definition of "mine" section 75 of the Act of 1887 had to be looked at. Apart from the definition in section 7b of the Act of 1887, the accident clearly did not happen "on or in or about" the mine, because it happened three-quarters of a mile away from the mine. There remained the question whether the meaning of the word "mine" was enlarged by section 75 of the Act of 1887 so as to include this spot three-quarters of a mile away. The words in that section, "adjacent to and belonging to the mine," meant physically adjacent to and belonging to the mine itself, and not merely belonging to the mine owner. In his opinion there was no evidence upon which the County Court Judge could find that the spot where the accident happened was adjacent to and belonging to the mine.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

LORD JUSTICE ROMER agreed.

[Solicitors—Rowcliffes, Rawle, and Co., for Cooper and Goodger, Newcastle-on-Tyne, for the appellants; H. S. Harris and Co., for Isidore Isaacs, Sunderland, for the respondent.]

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Q.B. Div. }
(Mathew, J.) }

1900.
May 7.

NICKOLL AND KNIGHT V. ASHTON, EDRIDGE, AND CO.*

Sale of Goods—Contract—Shipment by particular vessel—Performance of contract rendered impossible by sea peril—Implied condition excusing vendors.

In this case the plaintiffs claimed damages for the breach of contract, dated October 24, 1899, by which the defendant sold to the plaintiffs a cargo of Egyptian cottonseed to consist of from 1,600 to 1,900 tons to be shipped per the steamship Orlando at Alexandria and (or) Port Said and (or) Ismailia during January, 1900, at £6 3s. 9d. per ton. In November the Orlando stranded in the Baltic and sustained damage, and it was impossible for the necessary repairs to be executed in time for the ship to load the cargo in January. On December 28 the defendants informed the plaintiffs that the performance of the contract was impossible. After some abortive arbitration proceedings this action was commenced on February 28. The plaintiffs claimed as damages £2,740, being the difference between the contract price and the market price on January 31. The defendants contended that, the performance of the contract having become impossible, they had not committed a breach; and they further contended that, if they were liable, the proper measure of damages was the difference between the contract price and the market price at the end of December, on which basis they paid £750 into Court whilst denying liability. At the conclusion of the arguments his Lordship reserved judgment.

Mr. Joseph Walton, Q.C., and Mr. F. W. Hollams appeared for the plaintiffs; Mr. Bray, Q.C., and Mr. Edward Bray for the defendants.

MR. JUSTICE MATHEW delivered judgment, and, after stating the facts, said that the argument for the plaintiffs was that the contract was an absolute contract to load a cargo in January, and that there was therefore an implied warranty that the ship should be fit to take a cargo on board at that time; that the defendants had taken the risk of the ship's not being able to do so, and must pay damages for the breach of contract. The principle for which the plaintiffs contended was to be found in many cases, the most recent being "*Ashmore v. Cox*" (4 Com. Cas., 48, [1899] 1 Q.B., 436). For the defendants it was urged that any such warranty was unreasonable, and ought not to be implied. Both parties, it was argued, assumed that the ship would be fit to fulfil her engagement, and therefore there was an implied condition, it was said, by which the defendants were excused if the performance of the contract was rendered impossible by a sea peril. His Lordship read a passage from the judgment of Mr. Justice Blackburn in "*Taylor v. Caldwell*" (3 B and S., at p. 833), which stated the principle applicable to this case, and, continuing, said that in his opinion the defendants' contention was right, and that under the circumstances the contract was at an end, it having become impossible to perform it, and that a condition ought to be implied that in the circumstances which had happened neither party ought to be bound. It was further contended for the plaintiffs that such an implication was not reasonable in this case having regard to clause 5 of the contract, which contained, it was said, the sole conditions on which the contract was not to be binding. That clause provided that, in case of prohibition of export, blockade, or hostilities preventing shipment, the contract or any unfulfilled part thereof was to be can-

celled. It was said that, there being that express provision, no additional condition ought to be implied. A similar argument was urged in "*Jackson v. Union Marine Insurance Company*" (L.R., 10 C.P., 125). The expressed and the implied stipulations were, however, not repugnant to each other, and the implied stipulation applied to a different stage of the transaction from that dealt with by clause 5. There had been a prolonged argument as to the measure of damages. It was not necessary now to decide that point, but his Lordship expressed the opinion that the plaintiffs' contention was not tenable. Having regard to the decision in "*Roth v. Taysen*" (1 Com. Cas., 240, 306), the plaintiffs were bound to mitigate the loss by acting as reasonable men of business, and it appeared that they could have got another cargo in December for less than the price which would have been payable at the end of January. There would be judgment for the defendants, with costs.

[Solicitors—Hollams, Sons, Coward, and Hawksley; Tilleards.]

Q.B. Div. }
(Wright, J.) }

1900.
May 7.

IN RE HARRISON.*

Bankruptcy—Void settlements—Payment of premiums on life policies—Death of bankrupt—Bankruptcy Act, 1883, sec. 47.

This was an application by the trustee in bankruptcy of Cartmell Harrison claiming a declaration that two-fifths of the moneys payable under certain policies on the life of the bankrupt, or at any rate all premiums paid by the bankrupt to keep on foot the policies between 1889 and 1895, and two-fifths of the premiums paid by him between 1895 and 1899 in respect of the same policies, were voluntary settlements of the property of the bankrupt within the meaning of section 47 of the Bankruptcy Act, 1883, and void against him (the trustee) accordingly in the following circumstances:—In 1877 Mr. Cartmell Harrison executed a post-nuptial settlement by which certain policies of insurance on his own life became vested in trustees for the benefit of members of his family as he might appoint. There was no covenant or other provision for payment of the premiums. In 1895, on the marriage of a daughter, Mr. Harrison appointed for her benefit three-fifths of the interest in the policies; but again there was no provision made for keeping up the policies. He continued to pay the premiums until his bankruptcy, which occurred in November, 1899, and was followed in two days by his death. The Bankruptcy Act, 1883, section 47, enacts that "any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration . . . shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement." It was agreed that the appointment to the daughter on her marriage in 1895 made the settlement one for valuable consideration to the extent of the three-fifths appointed to her; and it was admitted that the parties claiming under the settlement could not prove that the settlor (Cartmell Harrison) was solvent in 1889.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

*Reported by H. L. FRASER, Esq., Barrister-at-Law.

Mr. Muir Mackenzie and Mr. Whinney appeared for the trustee in bankruptcy; Mr. Reed, Q.C., and Mr. O. L. Clare appeared for the trustee of the settlement.

MR. JUSTICE WRIGHT said.—The question is whether for the purposes of section 47 of the Bankruptcy Act, 1883, Mr. Cartmell Harrison's payments of the premiums on the settled policies, during the ten years before his bankruptcy, ought to be regarded as voluntary settlements, either of the premiums paid or of so much of the value of the policies as those payments may be supposed to have produced. The contentions of the respondent, as I understand them, are that the only settlement was the original settlement made in 1877, more than the ten years before the bankruptcy; that the annual payments of the premiums did not increase the sum which was to become payable on the death, and which was the subject of the settlement, but were merely performances of the condition on which the continuance of the liability of the insurance company depended; and that, even if the payment of the premium in any year can be regarded as a settlement at all, it was a settlement only of the amount of the premium itself and not of any part of the value of the policies. It seems however to be plain that the payment of the premiums is part of the consideration for the insurance (see "*Dalby v. India and London Life Assurance Company*," 15 C.B., 365), and the payment of each part of the consideration is *pro tanto* a purchase of the right to the amount insured, and, being paid for the purpose of acquiring or securing the settled fund and so converted into a portion of the settled fund, seems to be a fresh settlement from time to time as the payments are made. The payment of the premiums transfers the money from the settlor as the consideration for the settled fund continuing to exist. I cannot see any difference in this respect between payment of the premiums on an old policy and the payment of a premium for a new policy. In either case the payment of the premiums upon a settled policy seems in effect either to be a settlement of the premiums paid or a settlement of what is produced by the payment of it; and the only remaining question is which of these two settlements it should be considered to be. It seems to me that the thing which is settled is not the premium paid, but the fund or result which is produced by it; and that the section undoes in favour of the trustee in bankruptcy, not the payment of the premiums, but the alienation from the settlor's estate of whatever it is that, by paying the premiums for the purposes of the settlement, he has assured to the voluntary *cestui que trust*—and that is, not the amount of the premium, but the benefit resulting from the payment of it. The case seems to me to be the same in substance as if the money paid as premiums had been invested in buying the reversion of an estate for the benefit of the volunteer. In that case the trustee in the settlor's bankruptcy would, I suppose, take not the price at which the reversion was bought, but the reversion, which may be much more valuable than the price paid for it, but which, and not the price paid, is in the case supposed, the property which at the time of the accrual of the trustee's title is vested in the volunteer by virtue of the settlement and but for the settlement would have been vested in the bankrupt. This it is which the section gives back to the bankrupt, and through him to his trustee in bankruptcy. It is admitted by the trustee in bankruptcy that so much of the value of the policies as represents three-fifths of the premiums paid before 1895 must be regarded as settled in 1895 for valuable consideration. There must be a declaration that the trustee in bankruptcy is entitled to so much of the value of the policies as represents the premiums paid during the ten years before the bankruptcy, after deduction of so much of that value as represents

premiums paid between the commencement of the ten years and the appointment in 1895. If the amounts cannot be agreed there must be an inquiry.

[Solicitors—Harrison and Powell; Black and Moss.]

Court of Appeal (Lindley, M.R., } 1900.
Rigby and Collins, L.J.J.) } May 9.

BARRON V. WILLIS.*

Solicitor—Duties—Fiduciary relation—Solicitor and client—Gift by client—Absence of independent advice.

Decision of Cozens-Hardy, J. (15 *The Times* L.R., 469), reversed.

This was an appeal against a decision of Mr. Justice Cozens-Hardy's (reported in *The Times* of July 7 last and in 15 *The Times* L.R., 469). The case was one of interest and importance to solicitors. The plaintiff, Mrs. Annie Butler Barron, the wife of Mr. William Barron, and formerly Mrs. Joseph Willis, sought to rectify or set aside a deed executed by her in 1891. In October, 1889, the plaintiff was married to Mr. Joseph Willis. He was the only son of Thomas Willis, who died in April, 1890, having appointed his widow, Ann Willis, his executrix and sole residuary legatee. On December 29, 1890, a deed was executed which was made between Ann Willis of the first part, Joseph Willis of the second part, the plaintiff (then his wife) of the third part, and the defendants Nicholas Willis, Isaac Dunn, and William Moore Skinner of the fourth part. It contained a recital that the property of Thomas Willis consisted of the particulars mentioned in the first three schedules, and that the property mentioned in the fourth schedule belonged to Joseph Willis. There was a further recital that Ann Willis believed that it was her late husband's intention to revoke, or partially revoke, his will and to dispose of his property in favour of his widow and son, and that, with a view to carrying out in some measure the wishes of the testator and also with the object of making provision for Joseph Willis and his wife and any future wife and the lawful issue of Joseph Willis, it had been agreed between Ann Willis and Joseph Willis by way of family arrangement that the properties mentioned in the schedules should be settled in manner thereafter expressed. The trusts were during the joint lives of Ann Willis and Joseph Willis to pay him £100 a year, subject thereto to pay the income to Ann Willis during her life, and subject thereto there was a protected life interest given to Joseph Willis, and after his death the trust was for the widow of Joseph Willis during her life, with subsequent trusts in favour of the children or issue of Joseph Willis, and in default of issue a general power of appointment by deed was given to Joseph Willis and the plaintiff jointly, and subject thereto a general power of appointment by deed was given to the survivor, and subject thereto the property was settled in trust as to one half for Nicholas Willis and as to the other half for Frederick Herbert Skinner, son of the defendant William Moore Skinner, absolutely. Nicholas Willis was a cousin of Joseph Willis, and Frederick Herbert Skinner was a great friend of Joseph Willis, and was then under 21 years of age. In the year 1891 differences arose between Joseph Willis and his wife mainly, if not entirely, by reason of the intemperate habits into which he had fallen. On October 3, 1891, a deed was executed by Joseph Willis, the plaintiff (his wife), and Ann Willis. This deed contained a recital that the deed of 1890 did not in all respects carry out the wishes of the parties to the family arrangement, and that it had been agreed that for the purpose of varying the trusts

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

of the same deed and of fully carrying out the intention of the parties the deed now being stated should be executed, Ann Willis concurring therein to show her assent to the same; and the deed provided, first, that the provision for the widow of Joseph Willis during his life should be read and construed as a provision only for the benefit of the widow so long only as she should remain the widow of Joseph Willis, and that the words "after the decease of the survivor" should be read and construed as "after the decease of the survivor or the marriage of the widow"; and by the same deed Joseph Willis and the plaintiff, in exercise of the joint power of appointment vested in them in case of failure of issue, appointed that the trust funds should be held in trust for such person and in such manner as Joseph Willis alone should by deed appoint, and in default of appointment, and so far as no such appointment should extend, then (excluding the power of appointment by the widow of Joseph Willis) upon the trusts declared by the principal deed of 1890. Joseph Willis died intestate and without issue in September, 1893. By a deed dated August 2, 1894, and made between the plaintiff of the first part, Ann Willis of the second part, Frederick Herbert Skinner of the third part, and Nicholas Willis, Isaac Dunn, and William Moore Skinner of the fourth part, after an accurate recital of the effect of the deeds of 1890 and 1891, and a recital that it had been agreed by way of family arrangement that such further modification of the trusts as was therein-after contained should be executed, it was witnessed and it was thereby agreed and declared, and particularly Ann Willis, Nicholas Willis, and Frederick Herbert Skinner thereby agreed, declared, and directed that the direction contained in the settlement for payment or application of the income of the trust funds to or for the benefit of the widow of Joseph Willis during her life should have full force and effect, and that that income should be paid to the plaintiff during her life in the same manner as if Clause 1 of the modification deed of 1891 had not been inserted therein, and in all other respects the deeds of 1890 and 1891 should be and were thereby confirmed. All the three deeds of 1890, 1891, and 1894 were prepared by Mr. Skinner as solicitor, with the assistance of counsel. Mrs. Ann Willis died in April, 1897. In November, 1897, the plaintiff married her present husband, Mr. Barron, and on February 22, 1898, this action was commenced, claiming a declaration that the deed of 1891 was not binding on the plaintiff so far as it purported to deprive her of the general power of appointment given to her by the deed of 1890; a declaration that the deed of 1894 was not binding on her so far as it confirmed the deed of 1891; and rectification of the same deeds so far as necessary. Mr. Skinner purchased the reversionary interest of his son in one moiety of the property. The facts above set forth were stated by the learned Judge in his judgment to be undisputed. And he said that upon the evidence he had arrived at the following conclusions with regard to the facts which were in dispute:—In the first place, he thought that Joseph Willis and his mother, Ann Willis, were both desirous that the property which came from them should not go to "a strange man," by which, of course, was meant a second husband of the plaintiff, or to any member of her family, and this desire was made known to the plaintiff. She did not deem this desire unreasonable or improper, and she consented to give effect to it. Joseph Willis and his mother thought that the deed of 1890 did not, in respect to those matters, give effect to their real intentions, though those intentions had not been communicated to Mr. Skinner. He was angry at the suggestion that there was any mistake on his part, and unwilling that the deed should be modified. In the second place his

Lordship thought the deed of 1891 was in substance a transaction between the plaintiff and her husband. In the third place, he thought the nature and effect of the deed of 1891 were explained to the plaintiff on September 30, 1891, and again on October 3, when it was executed by her and her husband, and that on that occasion Mr. Skinner suggested that both of them should go to some other solicitor. In the fourth place, he thought the deed of 1894 was most carefully explained to the plaintiff before its execution, and he believed that she understood its effect, although she had now brought herself to believe that it was never explained to her and that she never understood it. In the fifth place his Lordship thought that Mr. Skinner did act as the plaintiff's solicitor in the matter of the 1894 deed, which was not complained of, but that he did not act for her in the matter of the 1891 deed. Whether at that time the relation of solicitor and client existed between the plaintiff and Mr. Skinner was a matter of more doubt, but on the whole he was not satisfied that Mr. Skinner did act as her solicitor until long after the execution of the deed of 1891. In the sixth place his Lordship thought that no case had been made for setting aside or rectifying the deed of 1891, unless it could be impeached on the ground of some fiduciary relation. And on the whole his Lordship came to the conclusion that the plaintiff's claim had failed, and he dismissed the action.

The plaintiff appealed.

Mr. Hughes, Q.C., and Mr. Ashton Cross were for the plaintiff; Mr. Astbury, Q.C., and Mr. P. S. Stokes for the defendant N. Willis; Mr. F. A. Milne for the defendant Dunn; and Mr. Eve, Q.C., and Mr. Austen Cartmell for the defendants W. M. Skinner and F. H. Skinner.

The COURT allowed the appeal.

The MASTER of the ROLLS said that the case was an important and difficult one. It had occupied a long time, but he could not say that any time had been unnecessarily consumed. The case was important because it was very near the line. The principles of law were well settled, though the application of them was difficult. The question was whether Mr. W. M. Skinner stood in such a confidential relation to the plaintiff in these transactions as made it his duty to see that she had independent advice. His Lordship made no reflection on Mr. Skinner, nor said that he did not act with perfect honesty. But on a consideration of the facts his Lordship thought it impossible to say that a confidential relation did not exist between the plaintiff and Mr. Skinner. Under the deed of 1890 he was a trustee for the plaintiff as much as for any other of the persons interested. Under that deed his position was one of difficulty and delicacy, not only because he was a trustee, but because his own son took a benefit under the deed. Before the deed of 1891 was executed the plaintiff had consulted Mr. Skinner about her position. In the latter part of the summer of that year there was some unpleasantness between her and her husband. He and his mother appeared to have desired that the deed of 1890 should be altered, and they naturally consulted Mr. Skinner. The plaintiff was told that they desired to have some alterations made, and his Lordship was satisfied that the plaintiff knew that it was intended to cut down her life interest to an interest during widowhood, and that her power of disposition was to be cut down. She knew that her husband was to have some power of disposing of the property. Whether she knew that her power of disposition was to be taken away altogether was more obscure. It was left to Mr. Skinner to carry out these intentions. There were different ways of doing this. What was his duty to the plaintiff in the matter? She said that she trusted him to carry it out properly. He did to

a certain extent suggest that she should go to another solicitor, but he did not explain to her her real position. He never gave her the advice that the proposed deed was so adverse to her interests that she ought not to execute it without independent advice. He set too low a standard of his duty. It was contended that he was merely carrying out a previous bargain between the parties. Considering his position it was impossible to accept that view. He did not rise to the occasion or appreciate the extreme delicacy of his position. He did not explain to her the loss which she would suffer by the deed, and she did not realize it. The rule which governed such cases was well settled. It was founded on a knowledge of human nature and was intended to prevent the very mischief which arose in such a case as the present. As to the deed of 1894, she by it confirmed the deed of 1891 without having independent advice, and the confirmation could not bind her. The defendant Nicholas Willis, being a volunteer, had no equity to prevent the setting aside of the deed of 1891. Mr. Justice Cosens-Hardy had not attributed sufficient importance to the confidential relation which existed between the plaintiff and Mr. Skinner in 1891, and he had overrated her admission that she did not employ Mr. Skinner as her solicitor. The appeal must be allowed and the declarations for which the plaintiff asked made.

LORD JUSTICE RIGBY delivered judgment to the same effect, in the course of which he said that, assuming that the effect of the deed of 1891 was fully explained by Mr. Skinner to the plaintiff, that was not enough. She was entitled to independent advice. The rule of law was that a person who entered into a transaction which had the result of benefiting the solicitor who acted in it was not bound by it, unless he had independent advice. It was plain that the plaintiff had no such advice. Mr. Skinner gave her an explanation of the deed, but that was entirely beside the mark.

LORD JUSTICE COLLINS gave a similar judgment.

[Solicitors—Wynne-Baxter and Keeble, for Beldon and Ackroyd, Bradford; Sismey and Sismey, for Skinner, Son, and Church, Sunderland; Patersons, Snow, and Co., for Ranson, Nelson, and Maling, Sunderland.]

Chan. Div. } 1900.
(Stirling, J.) } May 9.

PARDOE V. PARDOE.*

Waste—Tenant for life—Timber—Will—Construction.

A testator gave his wife (the tenant for life) "full and absolute control" over all his property during her life; held that these words did not enable her to commit waste.

This was an action for waste. The question was whether the defendant, who was tenant for life in possession of certain estates in Shropshire, was entitled to cut timber and apply the proceeds of sale thereof to her own use. The estates in question belonged to the late Mr. George Pardoe in fee simple. By his will, dated in 1879, he gave all his real and personal estate whatsoever and wheresoever and over which he might have any power of disposition by will unto and to the use of his wife, the defendant, Mary Elizabeth Pardoe, during her life, and after her decease, subject to the payment of his debts, funeral and testamentary expenses, and the legacies thereinbefore given, the testator gave all his real estate and all the residue of his personal estate

unto and to the use of his brother Frederick Pardoe, if living at his decease, and the testator appointed his said wife his sole executrix and gave her full and absolute control over all his property during her life. The testator died on November 29, 1884, during the lifetime of Frederick Pardoe. Frederick Pardoe, by his will dated in 1887, devised all the real estate of which he had power to dispose under the will of his brother (subject, *inter alia*, to the life estate therein of the defendant) to the use of his son, the plaintiff George Owen Pardoe, during his life without impeachment of waste, and after his decease to the use of his first and other sons successively according to seniority in tail with remainders over. Frederick Pardoe died on December 20, 1892, and his will was duly proved by his executors. The plaintiff alleged that the defendant, Mrs. Pardoe, claimed to be entitled to cut and sell timber and timber-like trees on the estate and to retain the proceeds thereof for her own use and benefit, notwithstanding that by the will of her late husband she was not punishable for waste; and that she had in fact from time to time cut and sold considerable quantities of timber and timber-like trees and applied the proceeds for her own use and benefit. The plaintiff claimed certain declarations and consequential relief. The defendant admitted that she had on several occasions cut timber on the estate, but alleged that she had laid out the proceeds of sale of such timber in repairs on the estate, and she claimed to be entitled to cut timber in a due course of management of the estates.

Mr. Butcher, Q.C., and Mr. P. M. Walters appeared for the plaintiff; Mr. Upjohn, Q.C., and Mr. G. E. Cruickshank for the defendant.

MR. JUSTICE STIRLING, in giving judgment, after stating the facts of the case, said that all the Court was now asked to do was to make certain declarations and to grant an injunction. The first question was whether the defendant was made impeachable for waste. That was a question of construction. The testator gave his wife, the defendant, "full and absolute control over all his property during her life." The question was whether that enlarged her interest under the will, and in his Lordship's opinion it did not. The property in question included real and personal estate. Where there was a gift of personal property for life with remainder over, the intention of the testator was shown that the property should pass to the remainderman. According to the rule in "*Howe v. Lord Dartmouth*," property of a wasting nature must not, in such a case, be retained, but must be sold, unless it appeared from the will that specific enjoyment by the tenant for life was intended. Though the question did not arise in this case with reference to personal estate, it might be considered, by way of a test, what was the testator's meaning with regard to the personal estate. Would the words used by the testator enable the defendant to set aside the rule in "*Howe v. Lord Dartmouth*"? In his Lordship's opinion, they would not. They only gave the defendant wide powers of management and did not affect the nature of the interests given by the will. It was, therefore, incumbent upon the defendant to preserve the personal property in such a way as not to affect the rights of tenant for life and remainderman. The same reasoning applied as to the real estate. The words did not enable the defendant to commit waste, and she was therefore impeachable for waste. That being so, it was proved that she had cut oak trees over 20 years old, which, according to law, were timber trees, and a tenant for life was not entitled to cut them unless authorized by the will to do so. *Prima facie*, therefore, she had committed waste, and the burden was upon her to show that she was entitled to do so. Two defences were set up. First, it was

*Reported by G. A. STANNAN, Esq., Barrister-at-Law.

said that this was a timber estate within "Honywood v. Honywood" (L.R., 18 Eq., 306) and "Dashwood v. Magniac" ([1891] 3 Ch., 306). In the former case Sir George Jessel, Master of the Rolls, said, "Once arrive at the fact of what is timber, the tenant for life impeachable for waste cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber estates—that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate and, therefore, goes to the tenant for life." And the ground of the principle upon which this was based was more fully explained in "Dashwood v. Magniac." What his Lordship had to do was to see how the estate had been dealt with in the lifetime of the testator. [He dealt with the evidence on that point.] It was to the effect that the trees had been cut at random and that the woods had not been worked periodically. The essence of a timber estate was that there should be a regular course of cultivation. Upon the evidence there was nothing of the sort during the life of the testator. If it were to be held that this estate was a timber estate within "Honywood v. Honywood," then almost every estate in England might be a timber estate. This estate was, in his Lordship's opinion, a very good example of what was not a timber estate. That defence therefore failed. Then it was said that what had been done came within the power of management conferred by the will. His Lordship then further referred to the evidence as to what had been done in the woods on the estate, and came to the conclusion that the defendant had not treated the woods in due course of management; she had destroyed the timber without properly cultivating the underwood. The plaintiff was entitled to (1) a declaration that the defendant was not dispunishable for waste; (2) a declaration that she was not entitled to cut timber and timber-like trees except in due course of management and at seasonable periods for the benefit and preservation of the estate; (3) a declaration that the defendant was liable to account for the proceeds of timber and timber-like trees wrongfully cut down, and was not entitled to apply such proceeds for her own use and benefit. There would be no injunction, but liberty would be given to apply for one if it should become necessary.

[Solicitors—Walters and Deverell, for the plaintiff; Richard White, agent for Byrch and Cox, for the defendant.]

Q.B. Div. (Ridley }
and Darling, J.J.) }

1900.
May 9.

THE ATTORNEY-GENERAL AND THE MIDLAND RAILWAY COMPANY.*

Revenue—Stamp duty—Company—Increase of nominal share capital—Stamp Act, 1891, sec. 113.

This was a special case stated by consent upon information filed by the Attorney-General claiming from the Midland Railway Company duty and penalties alleged to be due by reason of the increase of the

nominal share capital of the company under the authority of an Act of Parliament to the amount of £60,367,581 3s. 6d., and by reason of the neglect of the company to deliver to the Commissioners of Inland Revenue a statement of the amount of such increase within the period of one month after the passing of the Act authorizing the same, contrary to section 113 of the Stamp Act, 1891. That enactment provides that "in case of any increase of the amount of nominal share capital of any corporation or company, whether now existing or to be hereafter formed, being authorized by any . . . Act, a statement of the amount of such increase shall be delivered by the corporation or company to the Commissioners" within one month after the passing of the Act. The same section provides that the statement shall be charged with an *ad valorem* duty of 2s. for every £100, and also provides for the payment of penalties in the event of neglect to deliver the statement. By an Act passed on August 6, 1897, the Midland Railway Company were authorized to make the following alterations in their stock:—£342,500 Midland Railway four per cent. guaranteed stock was authorized to be created and issued to the Kettering, Thrapston, and Huntingdon Railway Company in substitution for the then existing four per cent. guaranteed stock of the company; £25,000 Midland Railway four per cent. preference stock was authorized to be created and issued to the liquidators of the same company in extinguishment of contingent rent payable to the company; £960,000 new stock was authorized; £3,899,121 5s. four per cent. consolidated perpetual rent-charge stock was authorized to be consolidated so as to amount to £6,238,594 guaranteed stock, bearing interest at the rate of £2 10s. per cent. per annum—an increase of £2,339,472 15s.; £150,000 Sheffield and Rotherham perpetual preferential stock was authorized to be consolidated so as to amount to £375,000 guaranteed stock, bearing interest at the rate of £2 10s. per cent. per annum—an increase of £225,000; £6,337,076 12s. 6d. four per cent. consolidated guaranteed preferential stock was authorized to be consolidated so as to amount to £10,139,322 12s. guaranteed stock, bearing interest at the rate of £2 10s. per cent. per annum—an increase of £3,802,245 19s. 6d.; £29,048,191 15s. four per cent. perpetual preference stock was extinguished, and in lieu thereof £46,477,106 16s. two-and-a-half per cent. perpetual preference stock was created—an increase of £17,428,915 1s.; and ordinary stock (existing and authorized) to the amount of £35,434,947 8s. was extinguished, and in lieu thereof there was created £35,434,947 8s. preferred converted ordinary stock, entitled to a dividend at the rate of £2 10s. per cent. per annum, and £35,434,947 8s. deferred converted ordinary stock—an increase of £35,434,947 8s. The railway company delivered such a statement as is required by section 113 with reference to the £342,500 Midland Railway four per cent. guaranteed stock, the £25,000 Midland Railway four per cent. preference stock, and the £960,000 new stock, and such statement was stamped in accordance with the Act, but they refused to deliver a statement with reference to the remainder of the increases of share capital authorized by their Act. The Commissioners, however, claimed duty upon the whole of the increases of share capital amounting to £60,558,081 3s. 6d.

The ATTORNEY-GENERAL (with whom were Mr. Danckwerts, Q.C., and Mr. S. A. T. Bowlatt) contended that in the case of each stock there was an increase of the nominal share capital of the company, and that the duty was therefore payable. He cited "Attorney-General and Milford Docks Company" (69 L.T., 458).

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

SIR R. REID, Q.O. (with whom were Mr. Asquith, Q.C., and Mr. Loechnis), for the defendants, distinguished "Attorney-General and Milford Docks Company" upon the ground that in that case the alteration of capital was effected in order to make persons shareholders of the company who were before only debenture-holders, and that there was, therefore, in that case a real increase in the share capital of the company. He contended that section 113 did not apply where there was, as here, no real addition to the value of the company's capital.

The COURT gave judgment for the Crown.

MR. JUSTICE RIDLEY said that he did not find that section 113 required the interpretation which Sir R. Reid put upon it. "Nominal share capital" meant the capital of the company in shares computed according to the figure value attached to the shares. An increase of the nominal share capital would therefore take place if the figure value of the shares was altered from, say, £100 to £200, and the increase of share capital so effected would be one in respect of which the additional duty provided for by section 113 would be payable. In his Lordship's opinion the alteration in the stock of the Midland Railway Company authorized by their Act of 1897 did amount to an increase of their nominal share capital, and the duty was payable accordingly.

MR. JUSTICE DARLING said that he was of the same opinion. Sir R. Reid's contention amounted to this—that whereas the section said, "in case of any increase of the amount of nominal share capital," he would read it as if it ran "any real increase," and he said that what happened in this case was that there was only a nominal increase in the amount of the nominal share capital, and not a real increase. Suppose the nominal share capital stood at £50,000 and a rearrangement took place the result of which was that the nominal share capital stood at £75,000. That could not happen without an increase of the amount of the nominal share capital. It was true that the assets of the company might not have been increased, but the nominal share capital was undoubtedly increased.

[Solicitors—The Solicitor of the Inland Revenue, for the Crown; J. S. Beale, for the defendants.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.J.J.) } 1900.
May 10.

OWEN V. LAVERY.*

Malicious Prosecution—Maliciously presenting bankruptcy petition—Absence of reasonable and probable cause.

This was an application for a new trial or judgment in an action tried before Mr. Justice Grantham and a special jury, reported in *The Times* of March 27. The action was brought to recover damages from the defendant for maliciously and without reasonable and probable cause presenting a bankruptcy petition against the plaintiff. The facts were these:—In the year 1895 there was a syndicate called the Iberian Mines Syndicate (Limited), which was working some mines in Spain. By a resolution passed in November, 1895, the syndicate appointed the plaintiff Owen to be its manager in Spain at a certain salary and also at an additional remuneration (if the syndicate should sell its property to a company at a profit) of 5 per cent. in cash and shares of such profit less all proper deductions. By a resolution passed in June, 1896, the syndicate decided to sell its property to a company formed for the purpose of buying it, and entered into voluntary liquidation and appointed the defendant Lavery liquidator. The sale to the new company was duly

carried out, and it became the duty of the defendant to discharge all claims on the syndicate. He received on behalf of the syndicate £20,000 in cash from the new company and shares in the new company of the face value of £95,000. In May, 1897, the plaintiff received 1,500 shares on account of his claim against the syndicate, and there still remained due to him in the hands of the defendant a large sum exceeding, according to the plaintiff's account, £4,000. In 1898 the defendant, who was the holder of a bill of exchange for £68 13s. 4d. accepted by the plaintiff, sued the plaintiff thereon, and obtained judgment against him for that amount on March 7, 1898. On March 18 the defendant served a bankruptcy notice on the plaintiff in respect of the judgment, and on April 5 he presented a bankruptcy petition against the plaintiff, and on May 4 a receiving order was made. On July 22 the defendant, as liquidator, submitted accounts to the shareholders of the syndicate, and the liquidation was concluded and the syndicate dissolved. On December 8 the plaintiff was adjudicated bankrupt. In March, 1899, the Official Receiver, who had been appointed trustee in the bankruptcy, assigned the plaintiff's claim against the defendant as liquidator to Mrs. Owen, the wife of the plaintiff. She brought an action against the defendant, and the defendant settled the action by paying her £1,400. A portion of that sum—viz., £700—was paid to the Official Receiver, who paid therewith the plaintiff's debts in full. The adjudication of bankruptcy and the receiving order were thereupon rescinded, and subsequently the plaintiff brought this action, alleging that the defendant had taken the bankruptcy proceedings maliciously and without reasonable and probable cause.

The jury found a verdict for the plaintiff for £2,000 damages, and the learned Judge entered judgment accordingly.

The defendant appealed.

MR. MCCALL, Q.C., and MR. HOBSON, for the defendant, contended that there was no evidence of malice or of want of reasonable and probable cause. The motive with which a legal act was done could not be inquired into. Here there was at date of the bankruptcy petition a valid debt due from the plaintiff upon which the defendant had a legal right to issue a bankruptcy notice and obtain an adjudication in bankruptcy against the plaintiff, under section 4 of the Bankruptcy Act, 1883. At that date there was no debt due from the defendant to the plaintiff which could be legally set off against that due from the plaintiff to the defendant. They cited "*Johnson v. Emerson*" (L.R., 6 Ex., 329), "*King v. Henderson*" ([1898] A.C., 720). The adjudication had only been set aside because the creditors had been paid in full.

MR. RAWLINSON, Q.C., and MR. S. H. EMANUEL, for the plaintiff, read a letter from the defendant showing that as early as July, 1897, he knew that a large sum was due from him to the plaintiff. They contended that the purpose of the bankruptcy proceedings was not to obtain payment of the debt but to prevent the plaintiff from establishing his claim against the defendant as liquidator of the Iberian Mines Syndicate (Limited).

LORD JUSTICE A. L. SMITH, in giving judgment, said that there was no reason to interfere with the verdict and judgment of the Court below. It was clear that the jury had agreed with the learned Judge that the bankruptcy proceedings were part of a fraudulent scheme to prevent the plaintiff from getting his just due. His Lordship was not surprised at that conclusion. That in an action the gist of which was malice the Court would not take upon itself to say that the verdict of £2,000 was excessive. The appeal must therefore be dismissed.

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

LORD JUSTICE VAUGHAN WILLIAMS concurred. The mere motive with which a legal act was done was immaterial, but the act of issuing proceedings in bankruptcy for purposes foreign to the legitimate object of the bankruptcy legislation and as an abuse of the process of the Court might well be called a fraudulent act. Such an act had two of the essentials of an actionable wrong, being malicious and without reasonable and probable cause. The third essential was not wanting—viz., that the proceedings should have been set aside; for it was not necessary that they should be set aside on the ground of being an abuse of process. The reason why it was necessary that the proceedings should have been set aside was simply because it was unseemly that there should be in existence two decrees of the Court inconsistent with each other. Given malice and want of reasonable and probable cause for issuing process, the necessary allegation that such process had been set aside was proved if the process was, in fact, set aside. It was not necessary to show that it ought never to have been issued. The adjudication had been set aside here, and therefore the act of the defendant had all the essentials of a wrong.

LORD JUSTICE ROMER delivered judgment to the same effect.

Q.B. Div. (Ridley and) 1900.
Darling, J.J.) May 10.

BEAUMONT V. BOWERS (SURVEYOR OF TAXES).*

Revenue—Income-tax—Salary of public servant
—Deductions—Sums chargeable on salary by
virtue of an Act of Parliament—16 and 17 Vict.,
c. 34, sec. 2, Sched. E.

This was a case stated by the Commissioners of Inland Revenue. The appellant, Mr. Herbert Beaumont, was appointed clerk to the Guardians of the Poor of the Wakefield Union and the Assessment Committee and School Attendance Committee of the said union on March 4, 1884, a date prior to the commencement of the Poor Law Officers' Superannuation Act, 1896, which came into operation from and immediately after the 29th day of September, 1896. The appellant did not exercise the option allowed to him as such officer or servant by signifying in writing to the aforesaid authorities within three months after the commencement of the Act, in pursuance of section 15 thereof, his intention not to avail himself of the provisions of that Act. He was assessed to the income-tax under Schedule E for the year ended April 5, 1899, in the sum of £510, the amount of his salaries as clerk to the Guardians Assessment Committee and School Attendance Committee of the Wakefield Union. After deducting the sum of £221 for expenses borne by him in the performance of the duties of the appointments which he holds, duty was left payable on the net sum of £289, which, at 8d. in the pound, amounts to £9 12s. 8d. The appellant claimed that the assessment was excessive by the duty on a sum of £15 10s. deducted from, or paid by, and borne by him for contributions made annually by him under the provisions of sections 12 and 13 of the Poor Law Officers' Superannuation Act, 1896 (59 and 60 Vict., cap. 50). Section 12 of that Act makes an annual contribution, according to a scale fixed by section 13, compulsory on every officer to whom the Act applies. In return for these contributions the Act provides for the superannuation of the officer after serving 40 years or on his attaining 65 years, and in other circumstances. The assessment to income-tax in respect of a public office

such as the appellant holds is laid under the general charging rule of the Act 16 and 17 Vict., cap. 34 section 2, Schedule E, into which has to be read the rules for charging the duties assessable under the now obsolete Schedule E of 5 and 6 Vict., cap. 35, section 146, the first of which rules charges all persons holding public offices with tax on all "salaries, wages, fees, perquisites, or profits, after deducting therefrom the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and *bona fide* paid and borne by the party to be charged." The Commissioners confirmed the assessment.

MR. ASQUITH, Q.C., and Mr. J. ROSKILL, for the appellant, submitted that he had the right under section 146 of the Act of 1842 to make the deduction claimed, as it was in respect of compulsory payments made by virtue of an Act of Parliament.

MR. ROWLATT (the Attorney-General, Sir R. B. Finlay, Q.C., and Mr. Danckwerts, Q.C., with him), for the Crown, submitted that the payment was not a legitimate deduction under the 146th section. It was found necessary to introduce into section 54 of the Act of 1853, in order to legalize a somewhat similar deduction, the following words, "and any persons who shall under any Act of Parliament be liable to the payment of any annual sum or to have deducted from his salary or stipend, in order to secure a deferred annuity to his widow or a provision to his children after death, shall be entitled to deduct." That if section 146 had the extended meaning which the appellant sought to give it, then the deduction made under the fifth rule of the same section from the salaries of public officers in respect of income-tax payable by them would also be a legitimate deduction, which admittedly it was not.

MR. JUSTICE RIDLEY said that the decision of the Commissioners was wrong, and the appeal must be allowed. *Prima facie* there was power to deduct the payments, as they were "duties or other sums payable or chargeable by virtue of an Act of Parliament." It had been contended that as section 54 of the Act of 1853 expressly authorized certain deductions, amongst which the present deductions were not included, that it could not have been intended that the compulsory payments made by the appellant should be included. The answer was that section 54 only dealt with insurance matters. It went on to say, in order to cover the whole ground, that where the payments were made to benefit others who should come after the recipient they should be included. To hold otherwise would be to place a very limited construction upon section 146.

MR. JUSTICE DARLING concurred. Section 54 did not cover all the ground of section 146, nor did section 146 wholly cover section 54. It was perfectly possible that two Acts of Parliament might overlap one another. To some extent they dealt with the same thing, but he did not therefore draw the inference that the words used were not to have their usual meanings.

Appeal allowed.

[Solicitors—Bridges, Sawtell, and Co., agents for Vulliamy and Son, Ipswich, for the appellant; The Solicitor of the Inland Revenue, for the Crown.]

Q.B. Div. (Bruce, J.) } 1900.
May 10.

MARSH V. HUGHES-HALLETT.*

Contract—Offer and acceptance—Horse sent on approval—Failure to return.

Held, concluded contract.

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

*Reported by C. G. WILBRAMAN, Esq., Barrister-at-Law.

This was an action brought by Mr. Frederick Marsh, the plaintiff, against Mr. Victor Hughes-Hallett, the defendant, to recover £65, the price of a horse. On January 13 last the plaintiff inserted an advertisement in the *Field* announcing that he had a dun gelding hunter for sale for £65. On January 14 the defendant wrote to the plaintiff:—"Will you send your hunter to me for a few days' trial? I will pay all expenses and take all risks," adding that he desired to try him with the Grafton hounds. On January 15 the plaintiff wrote:—"If you like to wire me to-morrow morning I will send the horse down that day for you to try on Wednesday. If you do not buy him you return him here on Thursday and pay three guineas for the day's hunting. If you buy him you pay £65 and no charge for the day. . . . He is at your risk while in your possession." On the following day the defendant wired:—"Send horse if week's trial for three guineas." On the same day the plaintiff wrote:—"I certainly should not send a hunter for a week's hunting with the Grafton for three guineas. . . . I will send him for a day's hunting as per my letter of last night, but not for longer." On January 18 the defendant wrote:—"Considering I take all risks I think the sum mentioned quite enough for a week's trial of a hunter." On January 21 the plaintiff wrote:—"If you will like to try the horse I will send him down for a week's trial for five guineas, you to take all risks. I don't think there is much chance of his coming back." On January 22 the defendant wired:—"Send horse to-day, with bridle, on terms of your letter." The horse was accordingly sent to the defendant. On January 29 the defendant wrote to the plaintiff saying that he had not had an opportunity of thoroughly testing the horse, and requesting him to extend the time for trial. The plaintiff replied that, the time for trial having expired on the 29th and the horse not having been returned, he considered that the horse was sold to the defendant. The defendant did not accept this position and returned the horse.

Mr. GARLAND (Mr. Ellis Hill with him), for the plaintiff, contended that the correspondence showed a completed contract for the sale of the horse on trial, which became an absolute sale on the defendant's failure to return the horse at or before the end of the period fixed for the trial.

Mr. STIMSON, for the defendant, contended that no completed contract for sale on trial could be inferred from the correspondence, because there was never any acceptance of the offer to sell. The most there was was a contract for the hire of the horse. He cited "*Harvey v. Facey*" ([1893] A.C., 552).

MR. JUSTICE BRUCE said that the question was whether there was a contract for the sale of the horse subject to approval. It was clear that the horse was offered for sale by means of the advertisement. The defendant then intimated that he wished to have him on trial. The plaintiff's letter of January 15 contained a proposal to send the horse on trial, to be returned on Thursday if not bought. The defendant did not dissent from the terms of that letter, but wired, "Send horse if week's trial." If the defendant had wired "send horse" that would have been an acceptance of the terms of the plaintiff's letter. Then followed further correspondence, and in reply to the plaintiff's letter of January 21 the defendant wired, "Send horse to-day." This telegram, taken in conjunction with what preceded it, constituted a contract on the part of the defendant to take the horse on approval for a week, and if he approved of it to buy. The rule was that if goods were delivered to a buyer on approval and if the buyer did not intimate his disapproval at or before the time stated, or if no time was stated a reasonable time, the property in the

goods passed to him. He gave judgment, therefore, for the plaintiff.

[Solicitors—Heath and Hamilton, for W. Brigg, Harpenden, for the plaintiff.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.J.J.) } 1900.
May 11.
FRITCHARD v. DOUGHTON, LOVYCK, AND CO.*

Gaming—Betting—Commission agent—Action for money had and received.

Action dismissed, on the ground that there was no evidence that defendant had made the bets for plaintiff or had received any money in respect of them.

This was an application by the defendants for a new trial or judgment in an action tried before Mr. Justice Darling and a common jury, reported in *The Times* of April 5. The action was brought to recover the sum of £120 alleged to have been received by the defendants as agents of the plaintiff, being the proceeds of bets made and won by them on his behalf. At the trial the plaintiff gave evidence to the effect that in 1899 he received an advertisement from the defendants, who had an office at 46, Pall-mall, offering to execute betting commissions for him. A book of rules and a circular issued by the defendants showed that they called themselves Turf commission agents, and acted as such. On October 11 the plaintiff telegraphed to the defendants to put £20 on Scintillant, which won the Cesarewitch at 6 to 1, but he had never received the money. On October 17 the plaintiff telegraphed to the defendants, saying that he had not received the week's account. On the same day the defendants replied "Awaiting report of inquiry, continue business." It was contended on the part of the defendants that the burden of proving that the money had been received by the defendants rested upon the plaintiff. The learned Judge, however, held that there was evidence to go to the jury, it being admitted that the defendants acted as commission agents. The defendant Lovyck, who said that he was the sole partner in the defendants' firm, then gave evidence denying that his firm had made the bet or received the money. He also said that he did not always place bets out, but sometimes made them with himself. The jury returned a verdict for the plaintiff for £120, and judgment was entered accordingly.

Mr. SPENCER BOWER, in support of the defendants' application for judgment or a new trial, contended that the plaintiff had not given any evidence that the defendants had received any money on the plaintiff's behalf; and that, therefore, the action for money had and received could not be maintained.

Mr. HOLMAN GREGORY, for the plaintiff, argued that, as the defendants held themselves out as commission agents, it was their duty to place the plaintiff's bet out. And there was evidence to go to the jury that the defendants had in fact placed the bet out and had received payment of the bet. Their telegram of October 17 as to continuing business was an admission that they had transacted some business for the plaintiff, and there was no suggestion of any other transaction between the parties except the bet in question. He relied on the judgment of Mr. Justice Charles in "*Grimerd v. Wiltshire*" (10 *The Times* L.R., 505).

The COURT allowed the application, and directed that judgment should be entered for the defendants.

LORD JUSTICE A. L. SMITH, after stating the facts, said that the only cause of action which the plaintiff

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

could have possibly had against the defendants in the circumstances was one for not fulfilling the mandate given to them by him by making a bet in accordance therewith. He could not, however, maintain such an action, for the defendants would have successfully set up the defence that the transaction between the parties was a gambling transaction. In fact, he had brought his action for money had and received, but in order to succeed in that it was necessary for him to show that the defendants had in their pocket £120 belonging to the plaintiff. In other words, he must prove that the defendants had carried out their mandate by making a bet in accordance with his instructions, and that they had received payment of the bet from the person with whom the bet was made. There was no evidence whatever that the defendants had made the bet or that they had received any money in payment of the bet. Therefore, the only cause of action on which the plaintiff attempted to rely, viz., that of money had and received, failed absolutely. In his opinion the learned Judge would have been well advised if he had acceded to the application made by the defendants' counsel at the end of the plaintiff's case, and had withdrawn the case from the jury. The defendants were entitled to have judgment entered for them.

LORD JUSTICE VAUGHAN WILLIAMS was of the same opinion. He hoped that this case might have the advantage of teaching people who were inclined to invest their money on such terms as those disclosed by the rules and circular issued by the defendants that they had no security whatsoever for the money which they so invested. It was always possible for the person whom they so trusted, instead of placing the bets out in accordance with the authority conferred upon him, to make the bets with himself; and if he did that he was in an impregnable position, in which he could not successfully be sued in any sort of action. His Lordship could not understand how people could be so foolish as to risk their money in such a way.

LORD JUSTICE ROMER concurred. He thought the evidence pointed to the irresistible conclusion that the defendants had never received any money on the plaintiff's behalf.

Q.B. Div. (Ridley and } 1900.
Darling, JJ.) } May 11.

GARTSIDES (BROOKSIDE BREWERY) (LIMITED) v.
COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamp duty—Amount chargeable—
“Substituted security”—Stamp Act, 1891,
Sched. I., “Mortgage,” &c. (2).

This was a case stated by the Commissioners of Inland Revenue. By an indenture dated June 24, 1898, and expressed to be made by Gartsidcs (Brookside Brewery) (Limited), the appellants, and the North of England Trustee Debenture and Assets Corporation (Limited), as trustees for the registered holders of debenture stock (hereinafter called the trustees), after defining (in effect) by Clauses 1 and 39 the term “debenture stock” as meaning a sum of £600,000, the appellants by Clause 6 provided that they might give notice of intention to redeem the debenture stock not earlier than December 31, 1915, and covenanted on the day and place fixed for redemption in such notice to pay to the registered holder of any debenture stock the nominal amount of the debenture stock referred to in such notice, with interest to the date of payment and with an additional bonus of 10 per cent., and by other pro-

visions of the deed, and in particular by Clauses 11, 12, 13, 14, 15, 16, and 24 thereof, conveyed and demised the freeholds and leaseholds set out in schedules 1, 2, and 3 thereof unto the trustees, and declared they would stand possessed of the leases referred to in schedule 4 thereof in trust for the trustees, and by way of floating security charged with the payment of all principal moneys, bonuses, and interest which might become payable in respect of the debenture stock and all other moneys which might become payable under those presents all its other property and assets, present or future. This instrument was stamped with the duty of £825, being *ad valorem* mortgage duty of 2s. 6d. per cent. on £600,000, and was adjudged by the Commissioners of Inland Revenue to be duly stamped in accordance with section 88 (1) of the Stamp Act, 1891, and the heading “Mortgage, Bond, Debenture, Covenant,” &c., in schedule 1 of the Act. By Clause 28 of the indenture of June 24, 1898, it was provided that the trustees might release any of the hereditaments described in the schedules thereto upon having conveyed to them hereditaments of equal value, notwithstanding that such substituted hereditaments might at the time be already subject to the floating charge thereby created. By an indenture dated July 24, 1899, after reciting that the trustees had agreed to release the hereditaments therein described (being a portion only of the hereditaments specifically assured to them by the indenture of June 24, 1898) on the appellants assuring to them hereditaments of equal value, the parties proceeded to carry such agreement into effect by releasing the said hereditaments, and in place thereof the appellants conveyed other hereditaments to the trustees to hold upon the trusts and for the purposes declared by and in the indenture of June 24, 1898. This instrument was presented to the Commissioners of Inland Revenue for their opinion as to the stamp duty with which it was chargeable, and the Commissioners, being of opinion that the instrument was chargeable under the heading “Mortgage, Bond, Debenture,” &c., in Schedule 1 of the Stamp Act, 1891, by reference to the sub-heading (2) thereof as “being a collateral or auxiliary or additional or substituted security by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped,” with the duty of 6d. for every £100 of the amount secured, assessed it as liable to £150, that being the duty at the rate of 6d. per cent. of £600,000, the amount secured by the principal indenture. They did not assess duty in respect of the premiums, amounting to £6,000, in deference to the decision of the Court of Appeal in the case of “Knight’s Deep (Limited) v. the Commissioners of Inland Revenue” ([1900] 1 Q.B., 217). The appellants, being dissatisfied with the decision of the Commissioners, required them to state their case for the opinion of the High Court, the question being whether the instrument was charged with the proper amount of duty. The appellants contended that the instrument was not a mortgage within the meaning of the schedule, because it was not within section 86 (1) a security for a “sum of money advanced or lent at the time, or previously due and owing”; the money secured by the indenture of June 24, 1898, being only due *in futuro*, and there being nothing in the instrument itself to show that it was a security for money, and that it was not a substituted security within the meaning of sub-heading 2, because the properties which were included in the instrument were already included as part of the floating security under the original deed. “Jones v. the Commissioners of Inland Revenue” ([1895] 1 Q.B., 484) was cited.

The Attorney-General (Sir Robert Finlay, Q.C.),

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

and Mr. S. A. T. Rowlatt appeared for the Crown; Mr. W. O. Danckwerts, Q.C., and Mr. Cartmell for the appellants.

The COURT gave judgment for the Crown.

MR. JUSTICE RIDLEY said that in his opinion the instrument was within the heading "Mortgage," &c., in schedule 1 of the Stamp Act, 1891, by reference to sub-heading 2. The instrument, though not in terms a security, contained a reference to the former instrument dated June 24, 1898, and upon referring to the instrument of June 24, 1898, it was clear that the later instrument was a substituted security. The argument that the money secured was not "due and owing" within section 86 was not a good one. The words of the section could not be narrowed so as to mean due and owing at the time. There having been a security in June, 1898, he was of opinion that the instrument under discussion was a substituted security and was chargeable with duty as such.

MR. JUSTICE DARLING gave judgment to the same effect.

[Solicitor—The Solicitor of the Inland Revenue, for the Crown.]

Q.B. Div. } 1900.
(Wright, J.) } May 11.

COBBETT V. LOCKE-KING.*

Vendor and Purchaser—Compensation—Misdescription—Contract for sale of land—Error in quantity.

The particulars of a contract for the sale of land contained a misdescription of the quantity of land in one parcel; *held* that the purchaser was not entitled to compensation under the contract, as he was well acquainted with the land he was buying.

In this case the plaintiff claimed compensation from the defendant under the terms of a contract entered into between the parties. The defence was that no compensation was due to the plaintiff.

Mr. English Harrison, Q.C., and Mr. Muir Mackenzie appeared for the plaintiff; and Mr. Bray, Q.C., and Mr. Gore Browne for the defendant.

The plaintiff's case was that a contract in writing was entered into between the plaintiff and the defendant on August 12, 1897, by which the defendant agreed to sell to the plaintiff, amongst others, two parcels of land at Weybridge, the one containing 2 acres 2 roods 16 poles and the other containing 4 acres 7 poles or thereabouts. The contract contained a provision that if any error, misstatement, or omission in the particulars should be discovered the sale should not be annulled, but that due compensation should be allowed by the vendor in respect thereof, and under this clause the plaintiff claimed compensation to the amount of £500 from the defendant, owing to the fact that the second parcel of land, which was described in the particulars as comprising 4 acres 7 poles, in reality only contained 2 acres 3 roods 7 poles. The amount of compensation claimed was the sum which the plaintiff had been compelled to pay to the National Land Corporation (Limited) as compensation on a sale by the plaintiff to the corporation of the lands in question described as above.

MR. ENGLISH HARRISON, on behalf of the plaintiff, contended that where there was an agreement for compensation the rights and liabilities of the parties must be regulated by that contract and by nothing else. If compensation was to be paid if an error was in fact dis-

covered, it did not matter at what time it was discovered, and in the present case the plaintiff was therefore entitled to recover. He cited the cases of "Palmer v. Johnson" (12 Q.B.D., 33) and "Lett v. Randall" (49 L.T., 71).

The defendant's case was that the plaintiff knew that the land in the parcels in question only comprised 5½ acres instead of 6½ acres, as set out in the particulars. It was treated by both parties as 5½ acres, and the whole amount comprised in all the parcels as 29 acres, and the amount which the plaintiff had agreed to purchase had actually been conveyed to him.

MR. BRAY, on behalf of the defendant, said that the negotiations had been going on for two years, and the plaintiff knew perfectly well what land he was buying. In order to entitle him to compensation the error must be such a one as would, except for the clause in the contract, entitle the plaintiff to annul the sale. The law was thus stated in "Dart on the Law of Vendors and Purchasers":—"A purchaser will lose his right to . . . compensation on the ground of . . . a variation from the description in the particulars if, at the time of entering into the contract, he had, or by using due diligence might have had, knowledge of the defect; or if, after having become acquainted with it; he, without insisting thereon, proceed in the treaty; or a *fortiori* take possession." He referred to "*In re Turner and Skelton*" (13 Ch.D., 130).

MR. JUSTICE WRIGHT, in giving judgment, said he thought the proper conclusion to come to was that the plaintiff was not entitled to recover the compensation he claimed. He did not think that the description of the size of the plot of land in question was material as regarded the intention of the parties. The plaintiff knew perfectly well the land he intended to buy; he had lived in the neighbourhood of it and had been negotiating for it for some time. The case of "*Lett v. Randall*," though not altogether easy to get over, was not actually decided entirely on the grounds in the present case. He did not think there was anything to justify him in refusing to be guided by the decision in "*Re Turner and Skelton*," where the statement from "*Dart's Vendor and Purchaser*" was quoted with approval. There would therefore be judgment for the defendant with costs, and if the defendant desired to have a rectification of the agreement by the insertion of the correct amount of land comprised in the parcel, he was entitled to it.

[Solicitors—W. V. H. Cobbett, for the defendant; Beaumont, Son, and Rigden, agents for Paine and Brettell, Chertsey.]

Q.B. Div. } 1900.
(Bruce, J.) } May 11.

INMAN V. ACKROYD AND BEST (LIMITED).*

Company—Directors—Remuneration.

Held, that the articles of association did not entitle a person, who ceased to be a director before his fee for the year became payable, to recover a proportionate part of such fee.

In this case a question was raised as to the right of a director of a limited liability company, who had ceased to be a director before his fee for the year became payable, to recover a proportionate part of such fee. The facts and arguments appear from the judgment.

MR. E. BRAY appeared for the plaintiff; and Mr. Llewelyn Davies for the defendants.

MR. JUSTICE BRUCE, in a written judgment, said:—This is an action brought by the plaintiff to recover

*Reported by P. B. DUFFORD, Esq., Barrister-at-Law.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

from the defendant company remuneration for services rendered by him as a director of the defendant company. The plaintiff claims one £125, as one year's remuneration, from November 1, 1897, to November 1, 1898, and that portion of his claim had been admitted. The plaintiff further claims remuneration from November 1, 1898, to May 30, 1899, the date when he resigned his office of director. Remuneration for this latter period at the rate of £125 a year, amounts to £72 18s. 4d., and this part of the claim is in dispute, the defendants contending that the plaintiff is not entitled to claim remuneration for a period of less than a year's service. The 81st article of the articles of association of the company is as follows:—"The directors shall be paid out of the funds of the company by way of remuneration for their services, and exclusive of travelling expenses, the sum of £125 per annum, per director, and such further sum as shall from time to time be determined by the company in general meeting, and the same shall be divided among them in such proportion and manner as the directors by agreement may determine, and in default of such determination, equally. The said sum of £125 per annum may be increased, but not diminished by the company in general meeting." That article does not seem to me to provide for the payment of any specific sum to an individual director. The directors as a body are to be paid out of the funds of the company the sum of not less than £125 per annum, per director, and the aggregate sum is to be divided amongst them in such proportion and manner as the directors may agree, and in default of such agreement, it is to be divided amongst the directors equally. I feel the greatest difficulty in putting a construction on this article which would justify a payment to be made out of the funds of the company for the remuneration of the directors of a sum of £62 10s., half-yearly, per director, or a sum of £31 5s., quarterly, per director. I think the reasonable construction of this article is that a sum shall yearly be paid out of the funds of the company for the remuneration of the directors who have served during the year, and that that sum shall be not less than £125 per director. That, I think, means that the aggregate sum must depend upon the number of directors who have completed a year's service, or at least upon the number of directors who are serving at the time the annual sum is paid out of the funds of the company. . . . I think I am supported in the view I have expressed by the decision of Mr. Justice Cozens-Hardy, in the case of "Salton v. New Beeston Cycle Company" ([1899] 1 Ch., 775). In that case, the provisions of the article of association upon which the question turned, were not, I think, materially different from the provisions of article 81 in the present case, and the learned Judge held that no remuneration could be claimed except for a complete year. This decision was followed by Mr. Justice Wright in the case of "In re Central De Kaap Gold Mines" (W.N., November 11, 1899, p. 216). In the latter case the words of the articles of association were not more favourable to the claim of the directors than the words of the 81st article in the present case, yet Mr. Justice Wright held that nothing by way of remuneration for services by the directors could be claimed except for a full year. . . . It was contended by Mr. Bray that even if, according to the provisions of the 81st article of the articles of association, the plaintiff could not claim remuneration in respect of service for a portion of a year only, yet that by the operation of the Apportionment Act of 1870 (33 and 34 Vict., c. 85) the plaintiff was entitled to recover a proportionate part of the annual sum which would be payable to him had he served a whole year. One difficulty in the way of my acceding to this contention is that if the Apportionment Act applies to

cases of this kind, then the Act ought to have been applied by Mr. Justice Cozens-Hardy in the New Beeston Cycle case and by Mr. Justice Wright in the Central De Kaap Gold Mines case. It is true that neither of the learned Judges gives any reasons why he considers the Apportionment Act inapplicable, but the provisions of the Act cannot have been overlooked; in each case it must have been decided to be inapplicable. I cannot overrule, even if I were so inclined, the two decisions referred to. But it seems to me that there is good reason why the Apportionment Act should be held not to apply. If it applies at all to the remuneration claimed by the plaintiff, it applies because his remuneration falls under the word annuities, which by the interpretation clauses includes salaries. Salary means a stated periodical payment. It is a definite sum computed by time. But in the present case I think that the plaintiff, even if he had served the full year, could not have claimed as a matter of course any definite share of the aggregate sum to be set apart for the payment of directors. The aggregate sum is, according to the 81st article, to be divided among the directors in such proportion and manner as the directors by agreement may determine. It is only in default of such determination that the sum is to be equally divided. It seems to me, therefore, there was no definite periodical payment to which the plaintiff could make an unconditional claim. His claim to remuneration was not a claim in the nature of salary to which the Apportionment Act of 1870 could apply. I must give judgment for the defendants, with costs.

[Solicitors—Clements, Williams, and Co., for the plaintiff; Walker and Rowe, for Wooler, Burrows, and Burton, Leeds.]

Prob., Divorce, and Adm. Div. } 1900.
(Gorell Barnes, J.) } May 11.

THE DORA FORSTER.*

Insurance—Marine—Policy on ship—Particular average loss—Subsequent total loss of vessel.

Judgment was given in this case which was heard on the 8th inst., when judgment was reserved. The case is reported in *The Times* for the 9th inst.

The action was brought by the owners of the late steamship *Dora Forster* to recover from the defendants, the Union Marine Insurance Company, the sum of £24 16s. 9d., being the balance of a particular average loss alleged to be due under a policy of marine insurance. The *Dora Forster* was insured with the defendant company for £800 under a time policy, dated July 13, 1898, for 12 months from July 3, 1898, to July 3, 1899, the value of the vessel for the purposes of the policy being agreed to be £16,000. On December 10, 1898, during the continuance of the policy, when on a voyage out to Savannah, the *Dora Forster*, by reason of perils insured against in the policy, suffered damage to her machinery and cylinders to the extent of some £1,500. A claim was put forward by the plaintiffs against the defendant company for a particular average loss, and on January 21, 1899, the defendant company paid the sum of £52, being 6½ per cent. on the amount of the policy, on account of the claim. The damage was repaired at Savannah and the repairs were completed on January 18. The cost of the repairs was paid for by the charterers of the ship at Savannah, the Georgia Export and Import Company, and they obtained from the master of the *Dora Forster* a promissory note for the amount, purporting to pledge the ship and her freight, and payable three days after the arrival of the *Dora Forster* at Liverpool on her return voyage. The

*Reported by HUGH C. S. DUMAS, Esq., Barrister-at-Law.

Georgia Export and Import Company effected insurances with the Firemen's Fund Insurance Company to cover the amount secured by the promissory note above referred to. The *Dora Forster* was totally lost on her voyage home, and on April 1, 1899, the defendant company settled a total loss under the policy sued on in this action. The Georgia Export and Import Company also recovered in full under their insurances with the Firemen's Fund Insurance Company, and it was stated that they were making no claim against the owners of the *Dora Forster*. The plaintiffs now sought to recover the balance of their claim in respect of the particular average loss. The defendant company denied that in the circumstances they were under any liability to the plaintiffs for the particular average loss, and they counterclaimed for the return of the sum of £52 already paid by them, which they alleged had been paid under a mistake of fact.

Mr. Carver, Q.C., and Mr. Roche appeared for the plaintiffs; and Mr. Joseph Walton, Q.C., and Mr. J. A. Hamilton for the defendants.

MR. JUSTICE GORELL BARNES, in the course of a long and exhaustive judgment, pointed out that the plaintiffs had sustained and would sustain no loss in fact, and the question, which raised a novel and somewhat difficult point, was whether under those circumstances they could recover from the insurance company the amount of this particular average loss. In his opinion the facts did not support this claim. He thought that by the arrangements which were made at Savannah between the Georgia Company and the master of the *Dora Forster* the owners of the *Dora Forster* never became liable for the cost of the repairs at Savannah. The case was within the principle which was well stated in section 1,267 of "Phillips on Insurance," and was like the case where repairs were paid for by a bottomry bond, and where no personal liability was imposed on the owners, if the vessel was lost on her voyage home. There was, consequently, never any loss for which the owners could have made any claim. With reference to the counter-claim, he thought that the £52 was only paid without prejudice and on account of such claims as the insurance company might ultimately prove to be liable for. It was paid under a mistake of fact and should be returned. In his opinion the law in the matter followed what in a business sense was the justice of the case. There must be judgment for the defendants with costs on both the claim and the counter-claim.

[Solicitors—Stokes and Stokes, agents for Bramwell and Bell, of Newcastle, for the plaintiffs; Waltons and Co., for the defendants.]

Prob., Divorce, and Adm. Div. } 1900.
(Gorell Barnes, J.) } May 11.

THE CATHAY.*

Ship—Collision—Limitation of liability—Foreign ship.

The provisions of Sched. VI. of the Merchant Shipping Act, 1894, with regard to the deduction of crew space apply to foreign ships.

Judgment was given in this case, which was heard on April 30, and is reported in *The Times* for May 2. The action, which raises a point of great interest and importance to foreign shipowners, was brought by the owners of the Danish steamship *Cathay* seeking to limit their liability under section 503 of the Merchant Shipping Act, 1894, in respect of a collision which occurred on September 4, 1899, between the *Cathay* and the Clan Line steamship *Clan MacGregor*. By

the collision the *Clan MacGregor* was sunk and lost with her cargo, and the *Cathay* was damaged. In an action which was heard on October 31 (reported in *The Times* for November 1) both vessels were found to blame, and it appeared that the amount for which under that decision the *Cathay* was liable would exceed the amount at which she could limit her liability under the Act. The plaintiffs claimed to have their liability limited on payment into Court of the sum of £32,046 14s. 5d., being £8 per ton on 4005·84 tons, the gross tonnage of the *Cathay* without deduction for engine rooms, but deducting crew space. The defendants, the owners of the *Clan MacGregor* and her cargo, contended that the owners of the *Cathay* were not entitled to make any deduction for the crew space, because under section 503 of the Merchant Shipping Act, 1894, crew space could only be deducted where it had been certified under the regulations scheduled to the Act with regard thereto, and that under Schedule VI., Clause 3, a certificate that the crew space was such as was required by the Act had to be given by one of the surveyors of ships under the Act to the collector of Customs, and the space was only to be deducted if the certificate was obtained and not otherwise, and that no such certificate had been given in this case. The plaintiffs contended that the requirements of Schedule VI. were not binding upon foreign ships, and that, under section 84 of the Act, the foreign register was conclusive as to the proper deduction of the crew space in the case of ships belonging to a country to which, by an Order in Council, the provisions of section 84 had been made to apply, as had been done in the case of Denmark.

Mr. Stokes appeared for the plaintiffs; and Mr. Scruton for the defendants.

MR. JUSTICE GORELL BARNES, in the course of a long and elaborate judgment, said that there was no doubt that the provisions of Schedule VI. had to be strictly complied with in the case of British ships seeking to limit their liability, and he thought that there was no distinction with respect to foreign ships having regard to the decision in the case of the *Franconia* (L.R., 3 P.D., 164), which was a judgment of the Court of Appeal with respect to the deduction of crew space in the case of a German ship and defended upon the construction of the analogous sections in the earlier Merchant Shipping Acts, those of 1854 and 1867. The reasoning in the case of the *Franconia* applied equally to the present case, and was binding upon him. The foreign register could not be accepted as conclusive. The importance of the case was very great because it affected not only the tonnage on which foreign shipowners would have to assess payments in limitation of liability actions, but also might very possibly affect the tonnage on which harbour dues, &c., would have to be paid. It seemed, at any rate, that it was impossible for foreign ships to deduct crew space for the purpose of limitation of liability. No such certificate as was required by Schedule VI. had been in fact obtained by the plaintiffs, who would only be entitled to limit their liability on payment into Court of £8 per ton on their gross tonnage without any deductions.

[Solicitors—Stokes and Stokes, for the plaintiffs; Hollams and Co., for the defendants.]

House of Lords (Lord Halsbury, L.C., } 1900.
Lords Macnaghten, Morris, Shand, } May 14.
and Bragginton)

STEAMSHIP 1818 COMPANY (LIMITED) AND OTHERS V.
BAHR, BEHREND, AND ROSS.*

Ship—Charter-party—"Full and complete cargo"

*Reported by HUGH O. S. DUMAS, Esq., Barrister-at-Law.

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

—Cargo in frozen condition—Decrease of amount that could be stowed.

Decision of the Court of Appeal (15 *The Times* L.R., 465) affirmed.

This was an appeal from a decision of the Court of Appeal (Lords Justices A. L. Smith and Rigby, Lord Justice Vaughan Williams dissenting), dated July 5, 1899, reversing the judgment of Mr. Justice Bruce, dated August 5, 1898. The case is reported 15 *The Times* L.R., 465; L.R. [1899] 2 Q.B., 364; 86 L.J., Q.B., 930. The action was brought to recover £337 14s. 8d. dead freight on 450 tons cargo short shipped, or alternatively a like amount as damages for breach of charter in not loading proper or usual wet woodpulp; in consequence of which, it was alleged, the said pulp loaded so badly as to prevent the steamship *Isis* from being loaded so as to carry within 450 tons of her proper cargo. By a charter-party, dated December 22, 1897, the appellants, who are the owners of the steamship *Isis*, chartered her to the respondents to load at Bangor, Maine, U.S.A., a full and complete cargo of wet woodpulp, containing about 80 per cent. of water. Ice prevented the steamship from reaching Bangor, and she was loaded at Bucksport, having proceeded there in accordance with a clause in the charter-party which provided that if ice should prevent the steamer from reaching Bangor charterers were to load the steamer at Bucksport. There are two kinds of wet woodpulp—viz., one in the production of which the wood is subject only to mechanical action, and another kind which is produced by chemical action. The respondents offered a cargo consisting in part of wet wood mechanical pulp and in part of wet wood chemical pulp. All the wet woodpulp offered by the respondents contained the proper percentage of water, and no cause of complaint could or would have arisen if the woodpulp had not been partly frozen as hereinafter stated. The steamship arrived at Bucksport on January 6, 1898, and during the time of loading a severe frost prevailed, as was usual there at that season. The quantity shipped was about 2,496 tons, and the appellants' case was that if the wet woodpulp had not been frozen the steamer could have loaded an additional 448 tons. It was admitted that no more than the quantity shipped could be stowed of wet woodpulp in a frozen condition. Mr. Justice Bruce delivered judgment in favour of the appellants. The Court of Appeal allowed the appeal, Lord Justice Vaughan Williams, while agreeing that what was tendered for shipment was wet woodpulp, dissented on the ground that the evidence did not in terms prove that wet woodpulp when shipped in a frozen condition was accepted as a full and complete cargo.

Mr. Carver, Q.C., Mr. Gardner Horridge, and Mr. Hyslop Maxwell were counsel for the appellants; Mr. Joseph Walton, Q.C., and Mr. Collingwood Hope for the respondents were not heard.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said that the substance carried was well known in the trade by a familiar name, and the charter-party provided that a full and complete cargo of it should be loaded. It was to be wet woodpulp containing 50 per cent. of water. That requirement was fulfilled. If the parties had intended to make some stipulations as to the amount of tonnage to be conveyed, it was open to them to do so in the terms of the charter-party. It was obvious that the amount would vary according as the loading was in summer or winter; in summer the article would pack more closely. It was contended for the appellants that the article ought to have been of a class which should make the greatest amount of tonnage. But there was no ground

for such a contention. The respondents had fulfilled their obligation. The stipulated article was tendered and the ship was so loaded that she could hold no more, and there was a full and complete cargo, and an entire performance of the obligations of the charter-party. The appeal must be dismissed with costs.

The other noble and learned Lords concurred.

[Solicitors—Rowcliffe, Rawle, and Co., for the appellant; Wynne, Holme, and Wynne, for the respondent.]

Q.B. Div. (Ridley and } 1900.
Bigham, JJ.) } May 14.

CRAIG V. NICHOLS.*

Army—Exemption from tolls—Army Act, 1881, sec. 143.

An officer's private carriage used by him in proceeding to his military duties is not exempted from payment of tolls by sec. 143 of the Army Act, 1881.

This was an appeal by case stated from justices of Plymouth. An information was heard before the justices charging the respondent with unlawfully demanding and receiving from the appellant, an officer in her Majesty's Regular forces, a toll of 4d. for passing along the Embankment-road, a turnpike road, contrary to section 143 of the Army Act, 1881. The question raised by the case was whether an officer of the Regular Army was exempt from the payment of the toll in question in respect of a private carriage in which he was proceeding to a place where his military duty required him to go. Section 143 of the Army Act, 1881, provides, *inter alia*, as follows:—"All officers and soldiers of her Majesty's Regular forces on duty or on the march, and their horses and baggage . . . and all carriages and horses belonging to her Majesty or employed in her military service, when conveying any such persons as above in this section mentioned, or baggage, or stores, or returning from conveying the same shall be exempt from the payment of any duties or tolls . . . in passing along or over any turnpike, or other road or bridge, otherwise demandable by virtue of any Act of Parliament. . . ." It appears from the case that the appellant was a major in the Royal Artillery stationed at Fort Bovisand, about six miles from Plymouth. He resided at Spencer-terrace, in Plymouth, and his duties frequently necessitated his attendance at the headquarters office, Mount Wise, Devonport. On July 10, 1899, he proceeded in his own private carriage from his residence in uniform to the headquarters at Devonport, where he transacted official business. He left the headquarters office in the same carriage, accompanied by his soldier servant. The servant was not in uniform. He drove through the Modbury-road toll-gate in the Embankment-road to Fort Bovisand, a distance of nine miles, in order to discharge official duty. The toll collector demanded and received the toll of 4d. authorized by a local Act of Parliament in respect of the carriage, notwithstanding that the appellant informed him that he was on duty. The carriage was the private property of the appellant, for which he took out an Excise licence, and was used by him partly for his own private purposes and partly for carrying out his military duties. The appellant was in receipt of allowances from the Government for a horse in connexion with his duties as a major in her Majesty's Army, but he was not in receipt of nor entitled to any allowance in respect of a private carriage, nor would he have been at liberty to hire a private carriage at the cost of the Government to convey him from Plymouth to Fort Bovisand for the pur-

*Reported by O. G. WILBRAHAM, Esq., Barrister-at-Law.

pose of discharging his duty at the Fort. The justices were of opinion that the carriage was not "employed in her Majesty's military service," not having been requisitioned for military service under the Mutiny Act, or otherwise appropriated for her Majesty's military service, so as to come within the exemption in section 143 of the Army Act, and dismissed the information. It was contended on behalf of the appellant that the exemption applied to every carriage which was used in military service, and that the carriage in question was so being used at the time when the toll was exacted.

Mr. Yarborough Anderson appeared for the appellant; and Mr. Duke, Q.C., and Mr. Frank Bodilly for the respondent.

The COURT dismissed the appeal.

MR. JUSTICE RIDLEY said that the case was clear. The question was whether the carriage was being "employed in her Majesty's military service" within the meaning of section 143. The words quoted could not be read in the wide sense suggested by the appellant's counsel as including any carriage being used in military service. In view of the other words of the section and taking into consideration the fact that allowances were made to officers for horses and carriages used by them in military service, he was of opinion that the words meant carriages employed in military service by the authority of those who were in command. The words were put in the way they were put in the section because they were intended to refer to three classes of carriages—namely (1) those which were employed in military service as part of the military equipment; (2) those which were requisitioned under the Mutiny Act; and (3) those in respect of which allowances were made to the officers to whom they belonged. The words did not include a carriage which was only used by an officer on duty because it was his pleasure to so use it. The carriage in question was therefore not within the exemption provided for in the section.

MR. JUSTICE BIGHAM concurred.

[Solicitors—The Solicitor to the Treasury, for Watts, Ward, and Anthony, Plymouth, for the appellant; Sharpe, Parker, and Co., for Ellis, Plymouth.]

Q.B. Div. (Wright and } 1900.
Darling, JJ.) } May 14.

IN RE MARLEY.*

Bankruptcy—Discharge—Discretion of the Court
—Bankruptcy Act, 1890, sec. 8, subs. 2.

On an application for discharge it is not usual to refuse the discharge until the debtor has paid 10s. in the pound, unless there is a reasonable prospect of there being some available funds or property.

This was an appeal by the bankrupt from an order of the Judge of the County Court of Croydon refusing his discharge until he had paid 10s. in the pound to his creditors. The bankrupt practically had no assets, and he had no means and no prospect of obtaining any property, and did not propose to engage in any business. His wife had considerable means. His bankruptcy had been brought about by his having backed bills for other persons as a surety. He had not received any part of the consideration paid for the bills. The learned County Court Judge had made the order in the exercise of his discretion under section 8, subsection 2, of the Bankruptcy Act, 1890, which provides that on the hearing of an application for an order of discharge the Court shall, on proof (*inter alia*) that the bankrupt's assets are not of a value equal to

10s. in the pound on the amount of his unsecured liabilities, either refuse the discharge or suspend the discharge for a period of not less than two years, or suspend the discharge until a dividend of not less than 10s. in the pound has been paid to the creditors. The County Court Judge expressed the opinion that it was the duty of the bankrupt to work and earn the means for paying his creditors.

MR. COLAM, who appeared for the bankrupt, contended that the County Court Judge had wrongly exercised his discretion. He ought to have suspended the discharge for two years. The case fell within the principle of "*In re Bullen*" (5 Mor., 243), "*In re Shackleton*" (6 Mor., 304), and "*In re Gould*" (7 Mor., 215), which went to show that such an order as that appealed against ought not to be made where there was no reasonable probability of anything being paid to the creditors.

MR. MUIR MACKENZIE, who appeared for the Official Receiver, submitted that the discretion exercised by the Court below should not be interfered with. The cases cited were all decided under section 28 of the Bankruptcy Act, 1883; but that section was repealed by the Bankruptcy Act, 1890, which gave (section 8) a wider discretion to the Court.

MR. COLAM replied.

MR. JUSTICE WRIGHT.—I do not like interfering with an order made by the Court below in the exercise of its discretion, but I understand it to be the usual practice not to make an order of this kind unless there is a reasonable prospect that some funds or property will be forthcoming which may be made available for the payment of the debts of the bankrupt. I think the appeal should be allowed, and that the better order to make will be to suspend the discharge for two years.

MR. JUSTICE DARLING.—I agree.

[Solicitors—W. C. Cooke; The Solicitor to the Board of Trade.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } May 15.

THE PHILADELPHIAN.*

Ship—Collision—Regulations for Preventing Collisions at Sea, Art. 11—Construction—Anchor light "in forward part of the vessel."

This was an appeal from the judgment of Mr. Justice Bucknill reported in *The Times* of December 19. The action was brought by the owners of the steamship *Ella Sayer* to recover damages sustained by them by reason of a collision which occurred about 11 p.m. on August 10 of last year in Quebec Harbour, in the River St. Lawrence, between their vessel and the defendants' steamship *Philadelphian*. The *Ella Sayer*, a steamship of 2,549 tons gross register, 313ft. in length, was lying at anchor in about mid-channel. The *Ella Sayer* was carrying two anchor lights, the one forward being on the fore-shroud of the starboard fore-rigging, just abreast of the foremast, 23ft. 6in. above the hull, and 72ft. from the stem. The *Philadelphian*, a steamship belonging to the Leyland Line, of Liverpool, of 5,120 tons gross register, was proceeding down the St. Lawrence on a voyage from Montreal to Liverpool with cattle and a general cargo. The *Philadelphian* was in charge of a duly licensed pilot. The *Philadelphian* struck the *Ella Sayer* with her stem, and damaged her. The main question was whether the *Ella Sayer* was carrying her forward anchor light "in the forward part of the vessel" as required by Article 11 of the Regulations for Preventing Collisions

*Reported by H. L. FRASER, Esq., Barrister-at-Law.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

at Sea, 1897. The learned Judge held that the Philadelphia was to blame for going at excessive speed, and for not keeping a good look out. He also held that a light 72ft. from the stem was not "in the forward part of the vessel" within the meaning of Article 11, and that therefore the Ella Sayer had committed a breach of the rules, but that this breach could not possibly have contributed to the collision. He therefore held that the Philadelphia was alone to blame. The defendants, the owners of the Philadelphia, appealed. By Article 11 "a vessel under 150ft. in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20ft. above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light, visible all round the horizon at a distance of at least one mile. A vessel of 150ft. or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20ft. and not exceeding 40ft. above the hull one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15ft. lower than the forward light, another such light."

Mr. JOSEPH WALTON, Q.C. (Mr. Aspinall, Q.C., and Mr. W. S. Glynn with him), for the defendants, said that the only question on the appeal was whether the learned Judge was right in holding that the Ella Sayer was not to blame as well as the Philadelphia. He contended that the learned Judge was wrong. First, the forward anchor light on the Ella Sayer was not "in the forward part of the vessel" within the meaning of Article 11. Those words did not mean any part of the ship forward of amidships. They meant somewhere near the stem. The object of Article 11 was, in the case of a vessel 150ft. in length or upwards, to show by the position of the lights the length of the vessel so as to enable passing vessels to avoid her. A distance of 72ft. from the stem could not be called "in the forward part of the vessel." In construing Article 11 its object must be borne in mind, and it would render the rule useless to construe it in any other way. Upon the construction of the rule the learned Judge decided in favour of the defendants, but he held that the breach of the rule could not possibly have contributed to the collision. Upon this latter point he contended that the learned Judge was wrong.

LORD JUSTICE A. L. SMITH.—We are against you upon the first point, and therefore you need not go into the second question.

Mr. Laing, Q.C., Mr. Dawson Miller, and Mr. Adair Roche, for the plaintiffs, were not called upon.

The COURT dismissed the appeal, differing, however, from Mr. Justice Bucknill upon the construction of Article 11.

LORD JUSTICE A. L. SMITH said that the question depended entirely upon the construction of Article 11. They must construe the rule according to the language used. The Ella Sayer had an anchor light in the fore-shroud of the starboard fore-rigging, and a second anchor light at or near the stern. The question was whether the forward light was "in the forward part of the vessel" within the meaning of Article 11. The learned Judge held that it was not, but at the same time he held that the breach of the rule could not possibly have contributed to the collision, because those on the Philadelphia never saw any light at all. In his (the Lord Justice's) opinion the learned Judge was wrong upon the construction of the rule. The language seemed plain. In the first part of the rule relating to vessels under 150ft. in length, the word "forward" seemed to him to be used in contradistinction to "aft." The part of the rule applicable to the present case was that relating to vessels of 150ft. or upwards in length. The forward light on the Ella Sayer was about

a quarter of the ship's length from the stem. Was that "in the forward part of the vessel"? The words were not "at or near the stem." In his opinion the light was in the forward part of the vessel. In regard to the after light, it was to be observed that the rule did not say that it must be "in the after part of the vessel," but it more or less fixed the spot by saying, "at or near the stern." Counsel for the appellants contended that the Court ought to read the words "in the forward part of the vessel" as "at or near the stem." What justification was there for introducing such language into the rule? The framers of the rule had drawn a distinction between the forward light and the after light. It was said that the object of the rule was to indicate the length of the vessel by the position of the two lights. If that were so, the framers of the rule had not carried out their intention. The result was the forward light in the present case was, in the terms of the rule, "in the forward part of the vessel." That being so the Ella Sayer had committed no breach of Article 11. It was unnecessary, therefore, to consider the second question upon which the learned Judge decided in favour of the plaintiffs. The appeal must therefore, be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS agreed. It was contended that the Court ought to construe the words of Article 11, "in the forward part of the vessel," as "at or near the stem." In his opinion that could not be done. The words in the rule "at or near the stern" gave a substantially fixed point for the after light, whereas the words "in the forward part of the vessel" did not give any fixed point, but left the matter largely to the discretion of the master.

LORD JUSTICE ROMER concurred.

[Solicitors—Botterell and Roche, for the plaintiffs; Thomas Cooper and Co., for Hill, Dickinson, Dickinson, and Hill, Liverpool, for the defendants.]

Cham. Div. }
(Cozens-Hardy, J.) }

1900.
May 15.

THE SACCHARIN CORPORATION (LIMITED) v. QUINCY.*

Patent—Infringement.

The plaintiffs were the owners of three patents which together gave them the sole authority within the United Kingdom to make, use, or vend saccharin; held, that although they could not prove which of the three patents had been infringed, they could prove infringement of one or other of them by the defendant, and were, therefore, entitled to damages.

HIS LORDSHIP gave judgment in this action, tried on the 2nd and 3rd inst., as follows:—The plaintiffs in this action are owners of 12 patents. They allege in their statement of claim that the defendant has infringed and threatens to infringe these several patents, and they seek an injunction and damages. The fact is that the defendant in December, 1897, and January, 1898, purchased 33lb. of saccharin from the Chemical and Drugs Company (Limited), who were then carrying on business at Manchester. This is the only infringement relied upon. The validity of the patents is admitted. The sole issue before me is that of infringement. It appears from the evidence of Dr. Passmore, the only witness called by the plaintiffs, that the 12 patents may be conveniently, for the purposes of this action, treated as only three in number, and that these three relate to separate and distinct modes of producing a chemical compound known as saccharin, and that it is not

*Reported by D. FITCAIRN, Esq., Barrister-at Law.

possible to tell from the examination of any particular parcel under which process it has been produced. These patents are dated in 1885, 1894, and 1895. Saccharin was, in and prior to 1898, manufactured on a commercial scale only on the Continent, and only under one or other of these three processes. No evidence was adduced as to the place where, or as to the process by which, the parcels purchased by the defendant were produced. But the plaintiffs assert that Dr. Passmore's evidence is sufficient, unless answered by the defendant, to establish that it was made in contravention of their rights as patentees, and they ask an injunction and damages accordingly. The defendant, who is probably as ignorant as the plaintiffs are, of the place where, or the process by which, the purchased parcels were produced, called no evidence, and claimed a nonsuit on the ground that the plaintiffs have not shown which patent right was infringed. The peculiarity of the case is this. If the plaintiffs had brought three separate actions in respect of their three patents, I think they must have failed in each action, for there is neither presumption nor proof that any particular patent has been infringed, and it is forcibly argued on the part of the defendant that three bad actions cannot be so combined as to form one good action. Now, as to the injunction, I think the plaintiffs' case fails; an injunction cannot be properly granted except in respect of a patent which the defendant has infringed or threatened to infringe, and only during the continuance of that patent. I am satisfied that the saccharin was not made under all three processes. It was made under one of the three, though I cannot tell under which of the three. It may have been under the 1885 patent, which has now expired, and in respect of that patent no injunction could now be granted. The plaintiffs, therefore, have not established that which is necessary to entitle them to an injunction. As to the damages, there is more difficulty. Treating the pleadings as amended in order to raise the real question, the plaintiffs allege that they were in 1897 and 1898 the owners of three patents which, together, gave them the sole authority within the United Kingdom to make, use, or vend saccharin, that the damages recoverable for infringement must be identical in amount whichever of the three patents was infringed by the defendant, and that, although they cannot prove which of the three patents has been infringed, they can recover damages for infringement of one or other of the three patents, as they have proved that the defendant has infringed one or other of them. Now, in the ordinary case of a claim for alternative relief, the plaintiff has to prove at the trial under which of the alternatives pleaded he is entitled to succeed. The present plaintiffs cannot bring themselves within this principle. But I am not satisfied that under the modern practice it is always essential to establish the particular alternative, provided only that the rights of the plaintiffs and the obligations of the defendant are identical under each of the alternatives, and that the alternatives exhaust every possible contingency and are mutually exclusive. Suppose all the coal in the parish of X lying to the east of a certain fault is demised in 1890 by A to B, and by a subsequent lease in 1891 all the coal in the parish lying to the west of the fault is demised by A to B, and suppose that the rents and royalties reserved by the two leases are identical. The precise position of the fault may be unknown to both A and B, or, indeed, to any living person. B works coal within the parish in 1892. He ought not, it seems to me, to be able to refuse to pay any royalty unless A can show whether the coal has been got from the east or from the west of the fault, or whether his right depends upon the lease of 1890 or upon the lease of 1891. The coal must have

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been got from one side or the other of the fault, and the amount payable for royalty will be the same in either case. Common sense requires that A should be entitled to sue alternatively either under the first lease or under the second lease. In the case supposed the two alternatives exhaust every possible event, and, that being so, I think A ought to recover. The present case, though not turning upon contract, ought, I think, to be dealt with upon the same footing. I find as a fact that the plaintiffs' three patents covered every possible mode of producing saccharin. One of the three patents must have been infringed. The right to damages is precisely the same, the measure of damages is precisely the same, whichever of the three patents was in fact infringed. The nature and extent of the wrong done by the defendant does not depend upon the particular patent infringed. Justice requires that, under the peculiar circumstances of the case, the plaintiffs, who have certainly had a right infringed by the defendant, should not be without a remedy. I shall therefore direct an inquiry, without mentioning any particular patent, whether any and what damages have been sustained by the plaintiffs by reason of the use by the defendant of 33lb. of saccharin purchased by the defendant in December, 1897, and January, 1898, or any other saccharin purchased by the defendant before June 1, 1899. I shall reserve the costs of the inquiry, and I shall expect the plaintiffs before proceeding with the inquiry to make a definite demand of a particular sum. I regret that evidence was not adduced at the trial as to the amount of damages. With reference to the costs of the action, the plaintiffs have partly failed and partly succeeded. I do not regard with sympathy or favour actions of this nature brought against a purchaser. I give no costs to the plaintiffs up to and including judgment. The subsequent costs will be reserved.

Mr. Moulton, Q.C., Mr. Cripps, Q.C., Mr. J. Graham, and Mr. Colefax were for the plaintiff corporation; Mr. A. J. Walter and Mr. Bucknill for the defendant.

There were three other similar actions for trial, which counsel agreed could not be distinguished; similar orders were therefore taken in each action.

[Solicitors—J. H. and J. Y. Johnson; J. W. Asprey.]

Q.B. Div. (Ridley and }
Darling, JJ.) }

1900.
May 16.

THE ATTORNEY-GENERAL V. THE JEWISH COLONIZATION ASSOCIATION AND ANOTHER.*

Revenue—Estate duty—Foreign domicile—Property situate abroad—Succession Duty Act, 1853, secs. 2 and 16—Finance Act, 1894, sec. 2, subs. 2.

Judgment in this case, which was reserved on May 9 last, was delivered. The arguments were heard on May 8 and 9, and reports of the case appeared in *The Times* of May 9 and 11.

The following counsel appeared in the case:—For the Crown, Sir Richard Webster, Q.C., Sir Robert Finlay, Q.C., and Mr. Vaughan Hawkins; and for the defendants, Sir R. Reid, Q.C., Mr. Swinfen Eady, Q.C., Mr. Dicey, Q.C., Mr. Danckwerts, Q.C., and Mr. Schuster.

MR. JUSTICE RIDLEY, in a written judgment, said:—This was an information claiming estate and succession duty on the death of Baron de Hirsch de Gereuth upon property in respect of which he had made a disposition in favour of the Jewish Colonization Association. The

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Jewish Colonization Association was on September 10, 1891, formed into a company under the Companies Acts, 1862 to 1890, by a certificate of the Board of Trade. On its being proved that no portion of the income was intended to be used as profit to its members it was registered under section 23 of the Companies Act, 1867, without the addition of the word "limited." Its objects were, stated generally, to assist the emigration of Jews from any parts of Europe or Asia to other parts of the world, and to form colonies for their reception. The office was to be, and was, in London. By article 25 of the articles of association its affairs were to be under the general control of a council of administration, consisting of not more than six nor less than three persons—none of whom were required to be members of the company—who were required to be elected by the company in general meeting, and to hold office for five years. By the memorandum of association it was stated that the objects for which the company was established were, amongst others (a) to assist to promote the emigration of Jews from any part of Europe or Asia and principally from countries in which they might be subjected to any special taxes or political disabilities, and to form colonies in other parts of the world; (c) to accept gifts of money or property on the terms of the same being applied to the purposes of the company; (n) to invest the moneys of the company not immediately required for the operations of the company in the public stocks of the English, French, Belgian, Dutch, and German Governments or of the United States of America; (s) to do all such other lawful things as were incidental or conducive to the attainment of these objects; provided that the company should observe the provisions of the 21st section of the Companies Act of 1862 where applicable, and that, in case the company should accept any gift on such special trusts as to be subject to the jurisdiction of the Charity Commissioners, the company should if required by the Charity Commissioners vest the same in the special trustees thereof. The nominal capital of the company was to be £2,000,000, in 20,000 shares of £100 each, of which 19,992 were allotted to Baron de Hirsch. The seventh clause of the memorandum of association provided that if, in the event of a winding up or dissolution of the company, there remained any property it should not be distributed among the members of the company but be transferred to some institution with objects similar to those of the company, and that if such institution should not be selected by the members at or before the time of the winding up or dissolution it should be selected by the Judge of the High Court of Justice having jurisdiction in that behalf. By article 18 of the articles of association the first general meeting was to be held within four months after the incorporation, and subsequent general meetings were to be held once at least in every year in London or such other place as the council might from time to time determine, and the council might at any time convene an extraordinary general meeting. The first general meeting was held on October 14, 1891, at the offices of the company at 17, Old Broad-street, London, and at this meeting Baron de Hirsch was elected chairman of the council, and resolutions were passed approving two sets of rules defining the duties and powers of the council. It is not necessary to set out all these rules. By the first of them the directors were to be subject to the control of the council, and to exercise all such powers of the company as were not expressly reserved to the company in general meeting. The meetings continued to be held at the registered office in London, but the business there transacted was, until after the death of Baron de Hirsch on April 21, 1896, of a formal character.

The council held their meetings in Paris, and at these meetings they, by virtue of the articles of association and of the rules, conducted its affairs. On July 22, 1892, at a meeting of the council Baron de Hirsch proposed to hand over to the association various securities on condition that he was allowed by them during his life to have the income resulting therefrom and from any which might be substituted for them, and the council resolved to accept the gift and to affix the seal of the association thereto. On August 26, 1892, in pursuance of this resolution an indenture was entered into and executed by Baron de Hirsch and by the association the terms of which, so far as they need now be mentioned, are as follows:—The deed was expressed to be made between Maurice, Baron de Hirsch de Gereuth, described as of 82, Piccadilly, in the county of Middlesex (thereinafter referred to as the "donor"), of the one part, and the defendant corporation, the Jewish Colonization Association, described as having its registered office at 17, Old Broad-street, in the City of London (thereinafter referred to as "the association"), of the other part, and recited that the donor had agreed to give to the association and the association had agreed to accept the stocks, shares, and securities mentioned in the schedule on the terms and conditions thereinafter expressed. It was witnessed that in pursuance of the said agreement the association covenanted with the donor *inter alia* as follows:—(1) That the association would during Baron de Hirsch's life deal with the investments of the property as the baron should from time to time direct; (2) that the association would pay the income of the investments to the baron; and (3) that the association would, after the death of the baron, apply the property for the promotion of the emigration of Russian Jews from Europe to agricultural colonies in America and to other similar purposes. At about the same time all the stocks, shares, and securities mentioned in the schedule (which were at the time held partly by the London and Westminster Bank and partly by other banks situated abroad) were duly transferred by direction of Baron de Hirsch in pursuance of the indenture to the account of the association with the several banks, and were thenceforward held by the association upon the trusts and for the purposes declared by the indenture, and pursuant thereto from that time onwards the council paid the income accruing thereon to Baron de Hirsch during his life. All the securities were transferable by delivery. Baron de Hirsch de Gereuth died *sine prole* on April 21, 1896, domiciled in Austria; and it is now contended by the Crown that succession duty and estate duty are payable on the value of those securities or of the investments now representing the same, on the ground that the succession had descended by English law and that by that law the trust must be administered. On the other hand, Sir Robert Reid, while admitting that estate duty is payable on such of the securities as were situate in England at the time of Baron de Hirsch's death (that is to say, on such of them as were at the London and Westminster Bank), contended that no succession duty was payable on any of the securities, and no estate duty on those which were situated abroad. As by section 2, subsection 2, of the Finance Act, 1894, "property passing on the death of the deceased when situate out of the United Kingdom shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes," the single question in the case is whether in these circumstances, where the domicile of the predecessor is foreign and the property is situate abroad, duty is payable under the 2nd and 16th section of the Succession

Duty Act, 1853. Section 2 enacts as follows:— "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after an interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a succession: and the term 'successor' shall denote the person so entitled; and the term predecessor shall denote settlor, disposer, testator, obligor, ancestor, or other person from whom the interest of the succession is or shall be derived." His Lordship referred to and discussed the following cases:—"Lovelace's Settlement" (4 De G. and J., 340), the effect of the decision in which he said was that the Succession Duty Act applied to a succession under a British settlement to British property vested in British trustees and falling under the jurisdiction of a British Court, though the predecessor and successor were both domiciled abroad; to "*In re Wallop's Trusts*" (1 De G., J., and S., 656), "*Wallace v. the Attorney-General*" (L.R., 1 Ch., 1), "*The Attorney-General v. Campbell*" (L.R., 5 H.L., 524), "*In re Badact's Trusts*" (L.R., 10 Eq., 288), "*Lyall v. Lyall*" (L.R., 15 Eq., 1), and proceeded:—It follows from the decision in "*The Attorney-General v. Campbell*" that if, in order to administer the property or to carry out the trusts upon which it has been disposed resort must be had to English law, succession duty is payable although the domicile of the testator be foreign; and it follows also from that and the previous decisions that if the disposition of the property be made by a testator acting under a power given him by an instrument which must be construed and carried into effect by the laws of England then also succession duty is payable, although the domicile of both predecessor and successor is a foreign one. But, if the gift or devise be made by a person domiciled abroad, then even though the property be situate in England, unless the intervention of the English law is required in order to carry the gift or devise into effect, succession duty is not payable. Having referred to "*In re Cigala's Trusts*" (7 Ch.D., 351) and to "*The Attorney-General v. Felse*" (10 *The Times* L.R., 337), he proceeded:—Now what is the case in the present instance? Sir Robert Reid's points were—(1) that the property was situate abroad; (2) that it was settled by a foreigner domiciled abroad; (3) that the deed was executed abroad; and (4) that the deed was executed in favour of foreigners. But the argument appears to assume that in order to make succession duty payable the domicile must be English and the property situated in England, or, at all events, that these are circumstances to be chiefly considered, whereas from an examination of the authorities it has been shown that that is not so. With regard to the third point, I think this cannot be material. The deed was an English deed. It purports so to be. Baron de Hirsch and the association are alike described in it as resident in England, and the registered office of the latter is stated to be in London. I therefore think it must be treated as an English document. With regard to the fourth point, this also if true would not be material, according to the Lovelace case, in which both predecessor and successor were domiciled abroad. But it seems incorrect to say that

the beneficiaries of this trust, meaning by that phrase the Russian Jews, were the successors on whom the tax is to fall, if it is to fall. They are not, and no one on their behalf is in the position of a *cestui que trust* or can call on the council or the company to carry out the trust in a particular manner in favour of any applicant or of any body of applicants. Then is the council the successor, so that it may be argued that the domicile of the members of it is a foreign one? Their whole authority to act in this matter is derived from the company, the owner of the property. It is the company that has become beneficially entitled on the death of Baron de Hirsch. Until that event the income had to be paid to him through the persons authorized by the company to do so. After that event the income is dealt with by the same persons on the same authority, but freed from the life interest. But it was argued that the domicile of the company is French, because the meetings of the councillors have been held in Paris. But, according to that view, the domicile could be changed by a mere resolution to hold the meetings elsewhere; and that does not seem reasonable. "*The Cesena Sulphur Co. v. Nicholson*" (1 Exch. D., 428) was quoted on this point. . . . So far as that decision goes it is not against the view that this company was domiciled in England. It was further put, however, and with much astuteness, that it would not be by the British Courts, nor under their jurisdiction, that this property would be administered. It is true that it would not be governed by the rules of our municipal law in all matters. Thus, by the Austrian law (as was stated to us) an Austrian father cannot divest himself of property so as to impair the rights of his children to *legitim*; and any alienation at any time having that effect may on the death of the father be set aside to the extent to which it has that effect. The Austrian law was the law of the domicile of the deceased, and it could have been applied in this case if there had been any children. Again, if there had arisen any question upon which the French Government found that the association were working against their recognized policy, or interfering with colonies in a way not in their opinion desirable, there can hardly be any doubt that they could have enforced upon them the law of France. So could the Government of any country in which the association were working; and, further than that, if a proceeding were brought in England to determine such a point it can hardly be supposed that, assuming the jurisdiction, it would not have been exercised in favour of and by reference to the laws of the country concerned. But although it is true that these and other instances may be given where the foreign law would by any tribunal be allowed to apply to the administration of this trust, is it not true also to say that, in order fully to administer the property and to determine all questions relating to it, recourse must be had to the English tribunal? By it foreign law may have to be applied—some instances have been given where it probably would be so—but the property is owned here by a company registered under the Companies Acts. Suppose a winding up or dissolution; under what Court but the English Court having that jurisdiction could it be conducted? The 7th clause of the memorandum admits that. But the English law governs this company also in many other ways, such as its very name, the possible acquisition of land or of gifts on trust, and the share capital. And although the income be administered abroad and the property is foreign, in the sense of being situated abroad, it is here that it is owned. The property may be transferred from our country to another, and the council may sit in Austria or some other country, but here until

the title be altered remains the ownership. Probably, as was stated at the Bar, it was in order to gain the security given by our law that the company was constituted in England and made owner of the property. For these reasons I think that the Crown is entitled to judgment.

MR. JUSTICE DARLING read a considered judgment, arriving at the same conclusion.

Judgment was given accordingly for the Crown, with costs.

MR. DANCKWERTS applied for a stay of execution pending an appeal, but, on the suggestion of the Attorney-General, the application was adjourned. Mr. Danckwerts stated that the amount of the duty would be upwards of a million and a quarter sterling.

Q.B. Div. (Ridley and)
Bigham, J.J.)

1900.
May 16.

THOMAS V. VAN OS.*

Metropolis—Unsound food—Public Health (London) Act, 1891, sec. 47—Functions of medical officer and police magistrate.

This was an appeal by way of a special case from the decision of the magistrate sitting at the Thames Police-court, the question raised being whether, before a magistrate acting under section 47 of the Public Health (London) Act, 1891, condemns an article as being unsound, or unwholesome, or unfit for the food of man, it is necessary that the magistrate should have before him evidence that the goods were intended for the food of man. In July of last year an application was made to the magistrate to condemn 117 tubs of strawberries. The magistrate refused the application on the ground that there was no evidence before him that the strawberries were intended for the food of man. A rule nisi was then obtained directing him to state a case, and this rule was made absolute on January 11, 1900. From the case as stated the following facts appeared:—The appellant was the medical officer of health for the district of Limehouse. On July 17, 1899, he saw a van in Devonport-street, Ratcliffe, containing the fruit, which upon examination he found to be unsound and unwholesome and unfit for the food of man. The strawberries were sent to the defendant from Holland under contract with one Van Namsen, and on arrival in London the defendant had ordered a carman to convey them to Messrs. John Moir, Limited, of Brook-street, Ratcliffe, who on seeing them refused to take them. The defendant admitted that the strawberries were unfit for the food of man. The medical officer, acting under section 47 of the Public Health (London) Act, 1891, caused them to be brought before the magistrate, who refused to condemn them on the ground that there was no evidence that the fruit was intended for the food of man or sold or exposed for sale or deposited for the purpose of sale at the time of the seizure. He held that when Messrs. John Moir refused to take the fruit any intention of applying them for the purposes of food or sale was exhausted. In the absence of such evidence he held that he had no jurisdiction to make any order of condemnation.

MR. R. D. MUIR, for the appellant, contended that there was ample evidence that the strawberries were intended for the food of man, being deposited in a van for purposes of sale; that the defendant was unaware that Messrs. John Moir had refused them, and that the intention to sell continued after such refusal. He further argued that the question whether the goods were exposed for sale was not one for the magistrate but for

the medical officer. He cited "*White v. Redfern*" (5 Q.B.D., 15), "*Vintner v. Hind*" (10 Q.B.D., 63), "*In re Bater and Birkenhead Corporation*" ([1893] 2 Q.B., 77).

MR. JUSTICE RIDLEY, in giving judgment, said that section 47 of the Act defined the powers of the medical officer of health. He might enter upon the premises of the defendant and inspect and examine any article intended for the food of man. It was obvious that as a preliminary to putting his powers in force the medical officer must make up his mind whether the articles examined came within the description in section 47—that is, whether they were intended for the food of man or exposed for sale. Having made up his mind on that question his duty was to examine the articles. If he found them unsound or unwholesome or unfit for the food of man, then, and not till then, the functions of the magistrate came into operation. The magistrate must then decide whether the articles were in fact unsound, unwholesome, or unfit for the food of man, and, having decided that, his further duties were merely ministerial. The question whether the articles were intended for the food of man was, at this stage of the proceedings, immaterial, and did not become material until subsection (2) of section 47 came into operation and the person exposing the goods for sale was charged on summons for an offence under the Act. The case of "*White v. Redfern*" (5 Q.B.D., 15) was properly decided and covered this case in principle.

MR. JUSTICE BIGHAM concurring, the case was remitted to the magistrate with an intimation that the strawberries ought to have been condemned.

Prob., Divorce, and Adm. Div. }
(Jeune, P.) }

1900.
May 16.

SYNGE V. SYNGE.*

Divorce—Desertion, what amounts to—Reasonable excuse—Matrimonial Causes Act, 1857, sec. 27.

The refusal of a wife without cause to grant her husband conjugal rights constitutes a "reasonable excuse" within the meaning of sec. 27 of the Divorce Act, 1857, for his refusing to live with her.

This was a wife's suit for the dissolution of her marriage on the ground of her husband's desertion and adultery. The issue as to adultery was tried before the President and a common jury and resulted in favour of the petitioner, who is known on the stage as Miss Granville. The question of desertion was by consent argued before the Court itself, and judgment was reserved. The case has been fully reported in *The Times* on April 27 and 28, May 2, 4, 5, 10, and 11.

MR. DEANE, Q.C., and MR. LE BAS were for the petitioner; MR. GRAZEBROOK for the respondent Major Syngé.

THE PRESIDENT, in delivering a considered judgment, said that the only question he had now to consider was whether the respondent had deserted the petitioner without reasonable excuse. The learned Judge then gave an outline of the facts in the case—pointed out that according to the petitioner's view the desertion had commenced on December 4, 1896, at which date the respondent wrote from Sandwich, "I may add that I have now virtually settled here." On full consideration of the facts of the case he had come to the conclusion that the separation between the parties which constituted a desertion by one or other of them occurred in fact at a much earlier period. In order to explain this

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*Reported by J. H. MURPHY, Esq., Barrister-at-Law.

view it was necessary to consider the relations of the parties at several periods after their return from India in 1888. In 1889 they lived as husband and wife—no doubt in great affection. The respondent remained in India in 1890, and towards the end of the year wished his wife to rejoin him there, and then occurred circumstances which were of vital importance in the case. At first the lady was willing—nay, anxious—to go. At that very time she found or made an opportunity of trying her powers as an actress on the stage, and she afterwards secured an engagement and gave up the idea of going to India. This step she took without in any way consulting her husband. As soon as the respondent heard what had occurred he returned to England, and although he did not at first ascertain where she was living he soon discovered her whereabouts. On February 4, 1891, the wife wrote to her husband suggesting that they should live together “nominally,” and the full meaning of this word was made clear in a letter of February 12 in which the lady makes it a condition that “we shall only live together nominally as man and wife.” The respondent declined to sign the proposed conditions but he accepted them in this sense, that from February to July he lived in the same house as his wife, but occupying a separate bed-room. In his evidence the respondent stated that he accepted the inevitable unwillingly, as his wife’s insistence left him no alternative. In August, 1892, the respondent wrote a very important letter to his wife expressing his intention of not living the same sort of life as was imposed on him when he was last at home, and in reply the petitioner wrote offering to be the best of friends and companions so long as he did not insist on what was distasteful to her. After this date the parties never lived together again, and the husband resumed his military duties, while the wife remained in London pursuing the avocations of the stage. In March, 1893, the respondent wrote to his wife, asking her whether she was still of the same mind, and in her reply the petitioner asked him what he had to offer her for the independence she had earned. In 1894 the husband was anxious that his wife should go back to India with him, but the lady replied that they had better remain “friends at a distance.” In 1896 he again wrote asking her whether she had made up her mind about what he had asked her, and she replied, “Leave well alone.” Consideration of the facts and letters in their sequence showed conclusively that it was impossible to say that any desertion took place in the sense of commencing at the end of 1896. The period of the commencement of the separation was clearly defined as having taken place at the time of the husband’s return from West Africa in August, 1892. From that time the separation so long begun continued, even after the husband was willing to cohabit if and only if marital rights were allowed to him, and the wife was willing to cohabit if and only if such marital rights were not insisted on. It was argued on behalf of the petitioner that the husband was an officer in the Army having military duties out of London and the wife an actress compelled to live in town, and that for this reason they were unable to live together. He (the learned Judge) did not, however, accept that view, for in his opinion the only obstacle in the way of cohabitation after August, 1892, was the wife’s refusal to allow the exercise of marital rights. It was therefore necessary to consider at this point a question which went to the root of the case—namely, whether the refusal of a wife, without cause, to live *maritalement* with her husband gives the husband a reasonable excuse within the meaning of section 27 of the Divorce Act of 1857 for refusing to live with his wife. Mr. Deane had based his arguments on the undoubted principles of the old Ecclesiastical Courts, which had laid

down that “the duty of matrimonial intercourse cannot be compelled by the Court, the ‘matrimonial cohabitation may,’” “Forster v. Forster” (1 Hagg. Cons., 144, 154). A refusal to cohabit had never been regarded as a matrimonial offence, but it was clear also that a “reasonable excuse” within the meaning of section 27 of the Act of 1857 need not be a matrimonial offence either. It was so held in “Russell v. Russell” ([1895] P., 315) that “desertion without cause” in section 16 of the Act of 1857 did not limit the cause to the commission of a matrimonial offence. It was clear that “desertion without reasonable excuse” in section 27 is no more limited than desertion without cause in section 16. This at any rate was the view of Mr. Justice Gorell Barnes in “Oldroyd v. Oldroyd” ([1896] P., 175, 182) when he said that “cause,” “reasonable cause,” and “reasonable excuse” all mean the same thing. Did, therefore, the refusal of marital rights by a wife constitute a reasonable excuse for desertion by a husband? The answer depended on questions of a general character, and there was no reported decision on the point. The learned Judge then referred to some dicta in “Mackenzie v. Mackenzie” ([1895] A.C., 384-389), when Lord Herschell said, “It appears to me that it would be essential for the party suing for a divorce to show that he or she had during that time used every reasonable endeavour to induce the other, and had been ready and willing to discharge on his or her part all marital duties.” Again, in “Rippingall v. Rippingall” (24 W.R., 967) Lord Hennen said, “It was proved that Mrs. Rippingall refused to perform her conjugal duties, but that was no ground for refusing the order asked for. I cannot speculate as to her motives, but it must be presumed that she is now prepared to act in a different way.” It certainly appeared to him (the learned Judge) that Lord Hennen would not have so expressed himself had he thought that a wife while insisting in refusing to perform her conjugal duties, was nevertheless entitled to claim cohabitation from her husband by a suit for restitution of conjugal rights. He need only have said that the performance or non-performance of the conjugal duty was immaterial. In “Ousey v. Ousey” (43 L.J., 35) it was held by Lord Hennen that the desertion by a husband was excusable when a wife was unable or unwilling to consummate the marriage. The only case which had been cited which was at all in point was “Rowe v. Rowe” (4 S. and T., 162). That was a petition for judicial separation on the ground of the husband’s cruelty and adultery, and the husband pleaded that the wife had wilfully withdrawn herself from cohabitation, and refused to render conjugal rights. It was held that this plea was no answer. His Lordship also referred to “Duplany v. Duplany” ([1892] P., 53), and said that in the absence of authority he would not hold that a husband who declined to live with his wife—she having refused him the rights of a husband—had no reasonable grounds for so acting. He could not think any husband was bound to continually expose himself to such mortification and misery as was necessarily involved in the sort of life to which the petitioner invited the respondent in her letter of August 24, 1892. The objects of married life, as expressed in the marriage service, were not the less true because they were the utterances of a more plain-spoken age than the present, and—while human nature remains what it is—a husband has the right to decline to submit to a groundless demand of his wife that he should live with her as a husband only in name. He (the learned Judge) adopted the wise words of his great predecessor, Lord Stowell, who said in “Forster v. Forster,” speaking of a wife’s withdrawal from cohabitation:—“This species of malicious desertion is a

ground for divorce in some countries—certainly not so here, and still less will it justify a wife in a resort to unlawful pleasures that lawful ones are withdrawn. It is not to be considered as a matter perfectly light in the behaviour of a complaining husband that he has withdrawn himself without cause and without consent from the discharge of duties that belong to the very institutions of marriage, and if he has done so he ought to feel less surprise if consequences of human infirmity should ensue." The result is that, in my opinion, the respondent either did not desert his wife, but rather that she deserted him, or if he did desert her, then he did so with reasonable excuse within the meaning of the Act of 1857. His Lordship then proceeded to deal with the medical part of the case and said that he was satisfied that the petitioner never communicated to the respondent what she now alleged was the reason of her refusal to cohabit. It was, however, not difficult to form a conjecture as to what the real reasons of the petitioner's conduct were. The respondent had stated in his evidence that his wife had given him various reasons, the first of which was that she feared that her duties on the stage might be interfered with by her having children if she lived with the respondent as her husband. When one considered at what time this objection was first made—namely, in 1890 or 1891, on the eve of her going on the stage—that she had formed a strong determination that nothing should prevent her from testing to the utmost, and with brilliant hopes of success, her powers, and bearing in mind the conditions she imposed in her letter of February 12, 1891, it was obvious that the main ground of her refusal to cohabit arose not from any belief as to his state of health, but from her fear that interference more or less complete might be caused to the career which she had marked out for herself. He was therefore compelled to say that it had not been proved that the petitioner had acted *bona fide* in refusing to live *maritalement* with her husband. Mr. Deane had pressed the argument that even if a wife refused to cohabit without good cause, still the husband was bound not to sever himself from her, but to live with her and endeavour by kindness in course of time to obtain from her the fullest proofs of affection. But in this case it must be remembered that the experiment of living together nominally had been tried in 1891 with results satisfactory to neither party, and if a main cause of the wife's refusal was devotion to her art, lapse of time could not be looked to to produce any beneficial effect, indeed, increasing success on the stage would naturally increase the objection to any course which could be supposed likely to impair it. As to the costs the means of the parties were about equal. No doubt the petitioner should pay the costs of the petition which had failed, while the respondent should pay the costs of the issue of adultery. It would, however, practically amount to the same thing to order each party to pay his or her own costs.

Mr. GRAZEBROOK.—Then your Lordship dismisses the petition.

Mr. DEANE.—I submit that my client is entitled to a judicial separation on the authority of "*Duplany v. Duplany*." Perhaps your Lordship will reserve the question as my client may wish to appeal?

The PRESIDENT.—All I do now is to dismiss the petition for divorce. I will hear the arguments as to granting a judicial separation on Monday next after motions.

[Solicitors—Lewis and Lewis; Berkeley-Calcott and Co.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.J.J.) } 1900.
May 17.

H. M. S. SANS PAREIL.*

Ship—Collision—Regulations for preventing col-

lisions—Her Majesty's battleships—Merchant Shipping Act, 1894, sec. 419 (4).

Decision of Gorell Barnes, J. (*ante*, p. 241), affirmed.

This was an appeal from the judgment of Mr. Justice Gorell Barnes, sitting in Admiralty. The case is reported *ante*, p. 241. The plaintiff was the owner of the sailing ship *East Lothian*, and the defendant was Lieutenant George H. S. Potter, R.N. The action was brought to recover the damage sustained by the plaintiff by reason of a collision which occurred about 11 10 p.m. on August 7, 1899, in the entrance to the English Channel, about ten miles S. by E. of the Wolf Rock, between the *East Lothian* and H.M.S. *Sans Pareil*. The *Sans Pareil* at the time was one of the B Division of the Channel Fleet, which was returning up Channel from the naval manœuvres. The fleet consisted of about 30 ships of war, and was proceeding in columns of divisions in line ahead disposed abeam to starboard. The *Sans Pareil* was leading the second division, with a line of cruisers headed by H.M.S. *Europa* on her starboard hand, on her port hand being a line of battleships headed by H.M.S. *Alexandra*, the flagship, and a further line of cruisers was on the port side of the flagship. The defendant was in charge of H.M.S. *Sans Pareil* at the time, as officer of the watch. The plaintiff's case was that the *East Lothian*, a full-rigged iron ship of 1,389 tons register, with a crew of 19 hands, was on a voyage from Nantes to Cardiff, in ballast, with two passengers on board, and was in tow of the tug *Sir W. T. Lewis*. The *East Lothian* was on a course of N. 9° E. magnetic, and, with some sail set to assist the tug, was making about six knots. The weather was dark, but fine and clear, with a moderate breeze from the S.E., and the tide was low-water slack. The *East Lothian* was carrying the regulation side lights and a stern light, and the tug was carrying two vertical white lights in front of the foremast, the regulation side lights, and a white light abaft the mainmast for the tow to steer by. The lights were burning brightly. It was admitted that the steering light on the tug was not in accordance with Article 3 of the Regulations, inasmuch as it was visible forward of the beam. In these circumstances the masthead light of the *Sans Pareil* was observed amongst a number of other lights distant several miles and bearing between 4 and 5 points on the port bow, and as she came nearer her green light became visible, as also the green lights and signalling lights of the other vessels of the fleet. The *East Lothian* and her tug kept their course and speed, and passed ahead of the line of cruisers, the *Europa* porting to make room for them. As the *Sans Pareil* approached she opened her red light, but instead of passing clear astern of the *East Lothian* she came on showing both her side lights, and with her stem and rain struck the port side of the *East Lothian*, causing her such damage that she sank in a very few minutes, and with her crew's effects was totally lost. The defendant's case was that the *Sans Pareil*, with the fleet in the formation described above, was proceeding up Channel at a speed of 10 knots on a course of S. 72° E. magnetic. In these circumstances he saw about two miles distant, and about 4 points on the starboard bow, the masthead, port side light, and steering light of the tug. He made out the steering light, which was showing forward of the beam, to be an auxiliary white light of a steamship exhibited in accordance with Article 2 (c) of the Regulations. As the bearing of the lights did not alter, the helm of the *Sans Pareil* was ported so as to bring the lights of the tug on her port bow, and then steadied. Immediately afterwards, in order to keep clear of the line of cruisers on the starboard side, and

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

in order not to throw out the line of which she was the leading vessel, her helm was put hard-a-starboard. The defendant then observed on his starboard bow the red light of the East Lothian. As a collision appeared inevitable the engines of the Sans Pareil were put full speed astern, but the collision occurred almost immediately. The defendant charged the plaintiff with improperly attempting to proceed across and through a large fleet of ships of war steaming in company. The defendant admitted that the Sans Pareil was to blame for starboarding at the last moment. The trial of the action took place before Mr. Justice Gorell Barnes, sitting with Trinity Masters. The learned Judge gave judgment in favour of the plaintiff. The defendant appealed.

The Attorney-General (Sir Robert Finlay) and Mr. R. B. D. Acland appeared for the defendant; Mr. Joseph Walton, Q.C., and Mr. Scrutton for the plaintiff.

THE ATTORNEY-GENERAL said that the action was brought by the owner of the East Lothian in respect of a collision between that vessel and her Majesty's battleship Sans Pareil, which at the time of the collision was one of a fleet of 30 ships of war proceeding up the English Channel. The squadron was steering nearly due east, and was formed of four columns, the two outer columns consisting of cruisers, and the two inner columns of battleships. The Sans Pareil was the leading ship of the more southerly line of battleships. The distance between the columns was eight cables. The East Lothian was coming down the Channel in tow of the tug Sir W. T. Lewis. The squadron was going at the rate of ten knots; the tug and tow at six knots. The fleet was first sighted by the East Lothian at the distance of six miles. The vessels forming the columns then had the East Lothian and the Sir W. T. Lewis on their starboard side. The tug kept its way across the bows of the squadron, and cleared the first column, but the Sans Pareil came into collision with the East Lothian with the result that the East Lothian was sunk and unfortunately one man was drowned. The navigating officer on board the Sans Pareil saw the tug, and ported his helm in order to avoid her, but he did not observe that she had a vessel in tow, and having ported sufficiently to pass under the stern of the tug he starboarded in order to regain his position in the squadron, and also to keep clear of the line of cruisers on his starboard side. The learned Judge who tried the case found that the Sans Pareil was alone to blame. The defendant now asked this Court to say that both vessels were to blame. The vessels were crossing vessels, and the Sans Pareil had the East Lothian on her starboard side. But the present case did not come within the general rule laid down in Article 19 of the regulations for preventing collisions at sea, but it came within the exception laid down in Article 27. Article 19 was as follows:—"When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." Article 21 said, "Where by any of these rules one of two vessels is to keep out of the way of the other, the other shall keep her course and speed. Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision (See Articles 27 and 29)." Article 27 was as follows:—"In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." In the circumstances of this case the tug ought not to have kept her course. She ought not to have crossed under the

bows of her Majesty's fleet. [LORD JUSTICE A. L. SMITH.—Why not? Where do you find the legal right of a squadron to sweep the seas? Could a regiment of cavalry sweep down a high road from hedge to hedge?] The course covered by the fleet here was not more than 2½ miles in breadth. A prudent sailor would not have attempted to do as the tug did here. It was obviously an imprudent thing to do. The master of the tug ought either to have starboarded his helm or have slowed down, and the fleet would have passed him in a few minutes. Her Majesty's ships were not bound by the rules made under the Merchant Shipping Act of 1894; it was so provided by section 741 of that Act. There were, however, similar regulations for her Majesty's ships made by Order in Council. But it could not be said that the tug was bound by Article 21 to keep her course here. For she was only bound to do so where "by any of these rules one of two vessels is to keep out of the way." And her Majesty's ships were certainly not bound by these rules. A notice had been issued by the Board of Trade, which was as follows:—"Notice to shipowners and masters. Single ships approaching squadrons. The Board of Trade desire to call the attention of shipowners and masters to the danger to all concerned which is caused by single vessels approaching a squadron of warships so closely as to involve risk of collision, or attempting to pass ahead of, or through, or to break the line of such squadron. The Board find it necessary to warn mariners that on such occasions it would be in the interests of safety for single ships to adopt timely measures to keep out of the way of and avoid passing through a squadron." He did not suggest that that was binding on mariners, but it was a notice to them of how it was reasonable to act under particular circumstances. He submitted that the accident was caused by the negligent act of the master of the tug.

Mr. R. B. D. ACLAND followed on the same side.

Mr. JOSEPH WALTON, for the plaintiff, said that at the trial the Attorney-General had admitted that the reason why the defendant starboarded was because he thought the tug was a ship without any tow behind it. The point taken to-day, that the defendant's object was to regain his position and to keep clear of the column to his right, was a new point. Article 21, as a statutory regulation, did not impose any duty on the East Lothian, because it only applied where the other vessel was by the statutory regulations bound to keep out of the way. It could not be said that every breach of common care amounted to a breach of a statutory regulation with its penal consequences. Neither did Article 27 make disregard of the "notice to shipowners" a breach of regulations. Even if the East Lothian was wrong in crossing in front of the fleet, the Sans Pareil was guilty of negligence in running her down.

THE ATTORNEY-GENERAL replied.

THE COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that this was an action by the owner of a merchant ship called the East Lothian against the navigating officer of her Majesty's ship Sans Pareil. The plaintiff complained that at 11 o'clock at night on August 7, 1899, the Sans Pareil negligently ran into and rammed the East Lothian at the entrance to the English Channel and sank her. The facts were not in dispute. On the night in question a fleet, or squadron, of her Majesty's ships were steaming up the Channel disposed in four columns. The southernmost column consisted of eight cruisers headed by the Europa. North of that was a line of seven battleships headed by the Sans Pareil. North of that was another line of battleships headed by the Alexandra. And north of that again was another line of cruisers headed by the Melampus. The space of water covered

by the squadron was about two miles and a quarter in width, and the length of the squadron was a mile and three-quarters or two miles. The squadron was going at a speed of ten knots. At the same time the East Lothian, in tow of the tug Sir W. T. Lewis, was going at a speed of six knots in a northerly direction on a course which would take her across the course in which the squadron was proceeding. The Sir W. T. Lewis and the East Lothian were both exhibiting proper lights, such lights showing that the Sir W. T. Lewis was a tug with a vessel in tow. The squadron was seen by the East Lothian at a distance of six miles, and it was on the port side of the East Lothian. It was perfectly clear that the ships forming the squadron and the East Lothian were crossing vessels, and the ships of the squadron had the East Lothian on their starboard side. The East Lothian continued on her course and kept up her speed. She crossed in front of the Europa, and continued until she came level with the line of battleships headed by the Sans Pareil. The lines were at a distance of about three-quarters of a mile from one another, and the ships were following one another at distances of about 400 yards. The navigating lieutenant of the Sans Pareil, seeing the tug, ported his helm in order to go astern of her, but he negligently mistook her for a vessel not having any other vessel in tow, and, having ported and got clear of her, he starboarded his helm in order to get back into his proper line, with the result that he ran into the East Lothian. This action was brought, and it was practically an action against the Crown. Mr. Justice Barnes, having heard the case with the assistance of Trinity Masters, gave judgment in favour of the plaintiff, and the Crown appealed. The Attorney-General put forward a proposition which in substance amounted to this, that a squadron of her Majesty's ships might, whenever they pleased, proceed along the Channel in four columns disposed as this squadron was, and that it was the duty of all other ships to get out of their way. He could find no rule or regulation, or Act of Parliament, or law, to support that proposition. There were two sets of rules as to navigation. One set of rules was made under section 418 of the Merchant Shipping Act, 1894, and those rules bound all merchant ships. Section 741 of the Merchant Shipping Act provided that the Act should not apply to ships belonging to her Majesty, and it followed that the rules made under the Act had no application to her Majesty's ships. But two years after the passing of that Act her Majesty by Order in Council made rules for ships of the Navy. These rules were identical in their terms with the statutory regulations governing merchant ships, but it was important to observe that they were not statutory regulations. Article 21 of the statutory regulations said that "where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed." That referred to the case of crossing ships. But it only applied where the rule applied to both the crossing ships, and therefore it did not apply to the present case; for the Sans Pareil was not bound by the statutory regulations. But it seemed to him that what the article prescribed was a rule of good seamanship. Then Article 27 said that, "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." It was said that, though it was *prima facie* the duty of the East Lothian to keep on her course in accordance with Article 21, yet, in the special circumstances of the case, she ought to have disregarded that rule and had regard to Article 27. The real point was whether the East Lothian was

guilty of an infringement of a statutory regulation so as to be deemed to be in fault in accordance with section 419, subsection 4, of the Merchant Shipping Act. If she had broken a statutory regulation, then she would be deemed to be in fault, and she would be jointly liable with the battleship. But if she was not guilty of a breach of a statutory regulation, but only of negligence, then the right of action against the battleship would be a common law right of action, and the ordinary considerations as to contributory negligence would arise. He did not think that the statutory regulations applied, but, if he was wrong on that point, then he did not think the East Lothian had been guilty of any breach of the regulations, for the regulations themselves contemplated a departure from the regulations, and said that, if the circumstances were such as to justify a departure from them, the master was to follow the rules of good seamanship and do his best to avoid a collision. In his opinion the East Lothian was not in fault under the statute. With regard to the cause of action for negligence, it was admitted in the Court below that the Sans Pareil was to blame, but the defendant contended that the plaintiff's vessel was guilty of contributory negligence. The Court had now put to the assessors the question whether the East Lothian in the circumstances of the case was guilty of negligence in passing across the bows of the battleship. And the answer to that was that the East Lothian had been guilty of improper navigation. He agreed with that. But the question then arose whether those on board the Sans Pareil could by the exercise of ordinary care and skill have avoided the collision. The defendant ought to have seen the tow, but failed to do so. He was guilty of negligence in thinking that everything had passed him, and instead of keeping on his port helm a little longer, as he ought to have done, he starboarded too soon. If he had been hampered by the rest of the fleet, other considerations would have arisen, but there was nothing to hamper him, the Sans Pareil really being in the same position as if she had been sailing alone. It seemed to him to be impossible to say that the Sans Pareil could not by the exercise of ordinary care and skill have avoided the collision. The appeal would therefore be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS said that the view which the Court took was that in the circumstances there had been no infringement of any statutory regulation. The question therefore was a mere question of common law or Admiralty law, and, having regard to what was clearly established law, no serious question arose after the admission made by the Attorney-General in the Court below. He did not assent to the proposition that her Majesty's ships when moving in squadrons were governed by the same rules as other ships were. It seemed manifest to him that if her Majesty's ships when formed in a squadron were held to be governed by the ordinary regulations, it would result in extreme danger not only to such ships as they might meet but to the men-of-war in the squadron. He thought that the ordinary rules of navigation would not apply, not because of any special favour or exemption to her Majesty's ships, but because when they were moving in squadrons, as they clearly had a right to do, that constituted a special state of circumstances which would make it bad seamanship to apply the ordinary regulations. The assessors had advised them that the East Lothian had been guilty of improper navigation. In his opinion there were special circumstances here which justified a departure from the regulations. Had there been a breach of Article 27? It seemed to him that where there were circumstances justifying a departure from the rules, it could not be said that the rules were obligatory. But on the facts there seemed to be a good deal to show that the East Lothian and

the tug in dealing with these rules refused to depart from them notwithstanding the special circumstances which existed. They persisted in keeping on their course though the circumstances were such as to render a departure from the rules necessary. He was notwithstanding prepared to say that this was an infringement of Article 27. His Lordship then referred to "*Radley v. London and North-Western Railway Company*," 1 App. Cas., 754, and the case of "*The Margaret*," 19 App. Cas., 873, and came to the conclusion that in the face of the admission made in the Court below, the judgment of Mr. Justice Barnes must be affirmed.

LORD JUSTICE ROMER delivered judgment to the same effect.

Q.B. Div. (Ridley and)
Bigham, JJ.)

1900.
May 17.

WALKER V. BARKER.*

Principal and Agent—Authority to receive payment—Payment by cheque.

This was the plaintiff's appeal from the judgment of the Judge of the Westminster County Court. The question raised was whether a shop assistant has authority to receive payment on behalf of his employer by means of a cheque payable to himself where the cheque is subsequently duly honoured. The plaintiff sued for the price of jewels sold and delivered. The defendant pleaded payment. On several occasions the defendant had purchased jewelry and had paid in cash across the counter to one Miles, who was an assistant at the plaintiff's shop in Regent-street. In December, 1897, the defendant bought a bracelet worth £34. In the following February he came with his cheque-book to pay for this bracelet. Miles asked that the cheque should be made payable to himself, and the defendant made the cheque payable to "L. Miles or order." This cheque was subsequently cashed by Miles, who embezzled the proceeds. The question in the case was whether this constituted payment by the defendant to the plaintiff of £34. It appeared that when paying a subsequent account in 1899 the defendant had signed a cheque payable to the plaintiff. That cheque had been drawn out by Miles and signed by the defendant, who did not observe to whom it was payable. The learned Judge held that when the cheque was cashed it constituted payment, and so far as regarded the £34 he found for the defendant. The plaintiff appealed.

Mr. H. DOBB, for the plaintiff, admitted that Miles had authority to receive payment in cash or by cheque drawn in favour of the plaintiff; but not by cheque payable to any one else. The position of a servant such as Miles was different from that of a commercial agent, the liability of the agent being merely to account, that of the servant to hand on to his master what he receives in specie—"Bridges v. Garrett" (L.R., 5 C.P., 451). If this cheque had been handed on in specie, as it ought to have been, it would have been valueless to the plaintiff until the further events, the endorsement by Miles and the payment of the cheque, followed. He cited also "*Pearson v. Scott*" (9 Ch.D., 198). The result of holding this to be payment would be that payment by cheque to any one of the numerous assistants in a West-end establishment would be payment to the proprietor.

Mr. Cagney, for the defendant, was not called upon to argue.

The COURT dismissed the appeal.

MR. JUSTICE RIDLEY held that the case was covered by "*Bridges v. Garrett*" (L.R., 5 C.P., 451), the

authority of which had not been shaken by "*Pearson v. Scott*" (9 Ch.D., 198).

MR. JUSTICE BIGHAM said that the question was whether there was any evidence to support the holding of the County Court Judge. In his Lordship's opinion there was. It was clear Miles had authority to accept payment in cash, or by cheque drawn in favour of his master. These facts justified the inference that he had authority to accept payment by cheque drawn to himself provided he received cash for that cheque. In this case Miles did receive cash for the cheque and that was equivalent to payment. It made no difference whether he received the cash from the defendant himself or from the defendant's agent—i.e., his banker.

[Solicitors—White and De Buriatte, for the plaintiff; J. Hastings Dawney, for the defendant.]

Q.B. Div. }
(Mathew, J.)

1900.
May 17.

BELL V. PLUMBLY.*

Stock Exchange—Carrying over—Failure of broker—Privity of contract.

In this case the plaintiff claimed damages for the defendant's failure to accept and pay for 1,000 shares in the Colonial Goldfields (Limited), alleged to have been bought of the plaintiff by the defendant through his broker.

Mr. English Harrison, Q.C., and Mr. J. R. Atkin appeared for the plaintiff; Mr. Rufus Isaacs, Q.C., and Mr. Richard Nevill for the defendant.

The facts were as follows:—Before the middle of October, 1899, the defendant had open on the Stock Exchange 500 Colonial Goldfields shares, which had been purchased for him by Mr. Charles Hemmerde, his broker. These shares had been carried over from time to time. On October 12, Hemmerde bought on the instructions of the defendant 1,000 more shares in the same company for the end of October account; therefore, when that day arrived, the defendant had 1,500 shares to be dealt with, and, as he did not wish to take them up, arrangements had to be made to carry over. It was, however, found to be impossible to carry over the whole 1,500 on the Stock Exchange. The plaintiff, Mrs. Bell, was a lady of means who was in the habit of employing her money, through Hemmerde, in the "taking in" of shares, the arrangement being that various sums were from time to time sent to Hemmerde to be dealt with in this way, 10 per cent. contango being charged, of which 9 per cent. was credited to Mrs. Bell, the remaining 1 per cent. being retained by Hemmerde. Mrs. Bell's business affairs were under the control and direction of her son. In the present case, when the difficulty arose about carrying over the defendant's shares, Hemmerde arranged that 700 of the shares should be carried over on the Stock Exchange and 800 through him with the plaintiff. The actual transfer of the 800 shares was made in the names of Hemmerde and his clerk, that being in accordance with their arrangement with Mrs. Bell, the object being to save her trouble. The shares were carried over at successive accounts, with the exception that 400 only were carried over on the Stock Exchange, the balance being with the plaintiff until the approach of mid-December account, the date of which was December 14. A few days before that date Hemmerde informed the defendant that he would not be able to arrange for the carrying over of more than 500 of the shares, and that he must take up and pay for the remaining 1,000 shares.

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The defendant gave "a name," and an account was sent to him showing that 500 had been carried over and 1,000 closed, there being a balance due from the defendant of £1,256. On December 14 Hemmerde was declared a defaulter on the Stock Exchange. Application was made on behalf of Mrs. Bell to the defendant for payment. Negotiations followed, but without result, and eventually this action was brought. The defence was that there was no privity of contract between the plaintiff and the defendant.

MR. JUSTICE MATHEW, in giving judgment, said the defendant was bound to admit that he was liable to some one, but, it was said, not to the plaintiff. The transactions between the parties appeared somewhat complicated, but they could be illustrated very simply. A contract was made by the defendant through his broker to buy shares. The defendant, being unable to take them up, applied to his broker to get the shares carried over. This could not be done on the Stock Exchange, and the broker then told the defendant that he (the broker) had a client who would find the necessary money. By arrangement between the broker and his client the broker retained 1 per cent. as his commission out of the 10 per cent. contango which was charged for the carry over. It was said that the result of the transaction was that two separate contracts were entered into, one between the defendant and the broker, and the other between the broker and the plaintiff. His Lordship was of opinion that that result did not follow, and that it was never intended that the broker should as regards the defendant occupy the position of principal. It appeared that the plaintiff through her son kept a very vigilant eye on what the broker was doing with her money, and every separate transaction was treated by the broker in his books as one affecting the plaintiff. In this particular case the son was informed by the broker at each stage as to what was being done in the matter of the shares, and the son entirely approved. There was a clear case of a contract between the plaintiff and the defendant, and the plaintiff was therefore entitled to judgment for the amount claimed.

Judgment for the plaintiff for £635 with costs.

[Solicitors—N. Herbert Smith; S. D. Stoneham.]

Q.B. Div. (Ridley) } 1900.
and Bigham, JJ.) } May 18.

TYLER V. KINGHAM AND SON (LIMITED).*

Adulteration—Certificate of public analyst—Evidence—Margarine.

This was an appeal by case stated from the decision of justices of Middlesex, sitting at Brentford, dismissing a summons, issued at the instance of the appellant, an inspector of weights and measures, against the respondents, charging them that, being persons dealing in margarine, they did not conform to one of the regulations referred to in section 6 of the Margarine Act, 1887, inasmuch as they did deliver to Isaiah Longstreeth a package containing margarine without having durably marked on the top, bottom, and sides thereof, in printed capital letters not less than three-quarters of an inch square, the word "margarine." It was proved that on September 21, 1899, the appellant purchased from Longstreeth, a retail grocer, an article which was represented to him as being what he asked for—namely, butter. The appellant purchased the article with the intention of submitting the same to analysis. He complied in every respect with section 14 of the Sale of Food and Drugs Act, 1875, and Longstreeth accepted one of the three parts into which the article purchased

had been divided by the appellant. The appellant on the same day delivered one of the other parts of the article to the public analyst, who on October 3 certified that the same contained 10 per cent. of foreign fat not butter fat. After the analyst had given his certificate the appellant applied for and obtained summonses against Longstreeth, one under section 6 of the Sale of Food and Drugs Act, 1875, and one under section 6 of the Margarine Act, 1887. The article from which the sample purchased by the appellant was taken was purchased by Longstreeth, with no intention of having it analysed, from the respondents, who delivered it to him with an invoice and in a tub marked "pure butter." The summonses against Longstreeth were heard by justices sitting at Brentford on October 24. The justices found that the article purchased by the appellant was margarine, but that the words branded on the tub together with the invoice from the respondents amounted to a warranty given by the respondents to Longstreeth that the article was butter, and they accordingly dismissed the summonses. On October 26 the appellant applied for and obtained the present summons. On the hearing of the summons the appellant offered in evidence the certificate of the public analyst, but it was objected on the part of the respondents that the same was not admissible as evidence. They did not require the analyst to be called as a witness, but contended (1) that, the summons being in respect of a sale by the respondents to Longstreeth, the appellant was not a competent prosecutor, the right to proceed being limited by section 20 of the Food and Drugs Act, 1875, to the person causing an analysis to be made, in support of which contention "Smart and Son v. Watts" ([1894] 1 Q.B., 219) was referred to; and (2) that the certificate of the public analyst was not evidence as against the respondents, as no part of the sample of the article sold to the appellant and subsequently analysed had been offered or delivered to them. The justices, being of opinion that the sample taken and certificate given in Longstreeth's case could not be used in the respondents' case, and there being no other evidence as to the nature of the article in question, dismissed the summons.

Mr. LEWIS RICHARDS, on behalf of the appellant, contended that, Longstreeth not having purchased the article in question with the intention of submitting the same to analysis, section 14 of the Sale of Food and Drugs Act, 1875 (incorporated into the Margarine Act, 1887, by section 12 thereof), did not apply, and that under the circumstances the certificate of the analyst was made evidence by section 21 of the Sale of Food and Drugs Act, 1875. He cited "Buckler v. Wilson" ([1896] 1 Q.B., 83). Section 21 of the Sale of Food and Drugs Act, 1875, so far as it is material, is as follows:—"At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require the analyst to be called as a witness. . . ." And section 12 of the Margarine Act, 1887, provides that all proceedings under that Act shall be the same as those prescribed by sections 12 to 28 of the Sale of Food and Drugs Act, 1875.

Mr. Bonsey, for the respondents, was not called upon to argue.

The COURT dismissed the appeal.

MR. JUSTICE RIDLEY said that the analyst's certificate obtained for the purpose of the previous prosecution was not admissible as evidence in the proceedings against the respondents. In "Buckler v. Wilson" there was evidence to show that the article in question was margarine. The production of the certificate of an analyst was only one way of proving that the article was margarine. There were other ways of doing the

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

same thing. But here the appellant had simply tried to put in as evidence of that fact a document which was not evidence.

MR. JUSTICE BIGHAM said that he was of the same opinion. The question was whether there was evidence before the justices that the article was margarine. The only evidence of that fact offered to them was a certificate of analysis procured for the purpose of prosecuting Longstreeth, who on some previous occasion was prosecuted for selling a part of the article in question as butter. By the Sale of Food and Drugs Act, 1875, such a certificate given under the circumstances provided for in the Act was admissible as *prima facie* evidence of the facts stated therein in the prosecution of Longstreeth, but that did not make it evidence in the prosecution of any one else in the world. When in the prosecution of the respondents the appellant tendered the certificate of analysis as evidence that the article sold by the respondent Longstreeth was margarine the justices upheld the objection of the respondents to the admission of the evidence, and, in his Lordship's opinion, they were right in so rejecting the evidence. The respondents were entitled to require proper evidence of the fact that the article sold was margarine. The production of a document signed by a person who was not present, or who, at any rate, was not put in the witness-box, was not the proper way to prove the fact. The case of "*Buckler v. Wilson*," cited by the appellant's counsel, did not apply at all. It was true that the prosecution was taken under the same section, but in that case the analysis had been taken for the purposes of the case, and the certificate was admitted without objection. It was true that an objection was taken that certain of the conditions laid down in the Act in regard to the analysis had not been complied with. But that objection having been held to be bad, the respondent in the case admitted the result of the analysis, and did not dispute that the article in question was margarine. Here, however, the respondents required proper and strict proof that the article was margarine.

MR. BONNEY asked their Lordships to say whether they decided anything as to the question whether the appellant was the proper person to prosecute.

MR. JUSTICE BIGHAM.—We have heard no arguments on that point, and we decide nothing upon it.

[Solicitors—Sir R. Nicholson, for the appellant; Neve and Beck, for the respondents.]

Judicial Committee of the Privy Council } 1900.
(Lords Hobhouse, Morris, and Davey, } May 19.
and Sir R. Couch)

EDGAR V. PLOMLEY AND ANOTHER.*

Privy Council Appeals—New South Wales—Administration action—Priority—Fund carried to a separate account—Mortgage.

This was an appeal from a decree of the Supreme Court of New South Wales of November 17, 1897.

Mr. Swinfen Eady, Q.C., and Mr. A. A'Beckett Terrell were counsel for the appellant; Mr. Levett, Q.C., and Mr. George Serrell for the respondents.

LORD DAVEY, in delivering (for Lord Hobhouse) their Lordships' judgment, said the question in the suit arose in the administration of the estate of William Shepherd, who died in 1855, and who had devised his real estate to be divided among his wife and children when the youngest child should attain the age of 21. Each child was to take a life interest with remainder to his or her children. The testator left eight children, of whom one was named James. The youngest child attained 21 in 1876. In 1879 James Shepherd was ap-

pointed a trustee of the will, and in 1882 he became sole trustee. Mr. Plomley, the respondent, purchased the interest of some of the devisees, and in August, 1885, he instituted a suit against James Shepherd and all the other beneficiaries praying for a sale of the testator's land with a view to distribution of the proceeds, according to the interests of the parties to be ascertained by the Court. A decree for sale was made on December 3, 1885. The suit was numbered 3,840. On March 29, 1888, a decree was made on further consideration by which it was ordered that eight separate accounts should be opened, the fourth of which was headed, "The account of James Shepherd and his children." The purchase moneys of the testator's land were to be paid to the several accounts in certain specified proportions. And as to account No. 4 it was ordered "That all moneys which shall at any time hereafter during the life of the defendant James Shepherd be carried over to the credit of the said account number four (4) in respect of the interest or income arising from unpaid purchase moneys of the said hereditaments, or otherwise received or credited to the said account in respect of interest or income, and all interest and income that may arise from the investments, if any, of the said moneys or any part thereof respectively which may from time to time be authorized by this Court, be paid from time to time as and when the same shall have been carried over or credited as aforesaid to the defendant James Shepherd or his duly authorized attorney or attorneys until further order." As regarded some of the accounts, it was ordered that nothing should be paid out of Court without notice to the persons mentioned, but no such order was made to affect account No. 4. On the 26th September, 1893, the respondent and Anne Jones, who was one of the testator's children, jointly instituted a suit against James Shepherd alone. That suit was numbered 6,542. The plaintiff stated that some of the land was still unsold, and they prayed for an account of rents and profits received by James Shepherd, and so far as necessary for administration of the trusts of the will. On May 11, 1894, a decree was made for the account asked for. In October, 1895, Shepherd assigned to the appellant (Edgar) all his interest in the estate for the purpose of securing £725 and interest. The mortgage deed specified Shepherd's interest under account No. 4 in suit 3,840, to the credit of which there was then standing £5,158 6s. 5d., and it gave to the appellant full powers of application to the Court for procuring payment to himself. The pendency of suit 6,542 was known to the appellant. In March, 1895, the liability of James Shepherd to the other sharers in the estate (under the decree in suit 6,542) was established and he was ordered to pay into Court about £2,500 and costs. Meanwhile in October, 1896, the respondents filed a new claim against Shepherd and the appellant, claiming declarations that the sums due from Shepherd (who had been made a bankrupt) were charges on his interest under the will, and further that they had priority over the appellant's mortgage. The appellant did not claim to enforce his mortgage against any interest of James Shepherd in the testator's estate except the fund standing to the credit of account No. 4 in suit 3,840. That was now the sole question; whether, in the peculiar position in which that fund was placed by the decree of March 29, 1888, priority of charge should be given to the mortgagee of James Shepherd, or to the beneficiaries whose funds he had misapplied. The Chief Judge in Equity gave the respondents a decree in accordance with the prayer of their claim. He relied on the general principle that a defaulting trustee must make good his default before he was entitled to take any part of the trust estate for his own benefit.

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

and that his assignee could not stand in any better position. As for the effect of the decree carrying over funds to No. 4 account, he considered that suit 3,840 was a mere partition suit, and that the order was nothing more than a declaration that, so far as that suit was concerned, the fund might be treated as the separate property of the persons named in the heading. No question of administration, he said, was or could have been raised in that suit. There was no *res judicata* between the parties, or, if any, it was only that James Shepherd was entitled to the income of the fund until further order. The appellant's contention that he was a *bona fide* purchaser for value was, in the opinion of the learned Chief Judge, displaced by the fact that he had notice of suit 6,542. So far as regarded the liability of James Shepherd and his assignee in bankruptcy that judgment could not be and was not impeached. But as regarded the position of the appellant it raised a question of some subtlety and difficulty. There was not only no indication prior to October, 1895, of a purpose to enforce liability against the fund carried to account No. 4, but the proceedings in the two suits, when put together, were such as to induce a belief that the fund appearing by the separate account to be free was really free by not being attacked in suit 6,542. Their Lordships were disposed to agree with the learned Judge that it might not be quite accurate to apply the term *res judicata* to an order of that kind; because, though made in a suit in which one of the respondents was the plaintiff and the other a defendant, the particular question which had now arisen was neither decided nor raised. But that was hardly more than a verbal question. The important point was that the order was made in the presence of all parties interested; and its intention was to treat the fund as so far separated from the estate that it could be dealt with by the separate donees without notice to the others. That was a step forward in the administration of an estate, and it saved a great deal of expense and trouble. That fund could not be actually paid out because nobody had acquired an absolute and indefeasible interest in it, for the absolute interests acquired by the children were liable to variation in amount by the birth of more children. But the object of separate accounts was to relieve the subjects of each account from entanglement with the others, and to make the persons specified in each heading the owners of the fund carried to its credit, so far as was consistent with the necessity for retaining those funds in Court. The retention of the fund was not meant to prevent adult owners of interests in it from dealing with those interests. The division into separate accounts was intended to facilitate such dealings. Of course it was true that so long as any fund remained in Court claims against its owners could practically be enforced against it which could not practically be enforced if it were paid out. It was open to the other parties to the suit to show that they had claims enforceable against a separate fund which were not known or not existent when the fund was separated, and by proper proceedings to enforce them notwithstanding the order to separate the fund. But until some step was taken for the purpose the separation was commonly and rightly looked upon as showing that the separated funds were free from claims by the other sharers in the estate. Persons honestly dealing with those whom the Court declared to be owners of such funds were justified in trusting to that declaration, and their Lordships held it to be unjust to subject them to claims by the other sharers arising out of matters subsequent to the separation or latent at the time (*vide* "In re Eyton," 45 Ch. Div., 458). After referring to other

incidents and points raised in the case their Lordships said the result was that the decree could not stand so far as it was adverse to the appellant. The proper order would be to discharge the decree so far as it declared that the charges established by the plaintiffs against James Shepherd had priority over the appellant's mortgage, and so far as it awarded an injunction against the appellant, and so far as it ordered that no part of the interest accruing on account No. 4 should be paid to the appellant, and so far as it directed the appellant to pay costs. Instead thereof the decree should declare that the mortgage of October 24, 1895, was as between the plaintiffs and the appellant a valid security, and the first charge on the interests of James Shepherd thereby assigned; and should order that the income of the funds comprised in account No. 4 should be paid to the appellant until further order, and that the plaintiffs should pay him his costs of suit. That would leave standing all those parts of the decree which related to James Shepherd and to Mary MacGovern, and to the requisition of notice to the plaintiffs before any principal money was paid out, and to the questions reserved for further consideration. Their Lordships would humbly advise her Majesty in accordance with that opinion. The respondents must pay the costs of the appeal.

[Solicitors—H. T. Twynam, for the appellant; P. J. Gordon and Son, for the respondents.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.J.J.) } May 19.

PERCIVAL V. GARNER.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—"Undertakers," who are.

This was an appeal from the decision of the Liverpool County Court Judge under the Workmen's Compensation Act, 1897. The applicant for compensation was the widow of a workman, William Percival, who was killed by an accident arising out of and in the course of his employment. It appeared that a building was being erected on the premises of Messrs. Bowman and Co., chemical manufacturers. The building was over 30ft. in height, and was being constructed by means of a scaffolding. The building was being erected under the supervision of Messrs. Bowman and Co., who supplied the materials for it, and who employed the architect. The appellant, John Garner, at the request of Messrs. Bowman and Co., supplied the labourers for the brickwork of the building. The men so supplied acted under the orders of Messrs. Bowman and Co.'s foreman, and the appellant had nothing to do with the work, nor was he responsible for the way in which the work was done, nor had he any control over the men when at work. The appellant paid the men he supplied for the work, and Messrs. Bowman and Co. remunerated him by a payment—an extra halfpenny an hour upon the men's time. William Percival was one of the labourers supplied for the work by the appellant, and while at work on the building he fell off a scaffolding and was killed. It was contended on behalf of the appellant that he was not an "undertaker" within section 7 of the Workmen's Compensation Act, 1897, and was not, therefore, liable to pay compensation. The County Court Judge held that the appellant was the person undertaking the construction of the building, and was therefore an undertaker. He accordingly made an award in favour of the widow. Garner appealed. By section 7, subsection 1, of the Act, "This Act shall

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

apply only . . . to employment by the undertakers as hereinafter defined on, in, or about any building which exceeds 30ft. in height, and is either being constructed or repaired by means of a scaffolding, or being demolished. . . .” By subsection 2, “ ‘Undertakers’ in the case of a building means the persons undertaking the construction, repair, or demolition.”

Mr. A. P. Thomas appeared for the appellant; Mr. M. V. D’Arcy appeared for the respondent.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the person against whom proceedings must be taken to recover compensation was the person undertaking the construction of the building. It was clear that in the present case Messrs. Bowman and Co. were the persons undertaking the construction of the building. They were erecting the building on their own land, they employed their own architect, the building was being erected under their supervision, and the men were, while at work, under the control of their foreman. The appellant merely undertook to supply the labour. That did not make the appellant an “undertaker” within the meaning of the Act. In truth, the proceedings were taken against the wrong person. The decision of the County Court Judge must therefore be reversed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER agreed.

[Solicitors—J. H. Glover, Liverpool, for the appellant; Metcalfe, Birkett, and Rowlett, for Spensley, Liverpool, for the respondent.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) } 1900.
May 19.

GENTLE V. FAULKNER.*

Landlord and Tenant—Lease—Covenant not to assign—Assignment for benefit of creditors—Declaration of trust.

Covenant in a lease not to assign held to refer to legal assignments.

This was an appeal from the judgment of Mr. Justice Ridley in an action tried before him without a jury on July 5, 1899, reported in 15 *The Times* L.R., 466. The action was brought by the lessor against the lessee to recover possession of a shop at St. Albans on an alleged forfeiture of a lease for 21 years dated December 25, 1897. The lease contained among others a covenant “not (except by will) to assign or underlet the premises or any part thereof without the consent in writing of the lessor first had been obtained”; and it also contained a proviso for re-entry “if and whenever there shall be any breach or non-observance of any of the covenants,” or “if and whenever the lessee shall become bankrupt or have a receiving order made against him or shall execute an assignment for the benefit of his creditors or any of them.” The defendant on January 6, 1899, executed an assignment for the benefit of his creditors (to use the description thereof therein contained), by which he assigned to William Brook Keen for the benefit of his creditors “all the freehold, copyhold, and other lands, estates, tenements, hereditaments, and premises (save and except such as are of leasehold tenure), and all the stock, &c., of him the assignor,” and further it was stated in the deed, “the assignor hereby declares that he will stand possessed of all leasehold property of which he is now possessed for the said trustee and to assign and dispose of the same in such manner as the trustee shall from time to time direct for the purposes of these

presents.” On January 27 the plaintiff’s solicitors sent to Keen by post notice of a claim for forfeiture resting upon the execution of this assignment. On February 1 the writ was issued. The trustee since the assignment had had possession of the shop and managed the business. For the plaintiff it was contended (1) that there was a breach of covenant not to assign the premises; (2) that there was an assignment for the benefit of creditors which disposed of the land leased, so that in either case the landlord would be entitled to enter without giving notice under the Conveyancing Act, 1881, section 14, subsections 1, 6; and (3) that there was in any case an assignment for the benefit of creditors which would entitle the lessor to enter after notice given, and that such notice had been given and served according to the Act. For the defendant it was contended (1) that there was no breach of the covenant not to assign the premises; (2) that there was no assignment which disposed of the land leased within the meaning of section 14, subsection 6, of the Conveyancing Act, 1881, nor any assignment at all, or at the most only such an assignment as would render notice necessary under subsection 1 of the same section, and that the notice was bad and insufficiently served. The learned Judge held that the declaration of trust of the leaseholds contained in the assignment of January 6, 1899, operated, since the Judicature Act, 1873, as an assignment; that there had therefore been a breach of the covenant not to assign, which by subsection 6 of section 14 of the Conveyancing Act, 1881, entitled the plaintiff to re-enter without giving any notice; and, the question of the validity of the notice becoming immaterial, he gave judgment for the plaintiff.

Mr. WITT, Q.C., and Mr. KEEN, for the defendant, contended that a covenant not to assign was a covenant not to execute a legal assignment. A declaration of trust was not a legal assignment. An assignment for the benefit of creditors was not necessarily a breach of a covenant not to dispose of the land leased. Notice must, therefore, be served on the lessee before the lessor could re-enter, and, as this had not been done, the defendant was entitled to judgment. They cited “*Friary Holroyd, &c., v. Breweries v. Singleton*” ([1900] 1 Ch., 86; 2 Ch., 261).

Mr. H. TINDAL ATKINSON and Mr. T. H. CARSON, for the plaintiff, contended that there had been a breach of the covenant against assigning and disposing of the land, and that no notice was necessary to entitle the plaintiff to recover possession (“*Ex parte Gould*,” 13 Q.B.D., 454). If notice was necessary it was duly served on Mr. Keen, who was in substance the only person interested in the case. They also cited “*In re Hughes*” ([1893] 1 Q.B., 595); “*Ramage v. Womack*” ([1900] 1 Q.B., 116).

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the covenant not to assign meant a covenant not to make a legal assignment. The defendant in this case had, no doubt, made an assignment for the benefit of his creditors of part of his property, but expressly excepting his leaseholds. This assignment, however, contained a declaration of trust, and it was said that since the Judicature Acts such a disposition operated as an assignment. It was admitted that before those Acts it would not have had this effect, but the contention was that since the Judicature Act, 1873, section 24, subsection 4, requiring the Courts of Common Law to give full effect to equitable estates, a declaration of trust had all the effect of a legal assignment. That enactment did not convert into legal assignments instruments which without its aid had not the force of legal assignments. There was therefore no assignment within the meaning of the covenant. The second point was that the lessee by executing this assignment for the benefit of his

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister at-Law.

creditors had broken a condition against disposing of the land leased, so that the lessor was, by subsection 6 (i) of section 14 of the Conveyancing Act, 1881, entitled to re-enter without giving any notice. But an assignment for the benefit of creditors might or might not dispose of the land leased. The plaintiff did not prove enough by merely proving such an assignment. To entitle the lessor to re-enter without notice there must be a covenant which on its face bound the lessee not to dispose of the land leased and a breach of that covenant by a disposal of the land. No such covenant or breach was proved here. Therefore notice was necessary before the lessor could re-enter. By section 14 of the Conveyancing Act that notice must be served on the lessee. The notice in this case was not served upon the lessee, but only upon Mr. Keen. It was said that section 67 of the Act validated the notice notwithstanding. That section provided that a notice should be valid if addressed "generally to the persons interested." That did not exonerate the plaintiff from serving the notice on the lessee. This had not been done, and therefore the notice was insufficiently served. Consequently the plaintiff had no right to possession, and there must be judgment for the defendant.

LORD JUSTICE VAUGHAN WILLIAMS agreed with the above judgment.

LORD JUSTICE ROMER, in concurring, said that a condition against assignments for the benefit of creditors or any of them could not fairly be described as a condition against disposing of the land leased. An assignment for the benefit of creditors might or might not include the land leased. Subsection 6 of section 14 of the Conveyancing Act, 1881, dealt with two classes of conditions, the first containing well-known covenants in leases against assigning and under-letting; the second containing conditions directed to the solvency of the lessee. The lease in question contained examples of both classes. The covenant against assigning for the benefit of creditors clearly came within the second class and not within the first, and was inserted with an intention quite different from that to which those of the first class owed their existence. It was to be remembered that in section 14 short general descriptions of the covenants and conditions were used, and a condition against disposing of the land leased was not a fair description of a covenant against assigning for the benefit of creditors. The result was that notice was necessary before the lessor could re-enter, and as notice had not been served on the right persons there must be judgment for the defendant.

[Solicitors—Robbins, Billing, and Co., for Hodding, St. Albans, for the plaintiff; Hannay and Reynolds, for the defendant.]

Q.B. Div. (Ridley and } 1900.
Phillimore, JJ.) } May 19.

BATT V. MATTINSON.*

Adulteration—Procedure—Sale of Food and Drugs Act, 1899.

The provisions of the Sale of Food and Drugs Act, 1899, apply to prosecutions instituted after the date of its commencement, notwithstanding the fact that the offence took place before that date.

This was an appeal by case stated from the decision of the justices of Wellingborough. An information was preferred by the respondent, Thomas Mattinson, an inspector under the Sale of Food and Drugs Act, 1875, against the appellant, Alfred Richard Batt, the

manager of the Midland Stores, Wellingborough, charging him that on December 19, 1899, he did unlawfully sell to the prejudice of the respondent, the purchaser, a certain article of food which was not of the nature, substance, and quality of the article demanded—namely, golden syrup, the same being adulterated with glucose syrup, contrary to section 6 of the Sale of Food and Drugs Act, 1875. The summons was dated January 8, 1900, and was served on January 9, and was returnable on January 19. No copy of the analyst's certificate was served with the summons, and the summons did not state the quantity or proportion of glucose alleged to be contained in the golden syrup. The analyst's certificate was not given until January 2. At the hearing before the justices it was objected on behalf of the appellant that, inasmuch as the information was not laid until January 8, the proceedings should have been regulated in accordance with section 19 of the Sale of Food and Drugs Act, 1899, which came into force on January 1, and which provides that the summons shall state the particulars of the offence alleged, and also the name of the prosecutor, and shall not be returnable less than 14 days from the day on which it was served, and that there must be served with the summons a copy of the analyst's certificate obtained on behalf of the respondent. Section 10 of the Sale of Food and Drugs Act Amendment Act, 1879, provided that the summons in proceedings under the Sale of Food and Drugs Act, 1875, should contain particulars of the offence charged, and be made returnable not less than seven days from the day on which it was served. On the part of the respondent it was contended that, the offence having been committed on December 19, the date of the purchase, the procedure followed, which was in accordance with the provisions of the Sale of Food and Drugs Act, 1875, and of section 10 of the Act of 1879, was correct, the provisions of those Acts remaining in force, by virtue of section 38 (2) of the Interpretation Act, 1889, as regards any offence committed before January 1. The justices overruled the objection, and, having heard the case on the merits, convicted the appellant.

Mr. BONSEY, on behalf of the appellant, contended that, inasmuch as the provisions of section 10 of the Sale of Food and Drugs Act Amendment Act, 1879, were repealed by the Sale of Food and Drugs Act, 1899, the provisions of the later Act applied to prosecutions instituted after the date of its commencement, notwithstanding the offence in respect of which the prosecution was instituted took place before that date, upon the principle that alterations of procedure were retrospective unless it was otherwise provided in the enactment making such alteration.

Mr. MACASKIE, for the respondent, contended that the old form of procedure was the correct form, and relied on section 38 (2) of the Interpretation Act, 1889, which provides as follows:—"Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—(c) affect any . . . obligation or liability . . . incurred under any enactment so repealed; or (d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or (e) affect any investigation, legal proceeding, or remedy in respect of any such . . . obligation, liability, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed," contending that there was at the time of the commencement of the new Act a subsisting liability

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

under the old Act, the legal proceeding in respect of which would not be affected by the new Act. He contended further that, even if the Act of 1899 applied, all matters in regard to which that Act was not complied with were matters which could be cured by an adjournment. He cited "*Neal v. Devenish*" ([1894] 1 Q.B., 544), in which it was held, under section 10 of the Sale of Food and Drugs Act Amendment Act, 1879, that the omission of particulars of the offence from the summons did not deprive the justices of jurisdiction, but merely entitled the defendant to an adjournment in the event of the justices being satisfied that he was prejudiced by such omission.

The COURT allowed the appeal.

MR. JUSTICE RIDLEY said that the general rule was that enactments altering procedure had a retrospective effect unless a contrary intention appeared from the enactment. There certainly was no such contrary intention expressed in section 19 of the Sale of Food and Drugs Act, 1899. The respondent relied on section 38 (2) of the Interpretation Act, and especially on headings *c*, *d*, and *e* thereof. But those provisions related only to cases in which the enactment creating the obligation, penalty, &c., had been repealed. The effect of the provision was that a person who had committed an offence prior to the commencement of the repealing Act remained liable notwithstanding the repeal of the enactment creating the offence, the old Act remaining in force to that extent. But in the present case the enactment creating the offence with which the appellant was charged was not repealed. For this reason the justices were wrong in holding that section 38 (2) of the Interpretation Act had the operation contended for, and, accordingly, it was proper that the new procedure should be followed, notwithstanding the fact that the offence was committed prior to the commencement of the Act by which such new procedure was instituted. With reference to the point that all the matters in regard to which the Act of 1899 was not complied with were matters capable of being cured by an adjournment, he thought that the case of "*Neal v. Devenish*" was distinguishable, because the particulars were part of the summons and could therefore be amended under *Jervis's Act*. But, turning to the present case, the summons being made returnable less than 14 days from the date of service was not a matter capable of amendment under *Jervis's Act*. It was a matter that never could be put right. Nor could the omission to serve a copy of the analyst's certificate with the summons be put right. If it was not done at the time of serving the summons it could not be done afterwards. For these reasons he thought that the appeal should be allowed.

MR. JUSTICE PHILLIMORE delivered judgment to the same effect.

[Solicitors—Neve and Beck, for the appellant; Nicholson, Graham, and Graham, for James Heygate, Wellingborough, for the respondent.]

O.R. Div. } 1900.
(Wright, J.) } May 19.

IN RE FORD.*

Bankruptcy—Trustee's title—Money paid into Court to abide result of an action.

This was an application by the trustee in the bankruptcy claiming a sum of £1,000 paid into Court in these circumstances:—In August last Messrs. Jay sued the bankrupt Ford for £1,116 4s. 6d. and applied for judgment under Order XIV. of the High Court Rules. On September 21 Ford, on certain suggestions of fraud,

*Reported by H. L. FRASER, Esq., Barrister-at-Law.

obtained leave to defend upon an order which ran as follows:—"It is ordered that . . . the plaintiffs be at liberty to sign final judgment for the claim endorsed on the writ, and costs to be taxed, unless the sum of £1,000 be paid into Court within three days." Ford paid the money into Court, and on December 5 put in a defence and counter-claim, which was amended by leave on January 10. No reply was delivered, nor was any notice of trial given. On January 29 Ford filed his own petition, on which a receiving order was made, and adjudication followed. The trustee in the bankruptcy now claimed the £1,000 in Court on the ground that it still remained the money of the bankrupt at the time when the trustee's title accrued, which was the date of the receiving order; and that the plaintiffs at that time were and still remained mere ordinary creditors for whatever debt they might be able to prove in the bankruptcy.

Mr. Muir Mackenzie and Mr. Sinclair appeared for the trustee.

Mr. REED, Q.C., and Mr. MACASKIE, who appeared for Messrs. Jay, contended that in substance the £1,000 was paid into Court to abide the event, and that Messrs. Jay were secured creditors to the extent to which they could establish their claim.

MR. JUSTICE WRIGHT said,—It seems plain on principle and on the authorities that Messrs. Jay are for the present entitled to the benefit of the security which they obtained by the order of September 21 and the payment into Court in compliance with the order. The order must be treated as an order that the right to the money when paid into Court "shall abide the event." See "*Bird v. Barstow*" ([1892] 1 Q.B., 94), where the order appears to have been in the same form as in this case, and it is settled that when money is paid into Court to abide the event it must be treated as a security that the plaintiff shall not lose the benefit of the decision of the Court in his favour; see "*Ex parte Banner*" (L.R., 9 Ch., 379), "*Ex parte Bouchard*" (L.R., 12 Ch.D., 26), "*In re Gordon*" ([1897] 2 Q.B., 516). The very object of such an order is that the plaintiff shall be in as good a position, so far as the money paid in extends, against contingencies, such as bankruptcy, as if he got immediate judgment. The cases cited show that when the plaintiff has without default on his part failed to get judgment before the bankruptcy "the event" is the decision of his right in the bankruptcy. The money must remain in Court until the event is decided by the trial of the action, if that is to be tried, or by adjudication upon a proof by the plaintiffs in the bankruptcy.

[Solicitors—Nunn and Popham; Francis and Johnson.]

Q.B. Div. (Darling and } 1900.
Bucknill, JJ.) } May 21.

ASHWELL AND NESBIT (LIMITED) AND ANOTHER V.
STANTON.*

Contract—Consideration—Detriment.

In this case Mr. E. Pollock appeared for the plaintiffs; and Mr. Manisty for the defendant.

This was an action for £500 for supplying heating, ventilating, and lighting to certain shops and premises in Duncan-street, Leeds. The defendant counter-claimed in the following circumstances:—The original contract for doing the work contained no date for the completion of it. It was alleged, however, that, in the course of the work, a verbal promise was made that it should be finished by November 4, 1897. On the strength of this, the defendant incurred large expenses in advertising the opening of the premises on that

*Reported by H. G. SNOWDEN, Esq., Barrister-at-Law.

day, and hiring managers and shop assistants. The premises, however, were not lighted by that date and the expenditure thereby wasted formed the subject-matter of the counterclaim.

The question of the counterclaim had been already before a Divisional Court consisting of Mr. Justice Wills and Mr. Justice Ridley last year, when it was found that an absolute oral promise to complete by November 4, 1897, had been given, but judgment on the question as to whether there was consideration for the promise was reserved; and the point was now, owing to the prolonged illness of Mr. Justice Wills, re-argued by consent of both sides.

Mr. POLLOCK, for the defendant, on the counterclaim, contended that there was no evidence of any advantage accruing as the result of the promise made. He cited "*Alderson v. Maddison*" (8 App. Cas., 467); "*Dashwood v. Jermyn*" (12 Ch.D., 776), and the comments thereon in "*Pollock on Contract*."

Mr. JUSTICE BUCKNILL cited the definition of consideration contained in "*Pollock on Contract*," which included a "detriment" suffered by the other side as a form of good consideration.

Mr. Manisty was not called upon.

Mr. JUSTICE DARLING, in giving judgment, said that Mrs. Stanton had, on the faith of the promise made her, incurred expenses which were a detriment to her. The case of "*Dashwood v. Jermyn*" (*supra*) showed that, if a person altered his position as the result of a promise made him, there was a contract with good consideration.

Mr. JUSTICE BUCKNILL concurred.

Leave to appeal was granted.

Q.B. Div. (Ridley and) 1900.
Bigham, J.J.) } May 21.

THE QUEEN V. WINDER (EX PARTE THE CORPORATION OF BOLTON).*

Licence—Appeal—Costs of Justices on appeal—Taxation—Alehouse Act, 1828, sec. 29—Order for costs quashed.

In this case cause was shown against a rule for a writ of *certiorari* to quash an order of the Lancashire Quarter Sessions. In August last an application was made to the justices of Bolton for an alehouse licence in respect of premises known as Halliwell Lodge, in substitution for a licence theretofore held in respect of the Rope and Anchor publichouse. The application was refused, whereupon the applicants appealed to the quarter sessions. The appeal was heard at the October sessions and was allowed, and the licence was granted. The quarter sessions also made an order (which is the order now sought to be quashed), under and by virtue of section 29 of the Alehouse Act, 1828, ordering that the costs incurred by the justices in appearing to support their decision before the quarter sessions should be paid by the treasurer of the borough of Bolton out of the borough fund to Mr. Robert Winder, the clerk to the justices, and they adjourned the sessions until November 14 for the clerk of the peace to ascertain the amount of the costs. Before the date named Mr. Winder appeared before the clerk of the peace, who certified the amount of the costs to be £310 16s. 4d., which amount was inserted in the order, and the order, having been drawn up and dated the first day of the sessions, was served upon the treasurer of the borough. No sum was taxed off the bill of costs handed in by Mr. Winder. It comprised several items of "profit" costs, including 40 guineas for preparing the brief. The treasurer of the

borough of Bolton refused to pay the sum named in the order, and proceedings had been taken to bring the order up to the High Court in order that it might be enforced. The grounds on which the order was now sought to be quashed were (*inter alia*) as follows:—(1) That the taxation took place in the absence of the treasurer of the borough of Bolton—that is to say, the party who was ordered to pay the costs; (2) that the order was bad, because no bill of costs was served with it; (3) that it was bad, because it directed payment to be made to the clerk to the justices, and not to the justices themselves; and (4) that no consent was given by the treasurer that the costs should be taxed out of sessions. Section 29 of the Alehouse Act, 1828, after providing that, in the event of an appeal from the judgment of any justices being dismissed or abandoned, the Court of Quarter Sessions should have power to order the appellant to pay the costs of the justice, provided as follows:—"And in every case in which the judgment so appealed against shall be reversed it, shall be lawful for the Court, if it shall think fit, to adjudge and order that the treasurer of the county or place in and for which such justice whose judgment shall have been reversed shall have acted on the occasion when he shall have given such judgment shall pay to such justice, or to whomsoever he shall appoint, such sum as shall, in the opinion of such Court, be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been so put; and the treasurer is hereby authorized to pay the same, which shall be allowed to him in the accounts."

Mr. AVORY showed cause on behalf of the justices. He contended, in answer to the grounds of objection 1, 2, and 4, that the order was not an order for a taxation of the costs as between party and party, but was similar to an order for the payment of the costs of a prosecution and that the amount of the costs could be therefore estimated by the clerk of the peace in the absence of the treasurer. In connexion with the third ground, he read an affidavit made by Mr. Winder, in which he stated that the justices of Bolton, on October 9, 1899, passed a resolution in which they authorized Mr. Winder to incur the expense of appearing to support their decision at the quarter sessions, and that nine of the justices, being a majority of three of those who were present on October 9, had signed an authority or appointment appointing Mr. Winder to receive the sum of £310 16s. 4d., and he contended that, under the circumstances, the order was a sufficient compliance with the statute, especially as Mr. Winder, being the clerk to the justices, was the person likely to be appointed to receive the money. He cited "*Reg. v. Binney*" (22 L.J., M.C., 127) and "*Reg. v. Justices of Ely*" (25 L.J., M.C., 1).

Mr. LAWSON WALTON, Q.C., Mr. C. W. MATHEWS, and Mr. GUY STEPHENSON appeared on behalf of the Corporation of Bolton in support of the rule. They cited "*Freeman v. Read*" (10 L.J., M.C., 123, and 1 E. and B., 810); "*Reg. v. Mortlock*" (7 Q.B., 459); and "*Reg. v. Long*" (1 Q.B., 740).

The COURT made the rule absolute.

Mr. JUSTICE RIDLEY was of opinion that the order was bad, inasmuch as it directed the payment to be made to Mr. Winder and not to the justices or to a person appointed by the justices; and, further, because the costs having been taxed out of sessions without the consent of the person liable to pay them, there was no order of the justices adopting the taxation.

Mr. JUSTICE BIGHAM said the order was bad in two respects. It was bad on its face, because it did not state that the money was to be paid to a person whom the justices had appointed to receive payment, and it was bad also because the Court of Quarter Sessions had not exercised any jurisdiction as to the amount of the

*Reported by O. G. WILBRAHAM, Esq., Barrister-at-Law.

sum to be paid. It appeared that Mr. Winder never had, in fact, been appointed to receive the money. Some of the justices appeared to have appointed him, but not those who were entitled to the indemnity. With regard to the second point, the Court of Quarter Sessions had power to order the treasurer of the borough to pay such a sum by way of costs as they were of opinion was sufficient to indemnify the justices. The Court never, in fact, expressed any opinion at all. They made the order that a sum should be paid, but never expressed any opinion as to the amount. "Costs and charges" in section 29 meant costs and charges to which the Court thought the justices were properly put. There really was no taxation at all. A very large bill was put in, but the person who had to pay had no notice of the taxation. He did not know it was going on, and not a penny piece was taxed off the bill. His Lordship thought that in this proceeding the party ordered to pay ought to have an opportunity of being heard at the taxation and making objections to any items he thought fit.

By consent of the parties appearing, it was ordered that the bill of costs should be taxed in the Crown Office after notice to the treasurer of the borough.

[Solicitors—Indermaur and Brown, for Winders, Bolton, for the justices; Holt, Beaver, and Co., for R. G. Hinnell, Bolton, for the Corporation of Bolton.]

Q.B. Div. }
(Mathew, J.) }

1900.
May 21.

MACLAY AND OTHERS V. BAKERS AND SPILLER .
(LIMITED).*

Ship—Bill of lading—Conditions as to rate of discharge—Discharge to proceed "continuously."

Judgment was delivered in this case. The plaintiffs were the owners of the steamship *Magdala* and they claimed damages for the detention of the *Magdala* at Avonmouth, the port of discharge. The defendants were the consignees of a part of the cargo.

Mr. Robson, Q.C., and Mr. T. Gardner Horridge appeared for the plaintiffs; Mr. Carver, Q.C., and Mr. Inskip for the defendants.

MR. JUSTICE MATHEW, in delivering judgment, said that the action was brought by the shipowners against the consignees of part of the cargo to recover damages for the detention of the steamer *Magdala*. The defendants with other consignees received goods which had been shipped under bills of lading containing the following clause:—"Goods are to be received by the consignee immediately the vessel is ready to discharge and continuously at all such hours as the Custom House authorities may give permission for the ship to work." The vessel arrived at the dock at Avonmouth with a cargo of grain on November 8, 1899, and it was said for the plaintiffs that if the cargo had been received by the consignees continuously the discharge would have finished by November 14, whereas owing, it was said, to the default of the defendants and the other consignees the vessel was detained until November 20. The usual course was followed in the discharge. A firm of well-known stevedores, Messrs. King and Son, were appointed to act for the ship, and the dock company undertook to do the merchants' part of the work. The dock company had to put the grain into bags in the vessel's hold, to weigh the bags on deck, and to land them, and for this purpose 16 gangs of men would have been required for a continuous discharge. The stevedores' men had to lift the bags from the hold by means of winches and to guide them on to the deck, and this

part of the work required 21 men. It was admitted that there was at this time a difficulty in obtaining labour and that there was a great press of work at the dock; and it was impossible for the discharge to be completed by November 14. It was contended on behalf of the plaintiffs that there was an absolute obligation on the defendants to receive the cargo continuously, and that their duty was the same as if a period of six days had been expressly mentioned in the bill of lading as the time within which the cargo was to be received. The defendants said that regard must be had to the actual circumstances which occurred, and that the duty of the consignees was not an absolute duty, but only to make all reasonable efforts to receive the cargo continuously. His Lordship was unable to accept the plaintiffs' contention. The word "continuously" did not add to the obligation of the merchants, and afforded no indication of an intention to fix a definite time or rate of discharge. It meant no more than that the merchant bound himself to do his work in a reasonable time and with a reasonable amount of exertion. If it was intended that he was to be responsible for all extraordinary causes of delay, the language used in this bill of lading was not the right language to use. The case came within the principle laid down in "*Hick v. Raymond*" ([1893] A.C., 22) and was clearly distinguishable from the case of "*Budgett v. Binnington*" (25 Q.B.D., 320) which had been relied on by the plaintiffs. There would be judgment for the defendants with costs.

[Solicitors—Holman, Birdwood, and Co.; Whites and Co., for Press, Inskip, and Press, Bristol.]

Q.B. Div. }
(Mathew, J.) }

1900.
May 21.

BETTANY V. EASTERN MORNING AND HULL NEWS
COMPANY (LIMITED).*

Principal and Agent—Commission—Advertisement agent—Alleged custom as to payment after termination of engagement.

Custom held not proved.

The plaintiff in this case had formerly been the advertisement agent in London for the newspapers owned by the defendants, and had been paid a commission of 10 per cent. upon all advertisements obtained in London for the newspapers. In June, 1898, the defendants terminated the plaintiff's engagement, after notice. The defendants paid the plaintiff commission up to Christmas, 1898, on all advertisements published in their papers which had been originally obtained by the plaintiff. The claim in this action was for commission for advertisements published since Christmas, 1898. Advertisements are of two kinds—those the publication of which is required by the advertiser to continue until countermanded, and those which are published for a definite period, and then either lapse or are renewed. The plaintiff alleged that, although his engagement with the defendants had terminated, he was by the custom of the trade still entitled to commission on all advertisements which might appear in the defendants' papers, if they had been obtained by him in the first instance; and it was contended that the custom applied to both kinds of advertisements, provided that, in the case of renewals, the renewal was made within a period of 12 months from the previous publication. For the defence it was denied that there was any such custom as alleged.

Mr. Duke, Q.C., and Mr. W. T. Lawrance appeared for the plaintiff; Mr. T. E. Scrutton for the defendants.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The plaintiff himself, Mr. Cunison, advertisement manager of the *Daily News*, Mr. Nott, advertisement manager of the *London Echo*, Mr. Macdonald, formerly advertisement manager of the *Speaker*, and Mr. Vernon, an advertisement agent, gave evidence in support of the custom. For the defendants the following witnesses were called:—Mr. Thame, advertisement manager of the *Standard*, Mr. Madge, manager of the *Globe*, Mr. Leslie, of the *Pall Mall Gazette*, and Mr. Edwards, assistant-manager of the *Daily News*. All these gentlemen stated that there was no such custom as the plaintiff contended for.

MR. JUSTICE MATHEW, in giving judgment, said that the plaintiff insisted that by the custom of the business he was entitled to the payment of commission in two cases—first, where the advertisements were inserted “until countermanded”; secondly, where advertisements originally procured by him were renewed with less than a break of 12 months, even though the renewal of the advertisement might have been obtained by the plaintiff’s successor. The question was whether the alleged custom had been proved. It had been laid down over and over again that the way to prove a custom was to show an established course of business, at first contested but ultimately acquiesced in. A number of witnesses had been called to prove the custom. First there was the plaintiff himself, who admitted in cross-examination that it might not be quite fair that the payment of commission should go on for more than three or four years, although he said that the custom justified him in saying that the commission was payable for all time if the publication of the advertisements continued. Several of the plaintiff’s witnesses were obliged to admit that they knew of no instance where the supposed custom had been acquiesced in by newspaper proprietors. Mr. Macdonald had made a claim against the *Speaker*, but there had been no dispute, the payment was made without question, and therefore that instance did not support this case. Then another witness, Mr. Vernon, had recovered commission in a case tried before Mr. Justice Wills. His Lordship was not aware what materials for a decision the learned Judge had in that case. He could in this case act only on the evidence which had been given before him, and he was of opinion that the evidence of the alleged custom was most unsatisfactory. The defendants’ witnesses said that vague claims were made from time to time, but they were always stoutly resisted. His Lordship held that the custom had not been proved, and gave judgment for the defendants with costs.

[Solicitors—J. A. Maxwell; Woodhouse and Davidson.]

Prob., Divorce, and Adm. Div. } 1900.
(Jeune, P.) } May 21.

SYNGE V. SYNGE.*

Divorce—Judicial separation.

A wife seeking a divorce on the ground of adultery and desertion, failed to prove the desertion and was herself held to have deserted her husband; *held*, notwithstanding, that she was entitled to a judicial separation.

This was a suit in which Charlotte Granville Synge, *née* Stuart, who is known on the stage as Miss Granville, had petitioned for the dissolution of her marriage with Major Robert Follett Muter Foster Millington Synge, now adjutant of the provisional battalion at Shorncliffe, on the ground of his desertion and adultery.

*Reported by J. H. MURPHY, Esq., Barrister-at-Law.

The issue of adultery was tried by a jury and was decided in favour of the petitioner (*vide The Times*, April 27 and 28 and May 2, 4, and 5). The issue of desertion was by consent heard before the Court itself, and the learned Judge held that the respondent had not deserted the petitioner (*ante*, p. 388). The wife’s petition for divorce was accordingly dismissed, but the petitioner having expressed the desire that a judicial separation should be granted to her the question was argued to-day.

Mr. Bargrave Deane, Q.C., and Mr. Le Bas were for the petitioner; Mr. Grazebrook for the respondent.

Mr. DEANE said that on the finding of the Court and jury he had to ask that a decree of judicial separation should be granted to the petitioner.

Mr. GRAZEBROOK submitted that under section 31 of the Divorce Act, 1857, the granting of a decree was in the discretion of the Court in all cases where a decree of divorce was sought for if the petitioner had been guilty (*inter alia*) of desertion or conduct conducing to the respondent’s misconduct. Section 7 had substituted the granting of judicial separations for divorces *a mensa et thoro*. In sections 16 and 17 the use of the word “may” clearly indicated that a discretion was given to the Court in granting judicial separations. In “*Duplany v. Duplany*” ([1892] P., 53), which was the leading case on the subject, there had been no considered argument on behalf of the respondent, M. Marius, and the report showed that no cases were cited in support of his case. It was most material for the Court to consider the conduct of the parties when exercising its discretion, and in the present case it was now common ground that the respondent had not committed any matrimonial offence until years after his wife, by refusing to cohabit with him, had wilfully separated herself from him and thereby deserted him. The learned counsel then proceeded to cite the following cases:—“*Smith v. Smith*” (1 S. and T., 359); “*Boreham v. Boreham*” (1 P. and D., 77); “*Otway v. Otway*” (13 P.D., 141); “*Butler v. Butler*” (63 L.T., 256); “*Mackenzie v. Mackenzie*” ([1895] A.C., 384); and “*Yeatman v. Yeatman*” (1 P. and D., 489, and 2 P. and D., 187). In the present case the Court had held that the petitioner, Mrs. Synge, was “morally” responsible for her husband’s subsequent misconduct. All the cases showed that the invariable rule of the Court was that the party seeking for relief should come to the Court with clean hands. Mrs. Synge had without a reasonable excuse wilfully separated from her husband since 1892, and had therefore been guilty of the matrimonial offence of desertion.

The PRESIDENT.—Am I not in a sense bound by “*Duplany v. Duplany*”?

Mr. GRAZEBROOK.—With all respect I submit that that decision is wrong, and that if “*Boreham v. Boreham*” had then been cited to your Lordship the case would have been otherwise decided, for in that case a judicial separation was refused to a wife whose husband had been convicted of adultery. Under section 22 of the Divorce Act, 1857, the Court was “in all proceedings other than for divorce to proceed on principles and rules which shall, as nearly as may be, be conformable to the principles and rules on which the Ecclesiastical Courts acted,” and by that same Act desertion was made a matrimonial offence. The Court had found that Mrs. Synge had committed a matrimonial offence.

Mr. DEANE.—The Court did nothing of the kind.

The PRESIDENT.—I have not held that the wife’s conduct conducing to the husband’s adultery, and I did not think it necessary to do more than decide that the respondent had not deserted his wife; but I am now prepared to decide the question whether or not the petitioner deserted her husband.

Mr. DEANE.—I submit that your Lordship is *functus officio*.

The PRESIDENT.—On the question of divorce, yes; but not as to the question of judicial separation.

Mr. GRAZEBROOK.—In "Butler v. Butler" Lord Hannen refused to grant a judicial separation to a wife merely because her solicitor had been a party to a collusive document which was signed by the husband.

The PRESIDENT.—The question is whether the Ecclesiastical Courts would have refused to grant a divorce *a mensa et thoro* to a wife who had left her husband. I am bound by section 22 to act on the same principles as the Ecclesiastical Courts.

Mr. GRAZEBROOK.—Desertion was not formerly a matrimonial offence.

The PRESIDENT.—The Divorce Act does not make it a bar to judicial separation, though it does make it a discretionary bar to divorce.

Mr. GRAZEBROOK.—The Court is not bound hand and foot by section 22; the words are "shall follow as nearly as may be." It was not unreasonable to suppose that the Legislature, when creating a new offence, should intend it to be dealt with as though it had been an offence before the Act. I submit that desertion was engrafted by section 23 on to the powers of the Ecclesiastical Courts, and therefore the Court should refuse the present application.

Mr. DEANE.—The Court has held that no matrimonial offence has been committed by the petitioner, and under these circumstances it is idle to argue that she has deserted her husband. But, even if she had, it is no answer to a petition for judicial separation. Even conduct conducing is no answer, not being a matrimonial offence. My submission is that the Court has no discretion but to grant a judicial separation whether the petitioner had deserted her husband or not. My only reason for arguing this matter to-day is that my client wishes to appeal on the question of whether the respondent has been guilty of desertion or not, and if I do not take the point by asking for a judicial separation now it may not hereafter be open to me to do so.

The PRESIDENT, in giving judgment, said that, although he had not previously formally ruled upon the question, he now held that the petitioner had deserted her husband in 1892 by separating from him without reasonable excuse. He (the learned Judge) had fully considered the point now raised in "Duplany v. Duplany." He knew of no authority for saying that the Ecclesiastical Courts would have refused a decree *a mensa et thoro* on the ground of desertion for the mere reason that desertion was not, until after the passing of the Divorce Act of 1857, a matrimonial offence. Possibly the Ecclesiastical Courts might have refused relief on the grounds indicated in "Boreham v. Boreham," because in that case stress was laid on the neglect having caused the misconduct, and it was not unreasonable to argue that under these circumstances relief would be refused. His opinion was now the same as when he decided "Duplany v. Duplany," and that was that he was bound to construe strictly the Act of Parliament, which had abstained from making desertion a discretionary bar to the granting of a judicial separation. Although he considered the wife was perhaps "morally" responsible for her husband's misconduct, that was a long step from actually conducing to it. A man had no right whatever to commit adultery merely because his wife refused to cohabit with him. In his view the wife had been guilty of desertion, but that was no ground for refusing her the relief she now sought. There would therefore be a decree of judicial separation. The question of the custody of the child would be reserved into Chambers.

[Solicitors—Lewis and Lewis; Berkeley-Calcott and Co.]

Prob., Divorce, and Adm. Div. }
(Gorell Barnes, J.) }

1900.;
May 21.

THE CRIMDON.*

Admiralty—Practice—*Caveat* against arrest warrant—Personal undertaking given by solicitors—Arrest of ship—O. 29, rr. 11, 12, and 18.

A decision was given in an application in this case, which raised an important point of practice. The matter arose out of an action in which Mr. Justice Gorell Barnes on May 17 gave an award of £1,000 to the owners, master, and crew of the German steamship *Helène Woermann* for salvage services rendered by them to the steamship *Crimdon*, which broke down not far from Cape Finisterre in the Bay of Biscay, and was picked up by the *Helène Woermann* on March 23, and was towed into Plymouth on March 25. When the *Crimdon* arrived in Plymouth her owners were communicated with, and their solicitors on Monday, March 26, entered a *caveat* in the principal registry against the issue of a warrant for the arrest of their vessel under the provisions of Rules 11 and 12 of Order 29 of the Rules of the Supreme Court. In entering the *caveat* the solicitors gave an undertaking signed by themselves without any qualification to enter an appearance in any action that might be commenced in the High Court of Justice against the *Crimdon*, and also to give bail therein in a sum not exceeding the value of the ship, cargo, and freight. In the meantime a firm of solicitors at Plymouth had been instructed on behalf of the *Helène Woermann*, and they on the same day, March 26, issued a writ against the *Crimdon* and took out a warrant for the arrest of the ship, notwithstanding that the entry of the *caveat* was brought to their notice, the owners of the *Helène Woermann* declining to be satisfied with the undertaking of the defendants' solicitors. Under Rule 18 of Order 29 they were at liberty in the circumstances to take out the warrant, but that rule provides that the party at whose instance any property in respect of which a *caveat* is entered shall be arrested, shall be liable to have the warrant discharged and to be condemned in costs and damages unless he shall show to the satisfaction of the Judge good and sufficient reason for having so done. The *Crimdon* was arrested at Plymouth on the morning of March 27, just as she was about to proceed on her voyage. Application was made to Mr. Justice Gorell Barnes in chambers on March 28 for the release of the ship, and he ordered the warrant to be discharged, but directed that the question of the liability of the owners of the *Helène Woermann* for costs and damages in respect of the arrest should stand over until after the hearing of the action.

Mr. SCRUTTON (Mr. Chaytor with him), for the plaintiffs, contended that the plaintiffs might fairly object to be content with the undertaking of solicitors merely, and that that amounted to good and sufficient reason within the meaning of the rule. He cited the case of "The Evangelismos" (Swa., 378).

Mr. ASPINALL, Q.C., for the defendants (Mr. Noad with him), cited the case of the "*Johan Benjamin*," referred to in Pritchard's Admiralty Digest, volume 1, page 370.

MR. JUSTICE GORELL BARNES, in giving judgment, stated the facts, and said there was no doubt that if there had been any breach of the undertaking the solicitors who gave it would have been personally responsible. He thought it was an erroneous position for the plaintiffs to take up when they said that their refusal to accept the undertaking of the solicitors constituted good and sufficient reason for arrest.

*Reported by HUGH C. S. DUMAS, Esq., Barrister-at-Law.

ing the ship within the meaning of the rule. The rules clearly contemplated that undertakings might be given by solicitors for the sake of avoiding the unnecessary expense which would be caused by arresting the ship. In a case like this, where adequate security was offered, the plaintiffs were not entitled to insist on the arrest. There were no grounds shown for objecting to the undertaking, and the plaintiffs must pay to the defendants the sum of £18 by way of damages, that being the proved loss to the defendants occasioned by the act of the plaintiffs, as well as the taxed costs.

[Solicitors—Hollams and Co., for the plaintiffs ; Downing, Bolam, and Co., for the defendants.]

Q.B. Div. (Ridley }
and Bigham, JJ.) }

1900.
May 22.

HAWKINS V. JUSTICES OF BRIDGEWATER.*

Licence—Renewal—Objection to, what is—
Licensing Act, 1872, sec. 42.

Case stated by the Court of quarter sessions for the county of Somerset.

On August 28, 1899, at the general annual licensing meeting for the borough of Bridgewater, the chief constable presented his annual report, containing the following clause :—" It is my pleasure to again report a decrease in the charges of drunkenness during the year and also that the licensed houses generally have been well conducted, but I respectfully ask that the renewal of the Mariners' Compass beerhouse, St. Mary-street, may be withheld until the adjourned meeting." The justices thereupon directed the matter to stand over till September 25, when they refused the licence. The question was whether the head constable's notice was an objection within section 42 of the Licensing Act, 1872, which was a sufficient justification for the justices to grant the adjournment. The Court of quarter sessions held that it was.

Mr. Foote, Q.C. (Mr. Weatherly and Mr. Haythorne Read with him), appeared for the appellants—the tenant, lessee, and owner of the house respectively ; Mr. Duke, Q.C., and Mr. Douglas Metcalfe for the justices.

The COURT held that the decision of the Court of quarter sessions was right. The report had been given and acted upon by the justices as an objection, for the justices in fact adjourned. The report was read to the justices in open Court. The meaning of the head constable was that he objected. It would be frittering away the business of the thing to hold it was not an objection.

Appeal dismissed.

[Solicitors—Prideaux and Sons, agents for C. E. Hagon, Bridgewater, for the appellants ; Prior, Church, and Bigge, agents for W. Brice, Bridgewater, for the justices.]

Q.B. Div. }
(Bigham, J.) }

1900.
May 22.

SLEIGH V. TYSER.†

Insurance—Marine—Policy on cargo—Unseaworthiness of ship—Cargo of cattle—Want of proper appliances for ventilation.

This case was heard before Mr. Justice Bigham on the 7th, 8th, and 9th inst., and was a claim against an underwriter on a loss of certain cattle intended to be shipped to Lorenzo Marques.

Mr. Joseph Walton, Q.C., and Mr. J. A. Hamilton

* Reported by J. E. ALDOUS, Esq., Barrister-at-Law.
† Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

appeared for the plaintiff ; Mr. Robson, Q.C., Mr. Serutton, and Mr. F. D. Mackinnon appeared for the defendant.

In addition to those dealt with in the judgment the following cases were cited :—" *Dickson v. Zirinia* " (10 C.B., 602) ; " *Toussaint v. Martinant* " (3 T.R., 105) ; " *Bigge v. Parkinson* " (7 H. and N., 955).

At the conclusion of the arguments judgment was reserved.

MR. JUSTICE BIGHAM delivered a written judgment as follows :—This action was brought on a Lloyd's policy to recover from the defendant his proportion of the amount payable in respect of a loss of cattle shipped at Brisbane in the steamer Ningchow for carriage to Lorenzo Marques, in Delagoa Bay. The defense was that the ship was unseaworthy for the carriage of the cargo because of want of proper appliances for ventilation and because she carried an insufficient number of cattlemen to attend to the beasts. The reply to that defence consists of a denial of the unseaworthiness and of an allegation that the implied warranty of unseaworthiness was excluded by the express terms of the policy. The policy was dated February 10, 1899. It is in the usual form, but contains some special provisions which require to be noticed. The subject-matter of the insurance is described as " 500 cattle valued at £14 each." The premium was 15 guineas per cent., but to return 8 per cent. for no claim. The insurance was to cover " all risks of shipping, unloading craft, &c., until safely landed ; all risks including mortality and jettison arising from any cause whatever : animals walking ashore or when slung from the vessel, walking after being taken out of the slings, and landed, to be deemed arrived and no claim to attach to this policy on such animals. Each animal to be deemed a separate insurance." There is also a provision that the fittings and conditions of the cattle are to be approved by Lloyd's agents' surveyor. The Ningchow had been chartered by the plaintiff under a time charter, which provided that the owners of the ship should allow the charterer to erect and secure stock and extra passenger fittings, and should provide accommodation for not exceeding 12 stock men, the charterer paying the owners 2s. per man per day for victualling the number carried. The shipments of the cattle began on February 20 and finished on February 22, 1899, 438 beasts being put on board. Of this number 88 were put on an orlop deck, which was laid at the bottom of the vessel ; 180 were put on the between decks and 170 on the main deck. Above the cattle on the main deck 1,000 sheep were carried on a temporary staging erected for the purpose. The animals were in charge of a body of about 14 stock men furnished by the plaintiff, a man named Monro being their foreman or captain. Before the vessel arrived at Lorenzo Marques practically all the cattle on the between decks had died, and over 30 per cent. of those on the orlop and main decks had met the same fate. Only 185 beasts out of the whole number were landed alive at the port of destination. This mortality (about 60 per cent.) is admittedly far in excess of what might reasonably be expected. The bulk of it occurred during the first part of the voyage when the ship was traversing Australian waters, where the carrying of live cattle is a common trade, and where the evidence shows that the mortality in ordinary circumstances seldom exceeds 3 per cent. To what was this exceptional mortality due ? On the one hand, the defendant says it was due to bad ventilation and insufficient attendance to the wants of the cattle. On the other hand, the plaintiff says it was due to the weather and the consequent rolling of the ship. I am satisfied that there was no weather to account for the loss. [His Lordship,

after stating in detail the facts which led him to the above conclusion, proceeded.] The vessel, in my opinion, went to sea most insufficiently ventilated for the cargo she had to carry. Evidence was called before me which satisfied me that the ventilation on all three decks was insufficient. To this cause I attribute the abnormal mortality. I think also that the number of men, 14, put on board for attending to the cattle was not large enough to secure the carriage of the cattle in safety to their destination. I do not forget in coming to these conclusions either the certificate of Lloyd's agents' surveyor or the fact that certain statutory provisions had to be complied with, and are certified by a Government official as having been complied with in connexion with the accommodation for the cattle on board the vessel. I arrive at my conclusions notwithstanding this double certification. The insurance having been effected the cattle were hurriedly shipped without any proper care being taken to secure their safe arrival. Of course, the onus of proving the unseaworthiness is upon the defendant; but he fully discharged it. The question then arises whether insufficient ventilation and an insufficient supply of men constitute a breach of the implied condition of seaworthiness. I think they do. This implied condition in a policy on cargo is exactly the same as in a policy on ship—viz., that the ship shall be seaworthy for the adventure on which she starts; stating the condition with particular reference to a policy on cargo, it may be defined as a condition that the ship shall be fit for the proposed service; fit, that is, in respect of all those things which appertain to the safe carriage of the cargo in question to its destination. No doubt it is not usual for underwriters on cargo to rely on the defence of unseaworthiness; the underwriter usually pays the cargo owner and avails himself of the latter's rights against the shipowner, the benefit of which he obtains by subrogation (see *McArthur*, Contract of Marine Insurance, 2nd Ed., p. 15). But this is because of the supposed hardship of the law which makes innocent shippers of cargo responsible for the oversight or negligence of the shipowner. The practice does not modify the law, and in the present case the hardship out of which the practice has sprung does not exist, for the plaintiff had himself undertaken with the shipowner to provide both the ventilation appliances and the cattlemen. Then were proper ventilation and a sufficient number of men to attend to the beasts things which were required on board this vessel for the safe carriage of the cargo to its destination? Clearly they were. Many cargoes besides cargoes of living animals require ventilation if they are to be carried safely, and it cannot be doubted that a ship which put to sea without proper means of providing the necessary ventilation, or without sufficient men to utilize those means, would be unseaworthy for the service required. But it is said that in this case the implied warranty is gone by reason of the express words in the policy to which I have already referred, "the fittings and conditions of the cattle to be approved by Lloyd's agents' surveyor." They were in a somewhat halting way so approved; the certificate of the surveyor has been read, and it sufficiently complies with the requirements of the clause. It is argued for the plaintiff that his compliance with this express provision discharges him from further obligation. I do not think so. The certificate has nothing to do with the sufficiency of men shipped on board to attend to the cattle; with that matter the surveyor did not concern himself; and though ventilation appliances may well come within the meaning of the word "fittings" the question remains, Did the parties by this stipulation, that the fittings should be approved by the surveyor,

intend to supersede the implied warranty of seaworthiness in respect of ventilation? I am of opinion that they did not. I think this stipulation was inserted in the policy for the benefit of the underwriter and was intended to be additional to and not in substitution for the important condition upon the basis of which all contracts of this description are *prima facie* made. It may be asked what additional advantage does the stipulation give to the underwriter? I think the answer is that it probably enables him to reinsure with greater ease, and it affords him some assurance that he will not find himself involved in an action such as this. To exclude the implied warranty of seaworthiness the words used must be express, pertinent, and apposite (*per Lord Penzance* in "*Quebec Marine Insurance Company v. Commercial Bank of Canada*," L.R., 3 P.C., 234). If I could find in these words sufficient to satisfy me that the parties intended that Lloyd's agents' surveyor should be put in the position of a sole judge to decide once for all whether the fittings were enough for the purpose required, I should probably come to a different conclusion as to the intention of the parties in introducing the stipulation relied on. But I do not find anything of the kind. The stipulation is, in my opinion, merely superadded for the benefit of the underwriter, and therefore does not exclude the implied warranty—"*Mody v. Gregson*" (L.R., 4 Ex., 49). A question was raised by me during the hearing of the case as to the effect of the clause in the policy by which each animal is to be deemed a separate insurance; but I think nothing turns on that clause. It is inserted with a view to qualifying the liability for particular average, and with that view only. The result is that there must be judgment for the defendant.

[Solicitors—James Ballantyne, for the plaintiff; Parker, Garrett, and Holman, for the defendant.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) 1900.
May 24.

FRANCIS, TIMES, AND COMPANY V. CARR.*

Foreign Judgment—Judgment *in rem*—*Res judicata*—Tort committed abroad—Authority and jurisdiction of foreign Court—Judgment not affecting *status* of goods—Notice of proceedings in foreign Court—Act of State.

The Court delivered judgment in this appeal, after having taken time for consideration. The arguments were heard on three days at the beginning of the present month, as reported in *The Times* of May 3, 4, and 5.

The appeal was brought by the plaintiffs from the judgment of Mr. Justice Grantham after the trial of the action with a special jury. The case in the Court below was reported in *The Times* of June 6, 7, 8, 9, 19, and 20 last. The plaintiffs were a firm of merchants trading in the East, and the defendant was Captain Carr, R.N., who, in January, 1898, was in command of H.M.S. *Lapwing* in or near the Persian Gulf. The action was brought to recover damages for the seizure of ammunition belonging to the plaintiffs on board the steamship *Baluchistan* in the Persian Gulf. It appeared that the plaintiffs had been in the habit of shipping arms to Bushire, a Persian port, and also to Muscat and Bahrein. Since 1881 there had been a nominal prohibition against the importation of arms into Persia, but in practice this prohibition had only been used to substitute an arbitrary import for a regular Customs duty. The Sultan of Muscat was an independent Sovereign. One of the partners in the plaintiffs' firm resided at Bushire. In the autumn of 1897 rumours

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

became current that hostilities were about to break out between the Indian Government and the Afridis on the North-West Frontier of India, and in consequence the plaintiffs' shipments were marked "Bahrein via Bushire—optional Muscat," so that the consignments might be delivered at either of those ports. In November, 1897, the plaintiffs shipped arms and ammunition from London to the value of about £600 on board the *Baluchistan* marked as above. Between December 7 and 11, while the ship was on her voyage, the Persian Government, acting, it was said, at the request of the British Government, seized arms and ammunition at Bushire belonging to the plaintiffs to the value of about £30,000. A report of this fact appeared in *The Times* of December 15, and the plaintiffs, upon hearing of this, had the arms taken out of the ship at Port Said, but were unable to stop the ammunition. The captain of the ship upon instructions altered the destination of the ammunition to Muscat by obliterating the other marks. The ship was stopped on January 24, 1898, off Muscat by her Majesty's ship *Lapwing*, and the ammunition was seized. The seizure took place within two miles of the shore. It appeared that on January 13, 1898, the Sultan of Muscat, by a proclamation, gave permission to British ships of war to confiscate arms found in ships within the territorial waters of Muscat if it should appear that the arms were intended for Indian or Persian ports. The plaintiffs stated that they had never received any warning against sending arms or ammunition to Muscat until the *Lapwing* seized the ammunition now in question, that they had carried on their trade in arms and ammunition in a perfectly open manner, and that none of it had reached the Afridis. On April 15, 1898, a Muscat Court, consisting of the Prime Minister and the Commander-in-Chief, inquired into the seizure and held that it was valid. The jury found that the goods were for Muscat only, and not for Persia or India; that a reasonable man would have believed them to be for Persian or Indian ports; that the plaintiffs shipped the goods *bona fide* and in the ordinary course of business; that the trade was carried on with the knowledge of her Majesty's Government; that the words "Muscat optional" were added to the port marks before the ship left London; that they were added with the *bona fide* intention that the goods should be landed at Muscat, if desirable; that the plaintiffs were bound by the act of the ship's agents in altering the marks at Port Said; and that there was no evidence that the plaintiffs were notified of the proceedings of the Sultan's Court at Muscat. Upon further consideration, Mr. Justice Grantham held (1) that the proclamation of the Sultan of Muscat had the force and authority of a proclamation issued by a fully-constituted Sovereign Power; (2) that the defendant could rely upon it by way of defence if the seizure of the goods was contrary to the English law; (3) that the goods were not goods which were made liable to seizure under that proclamation; (4) that the Court of the Sultan of Muscat had jurisdiction entitling it to deliver a judgment *in rem*; (5) that the judgment or decree of the Court had the force of a judgment *in rem*; that (6) the onus lay on the plaintiffs to prove that no notice of the proceedings had been given to them, and that they had failed to prove it, they having a partner in Bushire, who would bear of the seizure, and a regular agent at Muscat; and he came to the conclusion that, even if the plaintiffs did not have direct notice, they did get notice, and did have an opportunity of appearing before the Court, and abstained from raising any objection to the seizure at Muscat, and could not now contend that the seizure was illegal or that the judgment was contrary to natural justice. He accordingly gave judgment for the defendant. The plaintiffs appealed.

Sir Robert Reid, Q.C., Mr. Joseph Walton, Q.C.,

and Mr. F. W. Hollams were counsel for the plaintiffs; the Attorney-General (Sir Richard Webster), the Solicitor-General (Sir Robert Finlay), and Mr. R. B. D. Acland were counsel for the defendant.

LORD JUSTICE VAUGHAN WILLIAMS read the judgment of the Court, allowing the appeal, as follows:— This is an appeal against a judgment of Mr. Justice Grantham's in an action brought by the plaintiffs against the defendant for wrongfully depriving the plaintiffs of goods, arms, ammunition, &c. The plaintiffs are merchants carrying on business at Bushire, in Persia, and Muscat, in Arabia, and in London. The defendant at the time of the acts complained of was in command of H.M.S. *Lapwing*. The statement of claim alleged that the plaintiffs in November, 1897, caused to be shipped on board the steamship *Baluchistan* certain cases of cartridges to be carried to Bahrein via Bushire, and, for the purpose of enabling the plaintiffs to avail themselves of whichever might prove to be the most advantageous market, it was a term of the said shipment that the plaintiffs should have the option to land the said cases at Muscat, and the said cases were accordingly marked "Bahrein via Bushire, Muscat optional," and that the steamship *Baluchistan* sailed from London on November 26, 1897, and on or about January 24, 1898, was on the high seas several miles from, but making for, the harbour of Muscat, when H.M.S. *Lapwing* signalled to the said steamer to stop and fired a shot across her bows; the said steamer thereupon hove to, and the defendant then boarded her and took possession of the above-mentioned goods of the plaintiffs. The defendant by his defence denied that the plaintiffs in the month of November, 1897, or at any other time in the ordinary course of business or at all, shipped the cases of cartridges as alleged, and denied that the plaintiffs had the option alleged, or that the goods were marked as alleged. There were certain other formal traverses in the defence, but at the trial the denials above mentioned were the only statements in the statement of claim which were really contested. On the face of the bill of lading the receipt of the goods was acknowledged from J. Vandersluys, who was the shipping clerk of the plaintiffs, but the plaintiffs are not mentioned in the bill of lading. No consignees are named in the bill of lading, and the goods were made deliverable in the body of the bill of lading at the port of Bushire or to his or their assigns, but in the endorsement on the bill of lading of the port marks the words are written, "Bahrein via Bushire, Muscat optional." In the course of the voyage the plaintiffs, through Messrs. Strick, the ship's agents, directed the master to deliver at Muscat; and he, in blue pencil, struck out "Bushire" from the body of the bill of lading and substituted "Muscat," and struck out in the endorsement the words "Bahrein via Bushire" and the word "optional," leaving only the word Muscat. The manifest of cargo describes the cargo as shipped on board the steamship *Baluchistan* from London to Muscat. The defendant in addition to the traverses pleaded affirmatively that in the month of January, 1898, and prior to the acts complained of, the Sultan of Muscat proclaimed that all arms and ammunition found within the territorial waters of Muscat belonging to British, Persian, or Muscat subjects, and intended for Indian or Persian ports, would be confiscated, and such proclamation was valid and effectual by the law of Muscat; and the said Sultan, in accordance with the law of Muscat, on or about January 13, 1898, authorized and requested the commanders of all British and Persian men-of-war to search all vessels in the territorial waters of Muscat sailing under the British, Persian, or Muscat flag, and to confiscate all arms and ammunition found on board such vessels intended for Indian or Persian ports. The

defendant, acting upon such authority and in compliance with such request and by the authority of her Majesty and not otherwise, searched the steamship *Baluchistan*, which was then within the territorial waters of Muscat, and, finding on board the said vessel the ammunition mentioned in the statement of claim intended for a Persian port, directed the captain to bring his vessel into the harbour of Muscat; and then, in the harbour of Muscat, acting upon such authority and in compliance with the said request and in accordance with the said proclamation, seized and landed the said ammunition; that subsequently proceedings were taken in the Court of the Sultan of Muscat to inquire into the legality of the said seizure, and it was thereupon determined and adjudged that the said arms, &c., were intended for Persian ports and were lawfully seized by the *Lapwing* in accordance with the said proclamation, authority, and request of the Sultan of Muscat; that all the acts complained of took place within the territories of an independent Sovereign, the Sultan of Muscat, and were lawful by the law of the country where they were committed, and have been adjudged to be so by the duly constituted Courts of that country; that the judgment of the Court of Muscat herein before-mentioned was a judgment *in rem* against the goods of the plaintiffs, and that the plaintiffs are, by the said judgment, estopped from alleging that the said goods were not lawfully seized and confiscated. The plaintiffs, by their replication, in addition to taking issue on the defence, say that the plaintiffs were not at any time prior to the alleged judgment served with any process or summons, and did not appear, and were not represented in the alleged proceedings, nor had they before the judgment any notice or intimation that the alleged proceedings were about to be held, or were being held, nor any opportunity of defending the same, and that it is contrary to natural justice that the said judgment should be binding on them. Mr. Justice Grantham left the following specific questions to the jury, and the jury answered as appears hereunder. 1. Were the goods for Persian or Indian ports when seized by Captain Carr?—Answer—For Muscat only. 2. When they arrived at Muscat, would a reasonable man believe them to be for Persian or Indian ports?—Answer—Yes. 3. Did the plaintiffs ship the goods in question *bona fide* in the ordinary course of business?—Answer—Yes. 4. Did that business have the knowledge of her Majesty's Government?—Answer—Her Majesty's Government knew of the trade. 5. Were the words "Muscat optional" added to the port marks before the ship left London?—Answer—Yes. 6. Were they added with *bona fide* intention that goods should be landed at Muscat if exigencies of trade made it desirable?—Answer—Yes. 7. Were the plaintiffs parties to the alteration of marks on board ship at Port Said?—Answer—They were parties to the re-marking, and the same as to altering the bill of lading. 8. Had the plaintiffs the opportunity of appearing and being heard in the proceedings at Muscat? Had they any notice of such proceedings? And had the public any notice of such proceedings?—Answer—That no evidence has been given before your Lordship that the Court at Muscat notified the plaintiffs of proceedings, and, with reference to the public, the same thing, no evidence. The jury added to their answer that the plaintiffs were parties to alterations of marks at Port Said, that they considered them bound by the action of the ship's agent. Now, these answers of the jury as to the questions of fact constitute a verdict in favour of the plaintiffs, and the Crown, who defend the action for Captain Carr, do not seek to impeach these findings, but the points of law raised by the defendant have to be dealt with. These points of law seem to be the following:—1. That a judgment *in rem* was obtained in

Muscat which binds the plaintiffs and disposes in favour of the defendant of several of the matters as *res judicata* in respect of which the jury found in favour of the plaintiffs. 2. That, in order to maintain an action in the Courts of this country for a tort committed abroad, the act must be an act which is wrongful and actionable by the law of the country where it was committed and also by the law of this country, and that it is established that the act complained of by the plaintiffs in the present case was not wrongful and actionable by the law of the country where it was committed. This point is based on the case of "*Phillips v. Eyre*" (L.R., 4 Q.B., 225, and 6 Q.B., 1). First, as to the point which raises the defence of *res judicata*, this defence is based on a State document issued within the State of Muscat on April 15, 1898. Now, is this document, signed by the State officers of the Sultan of Muscat and approved under the hand and seal of the Sultan, a judgment *in rem*? And what was the nature of the proceeding in which it was issued? It is not suggested that this is a judgment *in rem* resulting from an action instituted *in personam*. The suggestion is that the action and judgment alike are *in rem*. Now, to constitute a judgment *in rem*, the judgment must be a judgment of a competent Court in respect of a *res* actually or constructively within the jurisdiction of the Court, and the judgment must determine the right to, or disposition of, such *res* in the control of the Court. The question in the present case, as to whether the *res* was so in the control of the Sultan of Muscat as to give jurisdiction to a competent Court in Muscat to dispose of or determine the title to it, seems to depend on whether the goods were seized within the dominions of the Sultan. There seems no doubt but that the goods were seized within "the three-mile limit." We assume that a ship within the three-mile limit bound for Muscat is within the territorial waters of Muscat, and as such within the jurisdiction of the Sultan and his Courts executing his delegated authority, although, if this case depended upon the truth of that assumption, it might be necessary to consider further the question whether by International law such a vessel must be considered within the jurisdiction of the Sultan for the purpose of legal proceedings. We think that no objection can be taken to the constitution of the Court. It seems to us plain that the Court was so constituted as to be competent to exercise any jurisdiction which the Sultan purported to delegate to it; and it seems to us that this delegation is defined by the document itself under the hand and seal of the Sultan. Assuming the *res* to be within the dominions of Muscat and the Court to be properly constituted, it remains to consider what is the authority of the Court, and what is its jurisdiction, what is the law to apply, and what is the effect in Muscat of that document. There is no evidence outside the document itself as to these matters. Foreign law must of course be proved as a fact, but to some extent a document under the seal of the Court may be evidence of, or raise a presumption of, foreign law. The document is stated on its face to be issued by a Court held by the order of the Sultan of Muscat for inquiring into the circumstances under which certain munitions of war *ex steamship Baluchistan* of Swansea were seized by the British man-of-war *Lapwing* in the territorial waters of his Highness the Sultan of Muscat. Thus far there is nothing to indicate that the inquiry is to be a judicial proceeding for the purpose of determining the disposition of, or the title to, the goods in question. The Court might well be a Court to report to the Sultan or his Government. The document then goes on:—"We find after full inquiry and deliberation:—(1) That the munitions of war *ex steamship Baluchistan* were seized by the British man-of-war *Lapwing*; (2) that the seizure was in every respect legal

and in accordance with the permission given by his Highness the Sultan to British men-of-war at the request of the British and Persian Governments; (3) that these munitions of war were intended for Persian ports; (4) that the alteration in the port marks of destination on the cases took place during the stay of the steamship *Baluchistan* at Port Said, with the intention of misleading as to the true destination of those cases, but such alteration did not confer any immunity on them from seizure in accordance with the above-mentioned permission." These are the whole of the findings. The document contains no condemnation, no words of forfeiture, no words declaring the title of the owners to be divested, no *interim* order for a *sale pendente lite*, and no transfer to a purchaser under a sale by order of the Court, and no transfer whatever. For authority that a judgment *in rem* must in some one or other of these ways affect the movable *res*, see the opinion of the Judges delivered by Mr. Justice Blackburn in "*Castrique v. Imrie*" (4 H.L.C., 414), and section 592 of "*Story on Conflict of Laws*" cited with approval by him. Thus far there seems no alteration by the Court in Muscat of the *status* of the goods seized. There is a finding, it is true, that the seizure was in every respect legal and in accordance with the permission given by his Highness the Sultan to British men-of-war at the request of the British and Persian Governments, but this finding does not in terms affect the *status* of the goods, it does not in terms amount to an order condemning or confiscating the goods or divesting the title of any one or vesting the title in any one else than the owners. If the seizure declared to be legal is to be looked at as a seizure on behalf of the Sultan, which is a view which hardly seems to be manifested by the description of the seizure as a seizure made in accordance with the permission given by the Sultan to British men-of-war at the request of the British and Persian Governments, such seizure may have been a seizure similar to the arrest of the Admiralty Marshal for the purpose of a subsequent action *in rem*, and the destination of the goods may have been a condition precedent to the legality of the seizure, but we do not think that this would constitute a judgment affecting the *status* of the goods. If on the other hand the seizure is regarded as a seizure by the British Government, in accordance with the permission given by the Sultan to the British Government at its request, and not as the agents of the Sultan, we find no condemnation of the goods in favour of the British Government as captors. We do not think that one can construe a document, even though issued by a competent Court, as a judgment *in rem* by inference. See "*Plummer v. Woodburne*" (4 B. and C., 625). We think that you must find the judgment *in rem* in the express terms of the document, and we doubt whether you are entitled to look at any documents not expressly referred to in the alleged judgment; but it may be worth while to look at the document which, it is said, constitutes the permission to the British men-of-war to make the seizure. Now the documents in question are the notification and proclamation of January 13, 1898. The former document, after reciting the desire of the Sultan to prevent the introduction of munitions of war into India and Persia by export from Muscat and the agreement of the Sultan with Great Britain and Persia, goes on:—"We therefore warn that all munitions of war sent to those two countries (India and Persia) will be confiscated, and those engaged in this trade will be punished, as the introduction of such munitions into India and Persia is prohibited by the Governments of those two countries, and therefore illegal. In future our Muscat flag will be no protection to vessels carrying the said munitions from our dominions to India and Persia." This warning is in terms addressed to subjects of the Sultan of Muscat. It will be observed that the illegality is based

on the prohibition by the Governments of India and Persia, and the statement that "our Muscat flag will be no protection" to vessels carrying such munitions *prima facie* looks like a statement that the Muscat flag will not protect the vessels from seizure by vessels bearing flags other than that of Muscat. Then comes the proclamation, which runs thus:—"Be it known to all who see it that we have given permission to British and Persian vessels of war to search vessels carrying their and our flags in our territorial waters and to confiscate all munitions of war in them, if those munitions are intended for India or Persia, if they are the property of British, Persian, or Muscat subjects. We have also given permission to those vessels of war to search Muscat vessels in Indian and Persian waters suspected to carry munitions for Indian and Persian ports and to confiscate the said munitions." This looks as if the confiscation was to be by the British men-of-war, and as if the legality of the confiscation ought to be decided by British Courts within the British dominions, as would be the case if a British vessel seized and sought to confiscate munitions intended for those at war with Great Britain even though the seizure took place in foreign territorial waters with the assent of the foreign Power. It may be that the proper inference is that the seizure was on behalf of the Muscat Government, and that a confiscation, if adjudged, would have had to be to the Sultan and not to the British Government as captors, but there is certainly no express adjudication to this effect; and on the evidence it looks as if the ammunition might still be in the hands of the British Resident who gave the receipt to Captain Carr, the defendant. For the foregoing reasons we are not satisfied that the document issued by the Muscat Court was an adjudication by a Court of justice determining the *status* or ordering the disposition of goods seized within Muscat territory; and we wish to add that, even if we were so satisfied, we should hesitate to hold that our Courts ought to give effect to a judgment as to which there is no evidence of any public notice of the intention to hold the inquiry which resulted in the judgment. But, quite apart from any replication impeaching the judgment as against natural justice, the onus of proving which would be on the plaintiffs, there seems to be no judgment *in rem*—first, because there is no sufficient proof that the document issued by the so-called High Court of Muscat was the act of a Court having judicial functions or acting judicially; secondly, because the so-called judgment does not include any condemnation or other finding affecting the *status* of the goods seized or the title thereto or disposition thereof by an order for sale or transfer to a purchaser or otherwise, but only declares the seizure to have been lawful as being in accordance with the permission given by the Sultan to British men-of-war. There is no confiscation validated at the instance of either the Sultan or the captors. As to the second point of law—that, in order to maintain an action in the Courts of this country for a tort committed abroad, the act complained of must be an act which is wrongful, i.e., an actionable wrong, by the law of the country where it was committed and also by the law of this country, and that it is established in the present case that the act complained of by the plaintiffs was not at the date of the issue of the writ in this action in this country wrongful, or at all events did not constitute an actionable wrong, in the Courts of Muscat—there is no dispute as to the principle, only as to the application of it. We know that by the law of Muscat at the time when the plaintiffs were deprived of their goods by the defendant, the seizure could not be justified, and was therefore unlawful; for the only seizure which was then lawful, if any, was that of munitions of war sent

to India or Persia, which these goods were not. Where is the proof that this unlawful seizure subsequently became lawful by the law of Muscat? There is no judgment *in rem*. There is no evidence of the law of Muscat beyond the certificate of Lord Salisbury that Muscat is an independent State, and that the Sultan is the sovereign ruler thereof; so that for proof that the wrong complained of has ceased to be an actionable wrong, the onus of which is on the defendant, the defence can only rely on the document of April 15 *plus* the fact that the Sultan is a sovereign ruler, whatever that may mean. There are two suggestions which have been made in argument to support the proposition that the document of April 15 has legalized that which was unlawful when done, and so divested it of its tortious character as to afford immunity to the wrongdoer in respect of it. First, it is said that the document of April 15 is legislation by an autocratic, absolute Sovereign. There is no evidence to support this proposition and, even if there could be such legislation according to the law of Muscat, what is the suggested character of the legislation? It does not purport to alter the law. It is not an act of indemnity, because it assumes that the seizure which it declares to be lawful does not require an act of indemnity. In short, it is manifest it is not legislation legalizing a past wrongful act. Then it is suggested that, if the document of April 15 is not legislation, it is an act of State ratifying the seizure, which was in excess of authority when it was made, and that therefore the seizure would not be actionable in the Courts of Muscat according to the principle of the decision in "*Buron v. Denman*" (2 Exch., 167). Now, assuming that without evidence we ought to take it for granted that the law of Muscat recognizes the principle of "*Buron v. Denman*," yet how can that principle be applied to these facts? The document of April 15 recites or finds that the munitions were seized by a British man-of-war, and that the seizure was in accordance with the permission given to British men-of-war at the request of the British and Persian Governments. It seems, therefore, that the act done did not purport to be done on behalf of the Sultan, but only by his permission. We do not think that such an act, even though coupled with subsequent approval by the Sultan, falls within the principle of "*Buron v. Denman*," and can be treated as an act of State. The seizure was not, in fact, made under circumstances falling within the terms of the proclamation of January 13; and, even if it had been, it ought not to be assumed that the law of Muscat is different from our own law as laid down in "*Walker v. Baird*" ([1892] A.C., 491). The permission was not, nor was the seizure thereunder, an act of war or reprisal or embargo or a preliminary of war. It was something done by permission of the Sultan for the purpose of carrying out an agreement made by the Sultan with a foreign Government. The second point of defence, in our judgment, also fails. It only remains to deal with a point based on inferences of fact drawn by Mr. Justice Grantham. The learned Judge says:—"In my opinion the plaintiffs have failed to prove that no notice was given to them, or that they had no opportunity of appearing before the Court, though they had every opportunity of doing so (that is, of giving such proof), and as the jury were unable to answer the question definitely, we must look to admitted facts to see whether or not the plaintiffs had proved any presumption of want of notice or knowledge that the Court would sit or was sitting. The plaintiffs themselves are silent on the matter." What the learned Judge means by this statement is not quite clear. He had asked the jury this question—Had the plaintiffs an opportunity of appearing and being heard in the proceedings at Muscat; had they any notice

of such proceedings, and had the public any notice of such proceedings? The answer of the jury was that "no evidence has been given before your Lordship that the Court of Muscat notified the plaintiffs of the proceedings." Mr. D. E. Dkarwar, a partner in the plaintiffs' firm, was called as a witness, and states in answer 158 that he had no notice of any proceedings in Court; and Mr. Charles Times, the London partner of the firm, in answer to question 740, "Had you any notice at all of any legal proceedings at Muscat?" answered, "No; none whatever." The learned Judge goes on to suggest that notice might have been given to the plaintiffs' agent at Muscat, Damodhar Dharamsey, or to the ship's agents, Messrs. Towell and Co.; but this was not suggested to the plaintiffs in cross-examination, when they stated that they had no notice whatever of the proceedings. Then the learned Judge refers to a letter of April 9, 1898, of Damodhar Dharamsey to the plaintiffs, but it seems to me that in the passage of the letter referred to he only says that the British Resident had pressed the Sultan to hold a meeting in his own palace and declare that the "confiscation" of Baluchistan cargo was done by his order and wishes, "to which I am told that the Sultan did not agree, so the British agents are not on good terms with him, and they did not give him his monthly subsidy." This letter does not seem to me to be any evidence that the plaintiffs' agent at Muscat had any notice that a judicial proceeding was going to be held, or even that a meeting in the palace was going to be held. On the contrary it seems rather notice that the Sultan had refused, and there is no evidence of the scope of the agency. If it were proved that the proceeding which took place was a judicial proceeding, the onus would be on the plaintiffs to show that they had no notice or knowledge, but the answer of the plaintiffs denying that they had notice does not seem to me to be limited to a denial that they had formal notice, and I think it was on the defendants to suggest on cross-examination that the plaintiffs had notice by knowledge, either personally or through their agents; but the point is of no great importance as, in our judgment, there was no judgment *in rem*, and admittedly there were no proceedings *in personam*. The learned Judge further finds that the plaintiffs wilfully or deliberately abstained from raising any objection to the seizure at Muscat, and cannot, therefore, now contend that the seizure was illegal or that the judgment was contrary to natural justice, and says that if any authority for such finding were necessary "*Cornish v. Abingdon*" (4 H. and N., 549), and other cases of a similar class will be ample justification for so finding. Now the decision in "*Cornish v. Abingdon*" was based upon the principle that when a person by a representation by words or conduct induces another to alter his position he cannot afterwards deny the truth of the representation. It is not easy to see how the fact that the plaintiffs wilfully or deliberately abstained from raising any objection to the seizure at Muscat could, even if proved (which, in our opinion, it was not) be said to have induced the defendant to alter his position or the Court of Muscat to have altered its position. There is no evidence that the plaintiffs or their agents were present at the time of the seizure, and the condition of the port-marks, of the bills of lading, or the ship's manifest, can hardly amount to a representation that the goods were going to a Persian or Indian port *via* Muscat, although it may have been reasonable, as the jury say it was, to believe that the goods when they arrived at Muscat were intended for a Persian or Indian port. The appeal must be allowed, and judgment entered for the plain-

tiffs. The inquiry as to damages we believe has been arranged.

[Solicitors—Hollams, Sons, Coward, and Hawksley, for the plaintiffs; The Solicitor to the Treasury, for the defendant.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.J.J.) } 1900.
May 25.

HOGARTH AND CO. V. WALKER.*

Insurance—Marine—Time policy—Loss, whether covered.

The dunnage mats and separation cloths of a grain ship held to be part of her "furniture" within the meaning of a policy.

Decision of Bigham, J. (15 *The Times* L.R., 467), affirmed.

This was an appeal by the defendant from the judgment of Mr. Justice Bigham, reported 15 *The Times* L.R., 467; [1899] 2 Q.B., 401. The plaintiffs were the owners of the steamship Felbridge, and the defendant was an underwriter. The action was brought to recover a loss under a time policy of marine insurance, in the ordinary Lloyd's form, for 12 months, "at all times, in all places, and on all occasions, services, and trades, whatever and wheresoever," on the "body, tackle, apparel, ordnance, munitions, artillery, boats, and other furniture of and in the good ship or vessel" Felbridge. The question was whether the policy covered a loss of dunnage mats and separation cloths, the property of the plaintiffs, which were used in connexion with the carriage of grain cargoes, the Felbridge being usually engaged in the grain trade. It was the custom for ships engaged in the Black Sea grain trade to carry dunnage mats and separation cloths, the mats being placed underneath the grain, and the cloths being used to separate the different parcels in which the grain was usually shipped by the different shippers. In the American grain trade separation cloths were never used, as the grain was always shipped in one parcel, and wooden battens were used instead of dunnage mats. During the currency of the policy the Felbridge was on a voyage from America with a cargo of grain, and the mats and cloths were not in use, being stowed away in the forepeak. The dunnage mats and separation cloths having been damaged on the voyage by a peril of the sea, the underwriters contended that they were not liable under the policy. Mr. Justice Bigham held that the loss was covered by the policy, and he gave judgment for the plaintiffs.

Mr. J. A. HAMILTON (Mr. Joseph Walton, Q.C., with him), for the defendant, contended that the dunnage mats and separation cloths were not part of the ship as a ship, but were used solely for the convenience of the shippers of the cargo to separate the different parcels of the cargo. The absence of them would not make the ship unseaworthy. The mats and cloths were not covered by the policy on ship and furniture. "*Hoskins v. Pickersgill*" (3 Dougl., 222); "*Robertson v. Ewer*" (1 T.R., 127); "*Brough v. Whitmore*" (4 T.R., 206); "*Hill v. Patten*" (8 East, 373); "*Gale v. Laurie*" (5 B. and C., 156) were referred to.

Mr. Rufus Isaacs, Q.C., and Mr. Montague Lush, for the plaintiffs, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, the learned Judge was right. The policy covered as wide a power of trading as possible. There was evidence that in the Black Sea grain trade dunnage mats and

separation cloths were always required. They were necessary for the trade upon which the ship was entitled to go. They therefore formed part of the furniture of the ship. The learned Judge had said that he could see no distinction between the dunnage mats and separation cloths and movable bulkheads, which, it was admitted, would form part of the ship's furniture. In his (the Lord Justice's) opinion, the learned Judge was right.

LORD JUSTICE VAUGHAN WILLIAMS agreed.

LORD JUSTICE ROMER agreed. In his opinion, such a time policy as they had in the present case included fittings and things in the nature of fittings, though not fixed, provided by the shipowner for the purposes of the ship, and reasonably necessary to carry the ordinary kind of cargo for the ship, even though they were not actually in use at the time when the loss occurred.

[Solicitors—Botterell and Roche, for Vaughan and Roche, Cardiff, for the plaintiffs; Waltons, Johnson, Bubb, and Wharton, for the defendant.]

Chan. Div. } 1900.
(Farwell, J.) } May 25.

KING V. SMITH AND PICKER.*

Mortgage—Validity—Fraud by solicitor—Signature fraudulently obtained—Estoppel.

This action raised the question as to which of two innocent parties should suffer for the fraud of a third.

Mr. Hugo Young, Q.C., and Mr. Johnston Edwards appeared for the plaintiff; and Mr. Hughes, Q.C., and Mr. George Henderson for the defendants.

The plaintiff, Joseph King, before the year 1894, had frequently employed one Vincent Joseph Eldred, of the firm of Eldred and Bignold, solicitors, to act for him in the purchase of small properties. The plaintiff is not a man of much education, and he gave evidence to the effect that he had been in the habit of signing such documents as Eldred put before him without inquiry. In April, 1894, Eldred induced the plaintiff to execute an indenture purporting to be made between the plaintiff of the one part and the defendants of the other part and to be a mortgage of a piece of land belonging to the plaintiff, to secure the sum of £300 and interest thereon at 5 per cent. per annum. The plaintiff alleged that he did not know that the indenture was a mortgage and that he never intended to mortgage the said piece of land. The defendants, who invested the £300 as trustees, paid the sum by cheque to Eldred on the day that the deed was executed. Eldred cashed the cheque on the same day and kept the money for his own purposes and never furnished any account to the plaintiff. The plaintiff now claimed a declaration that the indenture of mortgage was void and ought to be set aside, and delivery of the title deeds of the property by the defendants.

Mr. YOUNG argued, first, that the deed was not valid, because it was obtained by fraud. In the second place, though Eldred had previously acted as solicitor for the plaintiff, he was not the plaintiff's solicitor in this particular transaction, because the plaintiff had not instructed him to mortgage the property, and consequently he had no authority to receive payment on the plaintiff's behalf. Lastly, the money was made by cheque, and that was not a good payment.

Mr. HUGHES, on the question of validity of the deed, referred to "*Hunter v. Walters*" (7 Ch., 75). There was a receipt for the consideration money in the body of the deed, and that was a sufficient discharge by virtue of section 54 of the Conveyancing Act, 1881.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

Moreover, the defendants were protected by section 56 of the same Act, which provided that "where a solicitor produces a deed having in the body thereof . . . a receipt for consideration money . . . the deed being executed . . . by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."

MR. JUSTICE FARWELL, in giving judgment, said that it was one of those unfortunate cases where one or other of two innocent parties had to suffer for the fraud of a third, but he could not allow his sympathies to interfere with the operation of the law. The plaintiff had for many years employed Eldred both as his solicitor and as a sort of banker. He used to deposit sums of money with him, on which Eldred allowed him 10 per cent. The plaintiff was also in the habit of buying small properties and leaving Eldred to pay the purchase-money, which was secured by promissory notes. It was clear that the plaintiff trusted Eldred implicitly and signed whatever he told him to sign. The plaintiff never read deeds and did not understand anything about them. In 1894 the defendant Smith, who had known Eldred for some time, was told by him that he knew of a good mortgage, and he and the other defendants agreed to advance £800 on the security. A mortgage was prepared and executed by the plaintiff without any knowledge of its contents, and the deed was produced to Smith containing a receipt for the consideration money in the body of it. The money was paid by cheque and kept by Eldred. Now it was argued that the deed was invalid because it was obtained by fraud. On that point he took the law as laid down by Lord Justice Mellish in "Hunter v. Walters," at page 86:—"Now, I am of opinion that there is evidence that both Hunter and Darnell were induced by the fraud of Walters to execute that deed, but the mere circumstance that they were induced to execute it by fraud does not make it a void deed in point of law"; and at page 88:—"Where a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed." While he accepted the plaintiff's statement that he never intended to mortgage the property, still the plaintiff knew that he was doing something with his property, and consequently he must hold in the circumstances that the deed was valid as against the plaintiff. The plaintiff had absolute confidence in Eldred, and had, at his request and without inquiry, previously executed deeds dealing with his property. Then section 56 of the Conveyancing Act had to be considered, and it had been argued that Eldred had no authority to receive the money from the defendants. That Act contained provisions for the convenience of business, and gave a statutory power to solicitors in certain cases to give a good discharge. He need not determine what was the precise meaning of "a solicitor." It was sufficient for him to say that, in his opinion, the plaintiff was estopped by the same circumstances as rendered the deed valid from denying that Eldred had authority to receive the money. The plaintiff could not be heard to say that it was not his solicitor who produced the deed duly executed. Then it had been argued that the payment by cheque was not a good payment. But the cheque was cashed on the same day, and, as the law made no distinction between hours of the same day, it was enough that the money was paid on the same day

as the deed was produced to the defendants. The plaintiff, therefore, failed in his action, and he must order him to pay the costs, the defendants being trustees.

[Solicitors—Goldberg, Barrett, and Newall, for A. J. O'Connor, Birmingham, for the plaintiff; Sherwood and Balls, for the defendants.]

Q.B. Div. (Darling and }
Bucknill, JJ.) }

1900.
May 23.

MARKEY AND ANOTHER V. TOLWORTH JOINT HOSPITAL DISTRICT BOARD.*

Limitation of Actions—Public Authorities Protection Act, 1893, sec. 1—Action to be commenced within six months.

This case came before the Court on a point of law raised on the pleadings. The action was brought under Lord Campbell's Act by the widow and child of a man who died while under treatment at the Tolworth Joint Hospital, of which the defendants had the management and control, to recover damages on the ground that the man's death was caused by the negligence of one of the nurses employed at the hospital. It appeared that the deceased, William Markey, was admitted into the Tolworth Joint Hospital on October 27, 1898. On October 31 following he died, in consequence, as it was alleged, of the negligence of a nurse in administering to him an overdose of opium. The action was commenced on May 19, 1899, more than six months, therefore, after the death of the deceased. Section 1 of the Public Authorities Protection Act, 1893 (56 and 57 Vict., c. 61), provides as follows:—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of such Act, duty, or authority, the following provisions shall have effect:—(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. . . ." The defendants are a body constituted by virtue of the Local Government Board Provisional Orders Act, 1898 (61 and 62 Vict., c. LXXXII.), for the purpose of the provision, maintenance, and management of the Tolworth Hospital for the use of the inhabitants of six districts formed by the same Act into a united district. It was admitted that the defendants were a public authority and that the alleged act of negligence was done by them in the execution of the above-mentioned Act of Parliament.

MR. WILBERFORCE, on behalf of the defendants, contended that they were entitled to judgment on the ground that the action was barred by the Public Authorities Protection Act.

MR. F. WATT, with whom was Mr. F. J. Coltman, jun., on behalf of the plaintiffs, contended that the injury or damage suffered by the plaintiffs was their cause of action, that that injury or damage did not arise until after the death of the deceased, when they began to feel the deprivation of the subsistence they formerly derived from him, and that it continued so long as they were so deprived, and he argued that this was, therefore, a case of "a continuance of injury or damage" within the Public Authorities Protection Act, and that the time of limitation prescribed by the Act had not

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

yet begun to run. He cited "*Darley Main Colliery Co. v. Mitchell*" (11 App.Cas., 127) and "*Crumbie v. Wallsend Local Board*" ([1891] 1 Q.B., 503) in support of the proposition. He also contended that, inasmuch as Lord Campbell's Act had itself provided a period of limitation of actions—namely, one year—the later Act should not be construed as interfering within that period of limitation, there being no express words repealing the provision of the earlier Act. He cited "*Seward v. Vera Cruz*" (10 App.Cas., 88).

The COURT gave judgment for the defendants.

MR. JUSTICE DARLING said that if the argument of the learned counsel for the plaintiffs were pressed to its logical conclusion they would be bound to hold that the right of action continued until six months after the death of the widow or other relative of the deceased. It did not appear to him that the words on which the learned counsel relied applied to actions under Lord Campbell's Act at all. Lord Campbell's Act contemplated a right of action in the deceased person, and provided that as he was dead and could not take advantage of his right the legal remedy should be transferred to certain of his relatives. There could be no continuance of the injury or damage to the person to whom the injury was done because he was dead, and, the injury or damage in respect of which the relatives had a remedy under the Act being the injury of the deceased, the time from which the six months' limitation must be calculated must be the date of the injury—that was to say, in this case, either the date when the opium was administered or the date when the evil effect of it occurred. Dealing with the second point raised on behalf of the plaintiffs, he said that the Public Authorities Protection Act was an Act passed in favour of certain specified persons and did not interfere with the period of limitation provided in Lord Campbell's Act, except in regard to those persons. He did not, therefore, agree with the contention of the plaintiffs' counsel on this point either.

MR. JUSTICE BUCKNILL gave judgment to the same effect.

[Solicitors—John W. Sykes, for James Edgell, Kingston-on-Thames, for the defendants; Thomas Young, for the plaintiffs.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) 1900.
May 26.

HOLMES V. GREAT NORTHERN RAILWAY COMPANY.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—Accident arising "out of and in the course of employment."

This was an appeal from an award of the Judge of the Clerkenwell County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was the mother of a workman who had died in consequence of accidental injury sustained by him in the course of his employment. The deceased workman was an engine-cleaner in the employment of the Great Northern Railway Company, and up to Saturday, November 4, 1899, he was engaged on work at King's-cross. A new engine-shed having been erected by the company at Hornsey, about four miles from King's-cross, the deceased was directed by his foreman to go there on the following Monday, November 6, for the purpose of cleaning the engines in the new shed. No particular instructions were given him by the fore-

man as to how he was to get to Hornsey, but, as he lived near King's-cross, he travelled by one of the company's trains from there to Hornsey. His time for beginning work was 6 a.m., and he arrived at Hornsey about 5.45 a.m. Not knowing where the engine-shed was, he went in a wrong direction, but on inquiry was shown a way which was not the most direct. He, however, reached the engine-shed and did his day's work. It did not appear by what way he returned home that evening. On the following morning, Tuesday, November 7, he and some other men, who were also engine-cleaners, proceeded from King's-cross to Hornsey as before, and reached the latter place at 5.45. None of them had tickets, and it did not appear that they would be expected to take tickets, and in fact they were not asked for them. On arriving at Hornsey the deceased and the other men proceeded to cross the lines of railway in front of the engine, which was then blowing off steam, when an express train coming from King's-cross on the main line caught him and injured him so much that he died on the following day. It appeared that there was a foot-bridge across the lines, and also a subway, by either of which the deceased might have proceeded to the other side, but he and the others crossed the lines on the level, as being the shortest way. The sole contention raised on behalf of the employers was that the injury to the deceased did not arise out of and in the course of his employment, and the case of "*Holness v. Mackay*" ([1899] 2 Q.B., 319) was relied on to show that the employment did not commence until the hour of actual work had arrived and the deceased was upon that part of the employers' premises where such work was to be performed. The County Court Judge was of opinion that the accident arose out of and in the course of the deceased man's employment—viz., whilst he was carrying out the orders of his superior officer and proceeding to the particular place upon his employers' premises where he was directed to go. He accordingly made an award in favour of the applicant for £150. The employers appealed.

MR. MONTAGUE LUSH and MR. A. CLUTTON BROCK appeared for the employers, and contended that the accident did not arise out of and in the course of the deceased's employment. He was not crossing the line for purposes of his masters. He was not under an obligation to cross the line at all. He selected a dangerous route, when he had the alternative of two safe ones. His employment did not begin till he reached the engine-shed. He might have gone by any train he liked. While he was travelling by train, and until he reached the shed, he was his own master, and he was not acting as the servant of the company at all.

MR. W. H. DUCKWORTH appeared for the applicant.

The COURT, without calling upon counsel for the applicant, dismissed the appeal.

LORD JUSTICE A. L. SMITH said the only question the Court had to consider was whether there was any evidence to support the conclusion of the County Court Judge that this accident arose out of and in the course of the deceased's employment. It seemed to him that there was an implied contract between the masters and the man that if he would get into a train at King's-cross they would take him by their line to his work and bring him back again. There was a difference between the beginning of employment and the beginning of work. In his opinion the employment in this case began at King's-cross, and the workman was in the course of his employment when the accident happened. He thought that the judgment of the learned County Court Judge was quite correct, and that the appeal ought to be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Q.B. Div. (Lord Russell of Killowen,
C.J., Lawrence, Wright, Channell,
and Bucknill, JJ.) 1900.
May 26.

REGINA V. MARY BAINES AND OTHERS.*

Criminal Law—Receiving stolen goods—Husband and wife—Separate receiving by wife—Joint indictment—Conviction, validity of.

This was a case stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the Deputy-Chairman of the Liverpool County Quarter Sessions, as follows:—(1) The prisoner, Mary Baines, together with Michael Baines, her husband, and two other prisoners named Godfrey and Toner, were tried at the quarter sessions holden at the Sessions-house, Islington, Liverpool, on the 17th day of April, 1900, on an indictment charging them with breaking and entering a dwelling-house at Rainhill, and stealing therein a quantity of property belonging to one William Holland (Owen). (2) The indictment contained a second count charging all of the said prisoners with receiving the property set out in the first count of the indictment well knowing the same to have been feloniously stolen. (3) The prisoner Toner pleaded: "Guilty" to the first count contained in the indictment and the other prisoners "Not guilty" to both counts. (4) Evidence was given of a breaking and entering of the premises described in the indictment on the 22nd day of January, 1900, and of property to the value of £80 having been stolen therein. (5) Evidence was also given that on the 6th day of February the prisoner Toner, who is the uncle of the male prisoner Baines, left at the house of the said prisoners Michael and Mary Baines in Westmoreland-street, Rainhill, in the county of Lancaster, some of the property referred to in the indictment—to wit, a silver lamp and a cigar box containing broken silver, and that the said silver lamp and cigar box were given to the prisoner Mary Baines by the prisoner Toner. (6) It was further proved in evidence that the detective, Albert Taylor, who made a search of the house, followed the prisoner Mary Baines to a house close to; that she went into this second house and came out with the silver lamp referred to in the previous paragraph. (7) The prisoner Godfrey was acquitted, but the prisoners Michael and Mary Baines were convicted of feloniously receiving on the second count of the indictment, and a sentence of three months' imprisonment was passed upon each of them. (8) Counsel for the prisoner Mary Baines thereupon submitted on the authority of "Reg. v. Archer and others" (1 Mood. C.C., p. 143) that the conviction was bad, inasmuch as the charge being a joint one no question of a separate receiving by the wife (the prisoner Mary Baines) had been left to the jury. (9) The point raised on behalf of the prisoner Mary Baines was argued by her counsel, who submitted that it was too late after sentence to cure the previous verdict by asking the jury whether the prisoner Mary Baines was guilty of a separate receiving. (10) After hearing counsel for the prosecution the Deputy-Chairman overruled the objection, and after reading over the evidence to the jury asked them whether or not the prisoner Mary Baines was guilty of a separate receiving. (11) The jury found that Mary Baines was guilty of a separate receiving, and her counsel then applied for a case, which was granted, the prisoners being admitted to bail pending the appeal. (12) The questions for the opinion of the Court are—(i.) whether a husband and wife being jointly indicted for receiving stolen goods can both be convicted, although the jury found a separate receiving on the part of the wife; (ii.) whether the Deputy-Chairman under the circumstances of this case was acting legally in

putting the question to the jury as to the separate receiving at that stage and after verdict.

Mr. V. D'ARCY appeared for the prosecution, and submitted that the conviction was good. He cited "Reg. v. John" (13 Cox, 100); "Reg. v. Cohen" (11 Cox, 99); and 24 and 25 Vict., cap. 96, s. 94.

The prisoner Mary Baines was not represented.

The COURT upheld the conviction.

The LORD CHIEF JUSTICE of ENGLAND (Lord Russell of Killowen), in the course of his judgment, said:—In this case, so far as is necessary to deal with it, we are concerned with that portion of the indictment in which Mary Baines and her husband are jointly indicted for receiving the goods knowing them to have been stolen. The evidence as regards the husband is not set out in the case, but apparently there was evidence that he had received a portion of the stolen goods. There is no reason why we are not to presume that the Chairman rightly directed the jury on the general law, but the point is raised that he did not specifically put to them the question whether there was a separate receiving by the female prisoner. That there was ample evidence of a separate receiving by her cannot be doubted, having regard to paragraphs 5 and 6 of the case. There is no question that she had received some portion of the stolen property, and that she was not then acting under the influence of her husband. In such a state of facts the Judge ought to tell the jury that the mere fact of the marital relation does not raise any presumption of the husband's control. Further, even if the husband was in the neighbourhood it is a question for them whether the wife was taking an independent part. "Brown v. Attorney-General for New Zealand" ([1898] A.C., 234) is an authority for that proposition. Any remaining difficulty as to whether each act of receiving is to be regarded as a separate crime is removed by section 94 of 24 and 25 Vict., cap. 96. Finally, as to the second question it is enough to say that it is not necessary to consider it for the purposes of the present case. If it were, I should hesitate for a long time before I could arrive at the conclusion that the course taken was a proper one. We see no reasonable cause to doubt that the prisoner Mary Baines was properly convicted.

MR. JUSTICE LAWRENCE concurred.

MR. JUSTICE WRIGHT said:—I am of the same opinion. I only wish to add that it seems likely that the Chairman put the second question to the jury, not as part of the procedure, but in order to satisfy himself whether there was any ground for reducing the sentence.

MR. JUSTICE CHANNELL and MR. JUSTICE BUCKNILL concurred.

Conviction affirmed.

[Solicitors—H. E. Clare, Preston, for the prosecution.]

House of Lords (Lord Halsbury, L.C.,
Lords Macnaghten, Morris, Davey,
and Branson) 1900.
May 28.

WEDDERBURN AND OTHERS V. THE DUKE OF ATHOLL
AND OTHERS.

THE DUKE OF ATHOLL AND OTHERS V. THE GLOVER
INCORPORATION OF PERTH AND OTHERS.*

Fishery—Salmon fishing—Fixed engine—"Toot-and-haul" nets—"Hang nets."

The use of "toot-and-haul" nets and hang nets for catching salmon on the river Tay held illegal.

The same counsel appeared in both appeals, the appellants' counsel in the first being for the respondents in the second, and *vice versa*. The case

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

is reported in 36 Scottish Law Reporter, 481. The appeal was from a decision of the First Division (the Lord President and Lords Adam, McLaren, and Kinnear), dated March 3, 1899, affirming interlocutors of Lord Low, dated November 5, 1897, and of Lord Stormonth Darling, dated May 18, 1898. In the first of these two appeals the question was of the legality of fishing for salmon with nets known as "toot and haul" nets or other nets of a similar kind. In the second it was whether it is lawful to fish with what are known as hang nets. Their Lordships have held both methods to be illegal. They are described in the judgment of Lord Brampton.

The counsel were the Dean of Faculty (Mr. Asher, Q.C.), Mr. Dundas, Q.C., and Mr. Blackburn (all of the Scotch Bar), for the appellants in the first appeal; and the Lord Advocate (Mr. Graham Murray, Q.C.), the Solicitor-General for Scotland (Mr. Dickson, Q.C.), and Mr. C. N. Johnston (of the Scotch Bar), for the respondents.

THE LORD CHANCELLOR.—In both these cases the question is whether the mode of catching salmon in the Tay pursued by those who are described in the two cases as fishing is a mode which may be lawfully pursued. I am of opinion that both modes are unlawful. The case known as the "Bermondsey Boat" case brought to a definite issue of principle what is or is not lawful in the use of a net, and I think the distinction may be compendiously stated and is that a fixed net is unlawful, while a net used by a fisherman in the act of fishing is lawful. I cannot help thinking that some ingenious person has carefully considered the exact words used by Lord Westbury in the case in question and has sought to evade the pressure of his words by colourable alteration of the method in which the net is treated, but *qui hæret in litera hæret in cortice*. The nets in both these cases seem to me to be fixed engines. The mode in which they operate is not an act of fishing at all. It is a wall of net suspended across the stream, not to operate to catch a fish in the ordinary mode in which a net is used, but fixed and operating as an obstruction through which the fish attempts to get and entangles itself in its efforts and so is caught. This, doubtless, is the way when herring nets in some places are put into the sea, but such an operation is not to my mind an act of fishing at all, and undoubtedly by the mode in which a succession of nets is used in this way all up the stream an enormous obstruction to the ascent of the fish is created, and undoubtedly this is one of the reasons which led the Scottish Parliament to enact that fixed engines were unlawful. Of course a net, however used, is in itself an obstruction, but there is all the difference in the world between the temporary use of a net in the act of catching a fish and what I have described as a wall of net remaining and intended to remain for a considerable time motionless, and in that sense fixed. And it appears to me that by a long line of decisions the broad distinction has been insisted upon, and, to my mind, unanswerably concluded, by the judgment in "*Hay v. the Lord Provost of Perth*" (4 Macq., 535). The quality which Lord Westbury attributed to the mode of fishing which he held to be lawful, and which he said came within the principle of ordinary net or coble fishing, was that it was a mode of fishing which exists only and takes the fish only while the net is kept in motion, and which preserves all the distinctive peculiarities of fishing by net and coble—namely, taking a grasp of a portion of the river during such time only as is required for the boat to run round the net. And Lord Chelmsford in the same case described the decisions which had been quoted to him as establishing that contrivances for the purpose either of preventing the fish from passing up

the river or of catching them by fixed nets were illegal. The principle is, I think, established also by the judgment of the Lord President in the earlier stages of the same case. One passage seems to me to put the matter very clearly. The judgment of the House of Lords is quite clear as to the stent nets. Then in the case of "*The Duke of Queensberry v. the Marquis of Annandale*" it was fixed nets for obstructing the passage of the fish used (as the judgment states) not for the purpose of catching fish, but for preventing or obstructing them from passing up the river, and I therefore find that the methods used of stenting nets across the river, either reaching altogether from side to side or overlapping each other in the manner mentioned in the proof, &c., are illegal. Fixed nets which would prevent altogether the passing of the fish I hold to be unlawful, whether the engine be a fixed net or fixed stakes stationary in the water. In the case of "*Dirom v. Littles*" it was a hang net; in the Searle case it was a stake net; in "*The Duke of Atholl v. Wedderburn*" it was toot nets and stake nets and tent nets alleged to be of the nature of stake nets. Then in the case of "*Cunningham v. Taylor*" it was a dyke erected; in the case of "*Mackenzie v. Houston*" it was the case of stent nets, the one end of the stent net being fixed by an anchor in the stream and the other end on shore, and the net so fixed was left standing stretched into the river, a fixed engine for catching the fish. Now it seems to me that both the hang nets and the toot and haul nets are illegal within the principles laid down by all the cases. In neither case is it an act of fishing. It is a fixed net, and, although fixed but for a time, its operation is that of an obstruction. It remains, as nearly as the person managing it can procure it to do, perfectly still, and its operation when thus still is simply obstruction. When a fish strikes it, it is true the fisherman then does something to catch the fish, most commonly by gaff; but its operation is what I have said. Under these circumstances it appears to me that the use of these nets in both the cases and upon the admitted facts is illegal, and I accordingly move your Lordships that the judgment in the first case should be affirmed and in the second case be reversed, with the usual result as to costs in each.

LORD MACNAGHTEN concurred; **LORD MORRIS**, who was absent, had expressed his concurrence; and **LORD DAVEY** concurred in the motion in the second case.

LORD BRAMPTON, in the course of his judgment, said,—The Duke of Atholl and others, proprietors of salmon fishings in the River Tay, sought in this action to obtain a decree against the defenders, who are proprietors or leasees of fishing on the estuary of that river below the fishings of the pursuers, to restrain them from fishing for salmon with nets known as "toot and haul" nets, or other nets of a similar kind. The Lord Ordinary pronounced such decree in favour of the pursuers. On appeal to the First Division of the Court of Session the judgment of the Lord Ordinary was unanimously affirmed, upon the ground that the Court was bound by the principle and rule of law enunciated by Lord Chancellor Westbury, and concurred in by Lord Chelmsford in this House, in the case of "*Hay v. the Magistrates of Perth*" (4 Macq., 535). In this view I entirely agree; and, applying that principle to the present case, I find it impossible to escape from the conclusion that the use of the toot and haul net in the manner described both by the pursuers and the defenders was and is illegal. The essence of Lord Westbury's judgment consists in those words, "It is illegal to fish for salmon with any net or with any species of engine or machinery devised or constructed for catching fish which is a fixture, which is at all fixed, or permanent even for a time in the water;" and he went on to say, "and if I were asked to define the conclu-

sion which I should derive from the statutes and the decisions, it would be this, that it was not legal to fish with a net unless when the net continued in the hand of the fisherman. The net must not quit the hand, and the net must be in motion during the operation of fishing." It is somewhat difficult to assign to the toot net its true office. In the appellants' case it is "admitted that the toot and haul nets are adapted for and have been used by the defenders for the purpose of catching salmon and fish of the salmon kind;" but I find this passage:—"The most important point about the action of this net is, the appellants maintain, that it does not capture fish while in its stationary position. If left in the water unattended, it would neither catch nor obstruct fish. There is nothing to prevent fish swimming round the net just as they may and frequently do swim round or back from the sweep net; and they are caught by being surrounded by the net after it has been cast loose and hauled on shore by the fisherman." Now it cannot be denied that *per se* the toot net, the use of which is objected to, is not, when extended and stationary, adapted for capturing salmon, for it has no bag or trap attached to it into which the salmon might enter in trying to clear the net, but from which, once in, it could not extricate itself. During such time it could only operate as an obstruction to check the fish in its onward progress up the stream, until such time as the net should be freed from the boat and hauled on shore. It is very obvious that such was the purpose for which it was designed; the hook or cleet very much assists the attainment of this object, for if a fish obstructed by the extended net at right angles with the shore attempted to make its way round the end of the net, instead of finding its way clear it would find its progress impeded by the hook or cleet and held within the ambit of the net until the haul was made. This to my mind is very strong evidence that the sole object of the stationary extended net is to obstruct, and the keeping the extended net stationary across the flow of the river for three or more hours waiting for a fish to come is confirmation irresistible that obstruction was the object—that is, to keep the fish below the line occupied by the net, and to capture him by releasing the net from the boat, and so then converting it into a sweep or drift net from below that line until the fish was landed on the shore. I cannot entertain a doubt of the soundness of the judgments of the Courts below. I think therefore that this appeal should be dismissed with costs. As to the second case, the noble and learned lord continued:—"This is an appeal from a judgment of the First Division of the Court of Session in Scotland, declining to declare the illegality of fishing for salmon with what are known as hang nets in the river or estuary of the Tay, following the decisions of the First and Second Divisions in the cases of 'The Masters of Allan's Mortification v. Thomson' (7 Rettie, 221) and 'The Earl of Wemyss v. the Earl of Zetland' (18 Rettie, 126), which the Court felt were binding upon it. I can see no substantial distinction between this case and that of 'Wedderburn v. the Duke of Atholl,' just decided by this House. The hang net and the method of using it may, I think, be thus described with practical accuracy. The net itself is an oblong net made of very light material, from 80 to 150 yards long, and from five to six yards deep, fitted on the upper side throughout its length with a light cord and floats to keep it up to the level of the surface of the water, and on the lower side with a thick rope sufficiently heavy to sink it when used for the purpose of fishing as low down in the water as the net is deep. It is paid out for its full length from an ordinary cable boat at a right angle across the current, and when so paid out forms to that extent a perpendicular barrier of network across the current. There is nothing

required beyond the weight of the rope to fasten the net either to the bottom or the side of the river. It hangs freely in the water floated and weighted as I have described. No doubt the action of the current upon the net is calculated more or less to shift the position of it, and so from time to time to make it necessary to gather it up and reshoot it, to restore it to its perpendicular position, which is the object of the fisherman, for so long as it can be maintained in that position it is a continuous slowly floating barrier at a right angle with the current, offering quite as effective and serious an impediment to fish proceeding upwards as if it were stationary, keeping many of them below the line of the net in the stream, so that they may be captured from the boat, which remains in attendance on the net, in their endeavours to get beyond it, or be secured by the gaff, which is mostly used, and the use of which for such purposes is illegal. I do not say that there is any absolute obstruction which would render it impossible for a fish to proceed upwards or downwards beyond the net, for there is mostly space between the bottom of the net and the bed of the river if the fish should chance to be swimming low down, or perchance it might find its way to the side of the net so as to get round it. The object of the fisherman, however, is to do that which the perpendicular net is calculated to do—namely, to arrest the progress of fish, whether going up or coming down the river—so as to afford the fisherman an opportunity of landing them with a gaff into the boat. If I had before me simply the evidence of Maxwell, one of the defender's witnesses, I could come to no other conclusion than that the object of the hang net was not to capture fish in the ordinary mode as by net and coble, but to impede the progress of the fish whether going up or down the river, to keep them on that side of the net they might chance to be approaching until they became unable to escape from the gaff, whether they previously had become entangled in the net or not. I can discover no satisfactory distinction between the use of the hang net and the operations complained of in the cases of 'The Duke of Queensberry v. the Marquis of Annandale' and 'Dirom v. Littles' ([1797] Mor., 14,282), referred to in the appellant's case in 'Wedderburn v. the Duke of Atholl'; and I think it falls within the principle and rule of law laid down by Lord Westbury in the case of 'Hay v. the Magistrates of Perth,' with the concurrence of Lord Chelmsford, "that it is illegal to fish for salmon with any net which is a fixture, which is at all fixed or permanent even for a time in the water," a decision which met with the approval of Lord Blackburn in 'The Duke of Sutherland v. Ross' (3 App. Cas., 746), for although it may be said that the net in this case is not stationary in one spot for any length of time, still, used as it is chiefly in slack water, it is in a perpendicular position when first paid out, and is retained in that position for as long a time as is possible; and so long as it so floats gradually down the current it remains a continuous obstruction. I think this brings it within the spirit of the decision, having regard to the mode in which the capture of fish is effected. I think, then, that the use of the hang net as described is illegal, and that the judgment appealed against should be reversed with costs.

[Solicitors—Stibbard, Gibson, and Co., for the appellants; Grahames, Currey, and Spens, for the respondents.]

House of Lords (Lord Halsbury, L.C.,
Lords Macnaghten, Davey, and
Brampton) 1900.
May 28.

GRANT V. LANGSTON.*

Revenue—Inhabited house duty—House occupied

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

partly as a dwelling-house and partly as business premises—Exemptions from payment of duty—Customs and Inland Revenue Act, 1878, sec. 13 (1) and (2)—57 Geo. III., c. 25, sec. 1—5 Geo. IV., c. 44, sec. 4.

The exemptions in the above statutes from payment of inhabited house duty as regards a house, or part of a house, occupied as trade or business premises apply to an entire house occupied by the owner partly as a dwelling-house and partly as business premises.

This was an appeal involving a very important question of house duty, on which the arguments were heard on March 29 last, from a decision of the First Division of the Court of Session in Scotland, sitting as a Court of Exchequer, dated June 24, 1898. The appendix, which in House of Lords appeals sometimes equals the bulk of "Liddell and Scott," was a model which one would like to see more frequently followed, as it consisted simply of a plan of the premises the subject of taxation. The action arose on a stated case, dated April 6, 1898, and the hearing below is reported 25 Ct. of Session Cases, 4th series, 1,040. The case was as follows:—"Mr. John Grant, licensed retailer of spirits, appealed against an assessment of £3 5s. 6d., being the inhabited house duty charge under 14 and 15 Vict., cap. 36, and Rule III. of 48 George III., cap. 55, Sch. B., and the Finance Act, 1897, for the year ended May 24, 1898, at the rate of 6d. in the pound on £131, the *cumulo* value of a dwelling-house and licensed premises situate in Bath-street, Portobello, and claimed that the premises did not fall within the said rule, and that the duty should be confined to that portion of the premises occupied as the dwelling-house. The following are the facts found and admitted:—1. The premises in question consist of a building of two storeys under one roof, of the whole of which the appellant is both owner and occupier. 2. The ground floor, No. 49, Bath-street, is used by the appellant for the purpose of carrying on the trade of licensed retailer of spirits, and the upper storey, No. 47, Bath-street, is occupied by him as his dwelling-house. The terms of his publichouse certificate, which is in the form of Schedule A, No. (2), appended to the Public-Houses (Scotland) Act, 1862, are that he is authorized and empowered 'to keep a publichouse at 49, Bath-street, Portobello . . . for the sale in the said house, but not elsewhere . . . of spirits, wine, porter, ale. . . ' 3. The only access to the dwelling-house is by the door opening from the street, No. 47, Bath-street, to the staircase leading to the upper storey, and for the appellant to enter his licensed premises from his dwelling-house he has to descend the stair, come into the public street, and enter by the public door, No. 49, Bath-street. 4. The dwelling-house is not included in the premises licensed for the sale of exciseable liquors, and they are separately entered in the valuation roll of the city of Edinburgh, the annual value of the house being entered as £33 and of the licensed premises as £98. 5. The licensed premises were formerly occupied by a tenant who was not tenant or occupier of the dwelling-house. No person resides in the licensed premises, as the magistrates of Edinburgh, being the licensing authority within whose jurisdiction Mr. Grant's house is situate, have made it an unwritten condition that Mr. Grant should not reside in his licensed premises. We, the Commissioners, being of opinion that no liability to inhabited house duty existed in respect of the business premises, No. 49, Bath-street, Portobello, sustained the appeal, and restricted the assessment to the duty on £33, the annual value of the dwelling-house, No. 47,

Bath-street, Portobello. Whereupon the surveyor of taxes, Mr. F. W. Langston, expressed dissatisfaction with our decision as being erroneous in point of law, and having required us to state a case for the opinion of the Court of Exchequer, it is hereby stated and signed accordingly.—JAMES H. GIBSON CRAIG, WM. WHITE-MILLAR, Commissioners." The Court of Session (the Lord President, Lord Adam, Lord M'Laren, and Lord Kinnear), on February 24, 1898, reversed the determination of the Commissioners and held that the appellant was liable for inhabited house duty for the publichouse.

Mr. Asquith, Q.C., Mr. Roskill, and Mr. F. T. Cooper (of the Scottish Bar) were for the appellant; the Attorney-General (Sir R. E. Webster, Q.C.), the Lord-Advocate (Mr. Graham Murray, Q.C.), and Mr. A. J. Young (of the Scottish Bar) for the respondents.

The LORD CHANCELLOR.—I think this is one out of many similar cases in which the difficulty of construction arises from an alteration in things which, notwithstanding alteration, retain their original name, while the Legislature in retaining the original name in a statute legislates by using words in a wholly artificial sense. A hundred years ago there was not much difficulty in saying what was a house, but builders and architects have so altered the construction of houses, and the habits of people have so altered in relation to them, that the word "house" has acquired an artificial meaning and the word is no longer the expression of a simple idea; but to ascertain its meaning one must understand the subject-matter with respect to which it is used in order to arrive at the sense in which it is employed in a statute. With the most sincere respect for the authority of Sir George Jessel, I cannot help thinking that his reasoning in the Westminster case is unsatisfactory. No one will doubt the soundness of the maxim which he quotes as the basis of his judgment, but, as usual, it is the application of it which raises the difficulty. Indeed, I think it is true to say that the judgment to which I refer proves too much for the purpose of the final conclusion. It establishes undoubtedly that the word "house" is an ambiguous word. It shows that you must seek otherwise than in the word itself what is the meaning in which the Legislature has used it, since a natural and ordinary meaning of an ambiguous word cannot be ascertained without the context. Now, the instances to which the learned Judge referred, such as the two Temples constituting one house, or to such houses as Christ Church, Oxford, have as little to do with structure, architecture, or forms of building or occupation as with the complexion of the inhabitants. House, in one sense, means simply a community, ecclesiastical or secular, having common revenues, objects, and, in pre-Reformation times, vows or obligations common to those who joined it; and accordingly the word "house" has no common or ordinary meaning fixed and definite so that by the mere use of the word you can determine in what sense the Legislature has used it. I think the original idea of an inhabited house was that of a building inhabited by one person responsible for the tax who was himself the inhabitant of the whole of the house, but very soon questions began to be raised as to what constituted the unity of a house. One side of a whole street is in one sense structurally one building, and the separate unity of each of the structures would in all its arrangements for occupation for one family and its head be, of course, recognized as a house separately liable for the tax. Even detached houses were always recognized as two houses, although they were structurally one and protected by one roof, but controversies have arisen in respect of rating for the poor for purposes of taxation and for the franchise, and decisions have been arrived at

not always satisfactory or reconcilable with each other. An outer door and a common or separate staircase have been most commonly the tests applied, and I am not myself able to see how the case of chambers in an Inn of Court and the decision of the Westminster case are reconcilable with each other. But the Legislature went further in respect of artificially creating more houses than one out of a house, which was in every ordinary sense one taxable house, by giving from time to time exemptions from taxation to parts of structures which were in every sense structures adapted and probably intended originally for the occupation of one inhabitant as the head of a family, but Sir George Jessel himself said in "*Yorkshires v. Clayton*" that in modern times a practice has grown up of putting separate houses one above the other. They are built in separate flats or houses; but for all legal and ordinary purposes they are separate houses. Now it appears to me that apart from the exemption created by the Act 41 and 42 Vict., c. 15, section 13, I should have great difficulty in holding this building to be one inhabited house within the various alterations which the Legislature has introduced into what it has for fiscal purposes called a house. It appears to me that in the language of Sir George Jessel there are two houses built one above the other. I suppose no one would dream of calling them one house if the same conditions which are found to exist here were found to exist in the same structures not built side by side and not one above the other, and if it is possible to have one house built over another house then all that has been held to constitute a separate house exists here. There is nothing which is held in common; the one house is superposed upon the other, and that is all. With respect to the exemption, I do not think what has been said by the Lord President can be made clearer. In "*Coutts v. Russell*," to use his own words, the word tenement in the statute means "part of a house so structurally divided and separated as to be capable of being a distinct property or a distinct subject of lease." There is no doubt that if this is right, and I am by no means prepared to say it is wrong, the house which is here described is undoubtedly capable of being a separate property or separately leased, but I have more difficulty in seeing that it is structurally divided if I assume that the whole building is one house. If, as some of your Lordships seem to think, the exemption was introduced so as to alter the law, as it was declared to be in the Westminster case, I cannot think it was very happily done. I am not sure that I know what is a tenement as applied to such a subject-matter, though, as I have said, I am not prepared to differ with the Lord President. Nor is it, perhaps, very material to consider it further since for the reason I have given I think this—i.e., the ground-floor house—is not an inhabited house within the statute, and therefore I agree with your Lordships that this appeal should be allowed and the decision of the Commissioners restored.

LORD MACNAGHTEN.—I think the claim of the Crown cannot be sustained. The question seems to me to depend entirely upon the true construction of subsection 2 of section 13 of the Customs and Inland Revenue Act, 1878. The argument on behalf of the Crown, as I understand it, was that subsection 2 was to be treated for all practical purposes as part of subsection 1; that the purpose of subsection 2 in substance was to provide that in the case of premises used for professional purposes, as well as in the case of trade premises, the mere circumstance that a caretaker resided therein should not make the building liable to taxation as a dwelling-house, and that the effect of reading the two subsections together was to limit the application of subsection 2 to buildings chargeable as an entire house or divided into tenements, being distinct properties. I

think the two subsections are quite independent, distinct in origin, and diverse in operation. The object of subsection 1 was to remedy the hardship exemplified in the case of "*The Attorney-General v. Mutual Tontine Westminster Chambers Association*" ([1876] 1 Ex. D., 469). The association had erected blocks of buildings structurally divided into separate tenements for suites of apartments. Some had been let for residential purposes, some as offices or chambers, while others were still unlet. Under Rule VI. of the Act of 1808 the association was held to be chargeable as the occupier of these buildings, and liable for duty in respect of all the separate tenements or suites of apartments, whether let or unlet. The evolution of subsection 2 was a more gradual process. It was marked by successive relaxations in favour of trade. Rule III. of the Act of 1868 provided that all shops which were attached to the dwelling-house or had any communication therewith should be valued with the dwelling-house. If that rule had remained unaltered there could have been, according to the decided cases, no doubt as to the appellant's liability. The first change was made in 1817. The Act of that year (57 Geo. III., c. 25, section 1), takes note of the fact that it had become usual for tradesmen and shopkeepers to carry on their business in one house and to reside in another. It enacts that tenements or buildings, "or parts of tenements or buildings," previously occupied as dwelling-houses by persons who since had gone to reside in taxable dwelling-houses elsewhere, should be discharged from assessment when used wholly as houses for trade or as warehouses for goods or as shops or counting-houses. The Act of 1824 (5 Geo. IV., c. 44) extended this exemption to persons using any house, tenement, or building, "or part of a tenement or building," for the purpose of any profession, vocation, business, or calling by which they seek a livelihood or profit. A further concession was made in 1867. By section 25 of the Inland Revenue Act of that year (30 and 31 Vict., c. 90) it was enacted that in order to entitle the occupier of "any tenement or building or part of a tenement or building" to exemption on the ground of such premises being occupied for trade purposes only, it should not be necessary to prove, nor should proof be required, that such occupier resided in a separate and distinct dwelling-house or part of a dwelling-house chargeable with the said duties. Section 11 of the Inland Revenue Act, 1869 (32 and 33 Vict., c. 14, section 11), provided that any "tenement or part of a tenement" occupied as a house for the purposes of trade only should be exempt, although a caretaker dwelt in it for the sake of protection. So far, the relaxations in favour of trade introduced by the Acts of 1867 and 1869 had not been extended to premises used for professional purposes. But in 1878, when the Legislature dealt with the house tax for the purpose of remedying the hardship which occurred in the case of the Westminster Chambers Association, occasion was taken to put premises used for professional purposes precisely on the same footing as premises used for trade purposes, and section 11 of the Act of 1869 was then repealed. It is to be observed that while section 11 of the Act of 1869 is repealed, section 25 of the Act of 1867, though apparently superseded, is not repealed. Now the Act of 1867, following the language of the earlier Acts, speaks of "any tenement or building, or part of a tenement or building." The Act of 1878, section 13, subsection 2, uses the expression "house or tenement." I do not think that it could have been intended to cut down or narrow the concession introduced by the Act of 1867. The more compendious phraseology to be found in the Act of 1878 was, I suppose, adopted because the previous subsection shows that the word "tenement" is used as meaning a division or part of a house.

In the present case it is not necessary to consider whether there must be a structural division or physical separation when exemption is claimed for part of a building as being used for trade or professional purposes only, because the two portions of the building belonging to the appellant are divided so completely that, in fact, they form separate houses. It is said they are not "distinct properties." That is true. But there is not in subsection 2 of section 13 of the Act of 1878, any more than in section 25 of the Act of 1867, anything requiring that when a tenement or part of a house used for trade purposes only is a portion of a building, the rest of which is used as a dwelling-house, the two portions must be "distinct properties" in order to enable the occupier of the trade premises to claim exemption. And certainly there is no reason why such a condition should be introduced if it is not prescribed in terms by the enactment. I am therefore of opinion that the claim of the appellant ought to be allowed. In coming to this conclusion your Lordships will not, I think, be differing from the opinion of the learned Judges of the Court of Session, although, in deference to previous rulings, the actual decision was the other way. My noble and learned friend Lord Morris desires me to express his concurrence.

LORD DAVEY.—If the question on this appeal depended only on the proper construction of the rules contained in Schedule B to the Act 48 Geo. III., c. 55, I should have some difficulty (having regard to the cases already decided on these Acts, both in England and Scotland) in avoiding the conclusion that this entire building is liable to be assessed to the inhabited house duty as one dwelling-house. There is this difference between the circumstances of the case decided in the English Court of Appeal in "Attorney-General v. Mutual Tontine Westminster Chambers Association" (1 Ex. D., 469) and the present one—viz., that in the Westminster case there was one door opening on the street and one staircase common to the occupiers of all the suites of rooms into which the building was divided, whereas in the case before your Lordships each portion of the building has a separate entrance from the street and no part of the building is used in common by the occupiers of the ground floor and the first floor. Whether that difference is sufficient to make any real distinction, or whether I should have decided the Westminster case in the same way as it was decided by the Court of Appeal it is not necessary for me to say, because I think that the case falls within the exemption contained in subsection 2 of section 13 of 41 and 42 Vict., c. 15. The first subsection applies to a house being one property which is divided into and let in different tenements. Two conditions are required. It must be both divided into and also let in different tenements. It has been decided in England that there must be a physical division of the house into different tenements, and that the word tenement is used in order to comprise the different kind of things (such as shops, warehouses, or offices) into which a house may be divided—"Yorkshire Insurance Company v. Clayton" (8 Q.B.D., 421), and see "Chapman v. Royal Bank of Scotland" (7 Q.B.D., 136). In the Scotch case of "Russell v. Coutts" (9 R., 261) the Lord President says, "Tenement in this statute means a part of a house so structurally divided and separated as to be capable of being a distinct property or a distinct subject of lease"; and Lord Shand says, "The line must simply be drawn by looking at the particular premises and ascertaining whether they are so structurally shut off from the rest of the building occupied as to form an entirely separate tenement of themselves." My Lords, I agree with this definition of the word "tenement" in this section of the Act, and I think it must have the same meaning in subsection 2 as it has in subsection 1.

The second subsection exempts every "house or tenement which is occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit," and it also provides that the exemption shall take effect although a caretaker may dwell in such house or tenement. The words are perfectly general. There is nothing about letting. The owner may be the occupier of the tenement. It was argued that the words "house or tenement" are used pleonastically because it was said these are so used in a section of an earlier Act. But it is a sound rule of construction that you must give to each word used in an Act of Parliament its significance if you can do so without violating other provisions of the Act. It was also said that the word "tenement" should be confined to the case when a tenement is separately assessable under section 14 of 48 Geo. III. I see no reason for cutting down the generality of the words in that manner. If that had been the intention it would have been easy to have expressed it. No difficulty is suggested in applying the words of the subsection according to their literal meaning, and I think that the Legislature intended to exempt from the tax every "tenement" (in the sense which that word bears in this section) used for the purposes of trade or business, or professionally. This publichouse is, in my opinion, clearly either a separate house, as some of your Lordships think, or a separate tenement within the meaning of the subsection to which I have referred, and I, therefore, think it should be declared that it is exempted from the tax.

LORD BRAMPTON read a judgment to the same effect. [Solicitors—Godden, Son, and Holmes, for the appellant; F. C. Gore, for the respondent.]

Chan Div. }
(Farwell, J.) }

1900.
May 28.

HAY V. NORTHCOTE.*

International Law—*Lex loci contractus*—*Lex domicilii*—Marriage abroad valid by English law held to be null and void by foreign Court—Marriage settlement—Validity.

This action raised a question of private international law. By an indenture dated July 20, 1880, made between Edmund Tyrwhitt (since deceased) of the one part and George Burges (since deceased) of the other part, after reciting that previously to the marriage of Louis Alphonse Duperrel with the defendant Louisa Harriet Tyrwhitt, a daughter of the said Edmund Tyrwhitt, the said Edmund Tyrwhitt agreed to assign the two policies of assurance thereafter particularly described upon the trusts thereafter declared concerning the same, and also to enter into a covenant for the payment of an annual sum of £40 in the manner thereafter provided, and that the marriage of the said L. A. Duperrel and the defendant L. H. Tyrwhitt was duly solemnized on May 25, 1880, for effectuating the said agreement, and in consideration of the promises the said Edmund Tyrwhitt assigned the two policies of assurance therein particularly described unto the said George Burges, his executors, administrators, and assigns to hold the same upon trust, to receive and invest all moneys assured by, or to become payable under, the said policies, and to pay the income thereof to the defendant L. H. Tyrwhitt during her life and after her decease upon trust for all the children of the defendant L. H. Tyrwhitt by the said L. A. Duperrel or any future husband, and it was thereby declared that if there should

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

be no issue in whom the trust funds should become absolutely vested then the trustee should hold the said funds upon trust for the next-of-kin of the defendant L. H. Tyrwhitt, and the said Edmund Tyrwhitt covenanted to pay during the joint lives of himself and the defendant L. H. Tyrwhitt the annual sum of £40 to the said George Burges for the benefit of the defendant L. H. Tyrwhitt. The ceremony of marriage between L. A. Duperré and the defendant L. H. Tyrwhitt took place before the British Consul at Bordeaux on May 24, 1880. By a judgment of the tribunal of first instance of Bordeaux, pronounced on March 15, 1882, the tribunal declared the said marriage to be null and void, and thereupon Edmund Tyrwhitt ceased to pay the £40 a year which by the marriage settlement he had covenanted to pay, but the policies of assurance remained in the hands of the trustees and the premiums were duly paid by Edmund Tyrwhitt. Edmund Tyrwhitt died on July 21, 1899, and his will was duly proved by the plaintiff and the defendant, George Russell Northcote, the executors. The defendants Gordon Stafford Northcote and George Russell Northcote are the present trustees of the indenture of settlement of July 20, 1880, and since the death of Edmund Tyrwhitt have received the moneys payable under the two policies of assurance. The plaintiff claimed a declaration that the said indenture of settlement was not binding on the estate of Edmund Tyrwhitt and ought to be delivered up, and an order to the defendants G. S. and G. R. Northcote to transfer and pay the trust funds to the executors of the will of Edmund Tyrwhitt.

Mr. BRAMWELL DAVIS, Q.C. (Mr. E. S. Ford with him), contended that the French Court was competent to declare the marriage null and void, and its judgment should be followed in this country. The consideration for the settlement therefore failed entirely, and the settlement was thereby rescinded. The settlement could not be regarded as a voluntary settlement upon the children of another marriage. In the alternative both parties thought there had been a valid marriage, but that proved to be a mistake, and therefore the settlement failed. He relied on the following cases—"Pemberton v. Hughes" ([1899] 1 Ch., 781), "Chapman v. Bradley" (4 De G., J., and S., 71), "Bond v. Walford" (32 Ch. D., 238), "Manning v. Gill" (20 W. R., 357).

Mr. BADDOCK, Q.C. (Mr. A. F. Peterson with him), argued (1) that the consideration had not failed. By 12 and 13 Vict., c. 68, a marriage celebrated before a British Consul abroad was as valid as if it had been solemnized in her Majesty's dominions and could not, therefore, be annulled by a French Court ("Simonin v. Mallac," 2 S. and T., 69). (2) Even if the consideration had failed, the settlement was still good as a voluntary settlement on the children of another marriage ("Paul v. Paul," 20 Ch. D., 742; "Smith v. Smith and Graves," 12 P. D., 102).

MR. JUSTICE FARWELL, in giving judgment, said that it was contended that, the marriage having been declared null and void by a French Court, the consideration for the settlement failed, and therefore the executors of the settlor were entitled to the policy moneys now in the hands of the trustees. The first question which he had to decide was—Was the marriage null and void in England? The marriage was between a Frenchman and an Englishwoman, and was covered by section 1 of 12 and 13 Vict., c. 68, which enacted as follows:—"All marriages (both or one of the parties thereto being subjects or a subject of this realm) which from and after the passing of this Act shall be solemnized in the manner in this Act provided in any foreign country or place where there shall be a British Consul duly authorized to act in such foreign country or place under this Act shall be deemed and held to be as valid in the law

as if the same had been solemnized within her Majesty's dominions with a due observance of all forms required by law." He took that provision to mean that for the purposes of the Act a British Consulate was to be regarded as part of her Majesty's dominions. He had therefore a marriage solemnized in the British dominions, a settlement made in this country with an English trustee, and he was asked to hold that in consequence of a judgment pronounced by a French Court the marriage was null and void in England. The case seemed to him to be governed by "Simonin v. Mallac," in which it was decided that a person having entered into a contract in this country was subject to the jurisdiction of the Courts of this country in respect of the personal *status* resulting from such contract, and that the personal *status* resulting from such contract was to be ascertained by the law of this country, in which the contract was made, and not any special law of the country of the domicile of the parties to the contract. In his opinion, therefore, he was not bound by the judgment of the French Court. Consequently the marriage being valid by English law, the consideration for the settlement had not failed, and he need not consider the point whether the settlement would have been good as a voluntary settlement. The plaintiff's action must be dismissed.

[Solicitors—Robins, Hay, Waters, and Hay, for all parties.]

House of Lords (Lord Halsbury, L.C.,
Lords Macnaghten, Davey, Brampton,
and Robertson) } 1900.
May 29.

OVERSEERS OF DALTON AND OTHERS V. NORTH-EASTERN RAILWAY COMPANY.*

Highway—Rate—Exemption—Liability to repair *ratione tenuræ*—Highway Act, 1835 (5 and 6 Will. IV., c. 50), s. 38—Highway Act, 1862 (25 and 26 Vict., c. 61), s. 35.

Persons liable to repair a highway *ratione tenuræ*, who have paid a capital sum, even though of nominal amount, under s. 35 of the Highway Act, 1862, in full discharge of such liability, are not liable to highway rates. Decision of the Court of Appeal (15 *The Times* L.R., 346) affirmed.

This was an appeal from the Court of Appeal (Lords Justices A. L. Smith, Vaughan Williams, and Romer), dated May 3, 1899, reversing the decision of May 16, 1898, of the Queen's Bench Division (Mr. Justice Wills and Mr. Justice Kennedy). The case below is reported—15 *The Times* L.R., 346; [1899] 1 Q.B., 1,026; 68 *L.J.*, Q.B., 640. The arguments were heard on April 3, when their Lordships reserved judgment.

The action was on a case stated by the Quarter Sessions for the North Riding of the county of York on October 22, 1897, upon the hearing of an appeal by the North-Eastern Railway Company against a rate made for the relief of the poor in the parish of Dalton in the said Riding, and for other purposes chargeable thereon upon June 7, 1897. It appeared from the case that (1) prior to the making of an order by the Quarter Sessions for the North Riding of Yorkshire at Michaelmas, 1880, constituting the hamlet of Islebeck a separate highway parish, and annexing such parish to the Birdforth Highway District the said hamlet formed part of the township of Bagby in the said district, and was a place in which all the highways were repairable by the occupiers *ratione tenuræ* and in which no highway rates were leviable by reason of the exemption contained in

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

section 33 of the Highway Act, 1835. The hamlet continued to form part of the township of Bagby until June 1, 1886. (2) The North-Eastern Railway Company was, prior to the making of the said order, and still was in occupation of lands in the said hamlet and was, prior to the making of the order next hereinafter referred to, liable *ratione tenuræ* to repair a portion, to wit 84 yards or thereabouts, of a certain highway in the said hamlet. (3) Upon April 11, 1881, an order was made under section 35 of the Highway Act, 1862, whereby it was ordered that all the highways within the hamlet of Islebeck should become and for ever thereafter be parish highways and be repaired and maintained by the Birdforth Highway Board, and whereby the sums to be paid by the respective occupiers of lands within the said hamlet previously liable to the repair of the said highways in full discharge of all claims thereafter in respect of the repair and maintenance of the said highways or any of them or any part thereof were fixed. (4) On August 22, 1881, the North-Eastern Railway Company was rated and assessed in respect of its said lands to a rate for the expenses incurred by the Birdforth Highway Board in repairing and maintaining the highways within its district including the highways within the hamlet of Islebeck and for other expenses legally incurred by the board. An appeal, however, against the rate by the company to the said Quarter Sessions at Michaelmas, 1881, was allowed. (5) By an order of the Local Government Board dated June 1, 1886, and confirmed by the Local Government Board's Provisional Orders Confirmation (Poor Law) Act, 1887, the hamlet of Islebeck was detached from the township of Bagby and was amalgamated with the township of Dalton in the Birdforth Highway District. (6) On June 7, 1897, a rate for the relief of the poor in the said parish of Dalton and for other purposes chargeable thereon was made, in which the North-Eastern Railway Company was rated and assessed in respect of its occupation of its said lands in the said hamlet of Islebeck. Such rate was levied (*inter alia*) in respect of expenses incurred or to be incurred by the Rural District Council of Thirsk, which council is the successor of the said Birdforth Highway Board, in respect of the repair and maintenance of the highways within the said rural district, including the portion of the said parish of Dalton which was or is comprised in the said hamlet of Islebeck. (7) The North-Eastern Railway Company duly gave notice of appeal against the said rate, and entered an appeal against such rate at the midsummer quarter sessions of the said Riding, which appeal was duly respite until the following quarter sessions, when it was heard. (8) The appellants admitted that, subject to the matters contained in paragraph 9 hereof, the said rate had been duly laid and demand therefor had been made. (9) On behalf of the company it was contended—(a) That, it having been decided in the appeal to the quarter sessions for the North Riding of the county of York holden at Michaelmas, 1881, that the company was not liable to contribute towards the repair and maintenance of the highways in that portion of the parish of Dalton which was formerly the hamlet of Islebeck, the question was *res judicata*, and the quarter sessions was precluded from deciding otherwise in the present appeal; (b) that the company, having been liable to maintain the highways in the said hamlet of Islebeck *ratione tenuræ*, was exempted by section 33 of the Highway Act, 1835, from liability to rates levied in respect of the repair and maintenance of such highways, and had continued to be exempt ever since; and (c) that the company, having complied with the requirements of the order of petty sessions referred to in paragraph 3 of this case, was by virtue of section 35 of the Highway Act, 1862, discharged of all claims thereafter in respect of the

repair and maintenance of the highways, or portions of highways, in the said hamlet of Islebeck, or any part of such highways, and was therefore not liable to pay the said rate. (10) On behalf of the respondents it was contended—(a) That the said decision of the quarter sessions on October 19, 1881, was final only for its proper purpose and object, which said purpose and object was that the North-Eastern Railway Company was not liable to pay a rate of 5½d. in the pound laid on August 22, 1881, for the purpose of raising moneys payable under a precept of the said Birdforth Highway Board, and that the said decision was not conclusive evidence of the matters set out in paragraph 9 (b) and (c) hereof, which said matters only came (if at all) collaterally in question before the said sessions, or were only incidentally cognisable, or were at most only matters to be inferred by argument from the said decision; (b) that the exemption from the payment of highway rates conferred by section 33 of the Highway Act, 1835, continued only so long as the liability of the said company to repair the said 84 yards (or thereabouts) of the said highway *ratione tenuræ* lasted, and that, therefore, the exemption determined on the said April 11, 1881, when by virtue of the said order of the said justices the said portion of the said highway became a parish highway; (c) that the said order, dated April 11, 1881, only operated to discharge the said company from all the claims from the said date by the said Birdforth Highway Board or its successors in respect of the repairs and maintenance of the said 84 yards (or thereabouts) of the said highway then ordered to be made repairable by the parish, and in no way affects the liability of the said company in respect of its occupation of property within the district of the said Thirsk Rural District Council and otherwise by law liable to be rated from paying rates for expenses incurred by the council of the said rural district in respect of the repair and maintenance of the highways within the said rural district. The county quarter sessions held that the question was not *res judicata*, and that they were not bound by the decision in the appeal to the quarter sessions in 1881. And that the North-Eastern Railway Company was not exempt from payment of any portion of the said rate. The questions for the opinion of the Court were—(1) Were the quarter sessions precluded by their previous decision at Michaelmas, 1881, from holding that the North-Eastern Railway Company was liable to be rated in respect of its occupation of lands within the said hamlet of Islebeck for expenses incurred by the rural district council of Thirsk in relation to the highways within the said rural district? (2) Was the North-Eastern Railway Company exempt from payment of so much of the said rates as was levied in respect of the repair and maintenance of the highways in the said hamlet? The decision of quarter sessions was affirmed by the Divisional Court.

Mr. Marshall, Q.C., Mr. Macmorran, Q.C., and Mr. Gawan Taylor were counsel for the appellants; Mr. A. T. Lawrence, Q.C., and Mr. R. Cunningham Glen for the respondents.

The LORD CHANCELLOR, in giving judgment, said:—By section 35 of 25 and 26 Vict., c. 61, a person liable to repair a highway *ratione tenuræ* was enabled, by a process described in the section in question, to apply for an order relieving him from the responsibility of repairing in future, and the justices were authorized in this form of procedure to make an order by which they fixed a certain sum to be paid by the person so applying in full discharge of all claims thereafter in respect of the repair and maintenance of such highway. The language of the statute seems very plain, and it is not denied that the proper procedure was followed; but, for some reason

which does not very clearly appear, the justices fixed a merely nominal sum, and for a considerable time the order thus made has been pursued. I know of no reason in the absence of fraud why the bargain thus made under statutable authority is to be set aside simply because the magistrates did not fix, as they should have done, a capital sum such as in their judgment would have been adequate payment in respect of the liability of which they were relieving the proprietor of the land. I do not know what led to this strange result. It may have been an honest blunder as to what was the meaning of the Act of Parliament, but, whatever it was, it is impossible now to treat what was done under the powers of the statute as if it was of no avail. I therefore move your Lordships that this appeal be dismissed with costs.

The other noble and learned Lords concurred.

[Solicitors—Robbins, Billing, and Co., for the appellants; A. Kaye Butterworth, for the respondents.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } May 29.

ANDERSON V. VICARY.*

Landlord and Tenant—Game—Occupying owner
—Lessee of sporting rights—Ground Game
Act, 1880 (43 and 44 Vict., c. 47).

The Ground Game Act, 1880, applies to the occupying owner of land, where the right of shooting is separated from the occupation, and the Act is not limited to an occupying tenant.

Therefore where the owner of land let the sporting rights over it, including a farm in the occupation of a tenant, to the plaintiff, and the owner subsequently conveyed part of the land, including that farm, to the defendant, who took a surrender of the tenant's lease of the farm, the defendant was held entitled to the ground game under the Act of 1880 as against the lessee of the sporting rights.

So held by Vaughan Williams and Romer, L.JJ., A. L. Smith, L.J., dissenting.

Decision of Wright, J. (15 *The Times* L.R., 496), affirmed.

This was an appeal from a judgment of Mr. Justice Wright's at the trial of an action without a jury, reported 15 *The Times* L.R., 496; [1899] 2 Q.B., 486. The action was brought by Mr. Frank Herbert Anderson against Mr. William Vicary for damages for trespass to sporting rights held by the plaintiff over land known as the Plumley estate, at Bovey Tracey, in the county of Devon. The defendant, who had trapped rabbits upon that portion of the Plumley estate of which he was the owner and occupier, pleaded that he was entitled to do so by virtue of the Ground Game Act, 1880. It appeared that on January 18, 1893, Mr. John Harris, who was then the owner of the whole of the Plumley estate, let a portion of it to Mr. William Wreyford for a term of 21 years, reserving to himself, subject to the Ground Game Act, 1880, the right to kill game and rabbits. On August 31, 1895, Harris let to the plaintiff Plumley-house, together with the sporting rights over the whole of the Plumley estate, for five years from January 1, 1896, reserving, however, to his remaining tenants in common with the lessee and subject to the Ground Game Act the right of hunting for and killing rabbits. In January, 1898, Harris sold the land comprised in Wreyford's lease, together with Northcombe-wood, which adjoined it, to the de-

fendant, and in May of the same year the defendant, having obtained from Wreyford a surrender of the land, of which he was the tenant, entered into occupation and farmed the land himself. The defendant then began to trap rabbits in Northcombe-wood and in the hedgerows between it and the land lately let to Wreyford, and the plaintiff, who continued to be the lessee of the sporting rights over the estate, complained, asserting that the defendant had no right to trap rabbits where he did. The question was whether a person who, like the defendant, was the owner as well as the occupier of land was one in favour of whom the Ground Game Act applied, and whether such a person was at liberty to kill rabbits, notwithstanding that his predecessor in title had conveyed away the sporting rights. Mr. Justice Wright was of opinion that the intention of the Act was that there should be no land over which the occupier should not have the right to kill ground game, and that, as far as this right was concerned, an occupying owner was to be treated like any other occupier. He therefore gave judgment for the defendant. The plaintiff appealed.

Mr. Duke, Q.C., and Mr. Bodilly appeared for the plaintiff; Mr. Foote, Q.C., and Mr. Clavell Salter for the defendant.

The COURT dismissed the appeal, Lord Justice A. L. Smith dissenting.

LORD JUSTICE A. L. SMITH said that though he was in the minority he had a very strong opinion about this case, and it would be useless for him to take time to consider whether he could not agree with his learned brethren. With all submission to them he thought that this appeal ought to be allowed. The action was brought to recover damages for trespass to shooting rights, and it was brought against a landowner who was farming his own land. The defendant justified under the Ground Game Act, 1880. An important question was thus raised—viz., whether the Ground Game Act was passed in the interests of landlords as well as of tenants. Speaking for himself he had no doubt that it was passed for the purpose of protecting tenants against landlords, and not for the purpose of protecting landlords against tenants. The original owner of the land in question was Harris, and he, having granted the right of shooting over the land by lease to the plaintiff for five years, sold the land in fee to the defendant subject to the lease of the shooting rights. The defendant went into occupation, and he claimed to be entitled to kill and take rabbits by virtue of the Ground Game Act. Did the Act apply to a landlord who had no tenant? In his opinion, the statement that the Act was passed in the interests of landlords as well as of tenants was absolutely without any foundation. Nothing could be more absurd than to suppose that in 1880 landlords required the protection which this Act was intended to afford. Landlords then had everything in their own hands. The Act was passed for the purpose of protecting tenants whose property was being eaten up by ground game in consequence of their landlords failing to keep the ground game down. It was entitled "An Act for the better protection of occupiers of land against injury to their crops from ground game." It was clear that, if a landlord had no tenant, he was completely *dominus* of the whole of his land and was not in need of any protection, and in his opinion the word "occupiers" in the title must mean tenants. Then the preamble was as follows:—"Whereas it is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game." There again it seemed clear to him that "occupiers" must mean

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

tenants. Then section 1 enacted that "every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land." There, again, "occupier" must mean tenant; for a landlord who occupied his own land and had no tenant did not require the protection of any such enactment. The provisos contained in subsections 1, 2, and 3 of section 1, and the provisions of the following sections all seemed to be applicable to tenants exclusively, and could not be aimed at a landlord who had no tenant under him. Reference had been made to the case of "*Smith v. Hunt*" (54 *L.T.*, 422), a decision on section 6 of the Act. Whether that case was rightly decided or not, he thought it clear that the Act generally was drawn in the interests of tenants, and that it was only to be brought into play where there was both a landlord and a tenant.

LORD JUSTICE VAUGHAN WILLIAMS said he had come to a different conclusion, and he thought that the judgment of Mr. Justice Wright was correct. The question was to find out the meaning of the words "occupier of land" in the Ground Game Act. He did not think it necessary to limit the meaning of those words. In his judgment they ought to be taken as meaning what they naturally meant—viz., the occupier of land. He did not at all say that the Act was passed for the protection of landlords, but neither did he know that it was only passed for the protection of tenants. He thought it was passed to prevent the separation of the right of shooting, so far as ground game was concerned, from the right of occupation of land. The Act provided that every occupier of land should always have the statutory right mentioned in section 1—viz., the right to kill and take ground game, inseparable from his occupation of the land. In his view the language of the Act was wide enough to cover the case of an occupier who was the landowner as well as an occupier who was a tenant. He wished to say plainly that there was nothing in his judgment which involved the proposition that, where a landlord was in occupation and there had been no separation of the rights of shooting, this Act would have any operation. In such a case he thought it had no operation.

LORD JUSTICE ROMER said he thought that the judgment of Mr. Justice Wright should be affirmed. In his opinion the policy of the Ground Game Act was to ensure that all occupiers of land should have the right to kill and take ground game; and the object of the Act was to give that right to all occupiers of land who would not have it independently of the Act. Subject to that the Act seemed to contemplate occupiers of all sorts. Occupiers of every kind, if they were not able otherwise to keep down the ground game on their land, had that right given to them by the Act. It was said that an occupier within the Act must only have a chattel interest in the land. But he could not see why. The policy of the Act applied as much to an owner in fee as to a tenant for a long term. There was nothing to justify the distinction that was sought to be drawn, and the suggested reason could not be found in the Act itself. If such a distinction were to be drawn, it would cause injustice in the working of the Act. For instance, if a landlord with an agricultural tenant granted a lease of shooting rights, the tenant of the shooting rights could not interfere with the right of the agricultural tenant under the Act. If then the agricultural tenant absconded, and the landlord went into possession, according to the contention of the appellant the landlord would be obliged to work the farm subject to the right of the lessee of

the shooting to let the ground game multiply. Yet why should the rights of the tenant under the shooting lease be thus enlarged? Again, a young farmer might be lessee to his father of a small farm over which the rights of shooting might be let. If the father died, and the son succeeded to the freehold, according to the appellant the son would lose his statutory right and the shooting tenant would acquire a right which he had not before. In his opinion the Act ought not to be cut down so as to shut out any occupier, so long as independently of the Act he had no right to kill and take ground game.

[Solicitors—Mann and Crimp, agents for Hacker and Michelmores, Newton Abbot; Church, Rendell, Todd, and Co., agents for Baker, Watts, Alsop, and Woollcombe, Newton Abbot.]

Court of Appeal (Webster, M.R., }
Rigby and Collins, L.J.J.) }

1900.
May 30.

CORNWALL V. HENSON.*

Vendor and Purchaser—Delay on part of purchaser—Abandonment of contract—Damages.

Held, upon the facts, that the plaintiff, the purchaser, had not, by his delay in paying the last instalment of the purchase money, abandoned the contract, and was therefore entitled to damages for the way in which the defendant, the vendor, had dealt with the property.

Decision of Cozens-Hardy, J. (15 *The Times* L.R., 544), reversed.

This was an appeal against a decision of Mr. Justice Cozens-Hardy's reported in 15 *The Times* L.R., 544). By an agreement dated August 11, 1892, and made between the defendant of the one part and the plaintiff of the other part, the defendant agreed to sell and the plaintiff agreed to buy 5½ acres of land at Pitsea, in Essex, for £150. Clause 2 was as follows:—"The purchaser has already paid to the vendor the sum of £40 on account of the said purchase-money of £150, and will pay the balance by equal quarterly instalments of £9 3s. 4d. each on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June in every year, the first of such quarterly payments to be made on the 25th day of December, 1892. The purchaser will also pay to the vendor with each such quarterly payment on account of principal such a further sum as shall be equivalent to interest at the rate of 3 per cent. per annum on the amount of principal remaining unpaid for the quarter then past, but if the purchaser shall make default in payment of any of such instalments of principal or interest or any part thereof for 30 days after the same shall have become due the whole of the unpaid instalments of the said purchase-money with the interest thereon shall become immediately due and payable." Thus far the clause was in print, but the following words were added in writing:—"I agree to grant a further extension on application of the purchaser at an increase of interest as shall be determined by both parties." The purchaser was by Clause 3 to have possession as on July 1, 1892, and he was by Clause 6 to make and maintain certain boundary fences and hedges, and also to complete and repair part of a road abutting on the land. By Clause 8 the vendor, in the event of default being made for 30 days in payment of the whole of the unpaid instalments with interest, was to be at liberty to resell and to retain out of the proceeds of sale unpaid instalments with interest, and the net balance of the proceeds was to be paid by the vendor to

*Reported by W. L. CARELL, Esq., Barrister-at-Law.

the purchaser. The plaintiff entered into possession and cultivated the land for a considerable time, but he did not make it profitable. He was generally in arrear with his instalments, and from time to time the defendant allowed a postponement, interest being charged and paid at 25 per cent. The last instalment paid by the plaintiff became due on June 24, 1895, and was paid with interest on August 27, 1895. This left only one instalment remaining due, but from August, 1895, no further payment was made by the plaintiff to the defendant. Much correspondence took place, in which the defendant called upon the plaintiff to pay, and on October 23, 1896, the plaintiff wrote a long letter to the defendant asking him to reply to a particular address in Jamaica-road, Bermondsey. Shortly after that date the plaintiff disappeared, and letters addressed by the defendant to him at Jamaica-road were returned through the Dead Letter Office. Inquiries made by the defendant at former addresses and from his relations led to no result. The field was in a derelict state, the fences were broken down, nothing was produced by the land, the road was not made, and rates and tithe were unpaid, the tithe being ultimately paid by the defendant. The land was not worth the total amount of the instalments paid by the plaintiff. Under these circumstances the defendant took possession and advertised the property for sale, and, not being able to effect a sale, he on March 7, 1898, agreed to let the property to a Mr. Burns, with liberty to erect a house, and with the option to purchase at any time during the term. Burns accordingly erected a house, and was still in possession at the trial of the action. The plaintiff again appeared upon the scene, and on June 13, 1898, he wrote to the defendant that he was prepared to "make the final instalment and settlement of the ground purchased." Correspondence took place, but nothing resulted from it, and on July 13, 1898, this action was commenced, the plaintiff claiming specific performance of the agreement of August, 1892, and damages instead of or in addition to specific performance, or alternatively damages for breach of contract or repayment of the purchase-money with interest. It was admitted at the trial that the plaintiff could not obtain specific performance of the contract, he himself not having been always ready and willing to perform his part of the bargain, and the learned Judge held that there was no legal foundation for the plaintiff's claim for damages, or for the return of the instalments which he had paid. His Lordship therefore dismissed the action, but without costs. The plaintiff appealed.

Mr. Astbury, Q.C., and Mr. Harry Greenwood were for the plaintiff; Mr. Frederic Thompson was for the defendant.

The COURT allowed the appeal.

The MASTER of the ROLLS said that Mr. Justice Cozens-Hardy came to the conclusion on the facts that the plaintiff had by his conduct shown that, in October, 1896, he had in fact abandoned the land and repudiated the contract, and that the defendant was entitled to treat the contract as at an end. If his Lordship (the Master of the Rolls) could come to that conclusion of fact, he should think that the judgment was right. But, with the greatest respect to the learned Judge, he was unable to agree in that conclusion. It was not necessary to decide whether Clause 8 of the contract was entirely optional in favour of the vendor, and that he had lost all his rights independently of that clause, for, in his Lordship's view of the facts, the defendant was not justified in treating the plaintiff as having abandoned his contract. It was quite plain that the defendant never brought it to the mind of the plaintiff, so long as they were in communication, that, if he did not pay the last instalment, the defendant would treat the contract as abandoned. Indeed, months after the last instalment

had become due, the defendant wrote letters to the plaintiff on the basis that the property still belonged to the plaintiff. His Lordship could not find any intention on the part of the plaintiff to abandon the contract, or any sufficient notice by the defendant to the plaintiff that, if the last instalment (less than £10) were not paid within a specified time, the contract must be treated as at an end. The way in which the defendant had dealt with the property was not justified, and he was liable in damages. The Court had been asked to assess the damages, and his Lordship thought substantial justice would be done by awarding the plaintiff £125. He must have his costs in both Courts.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS delivered judgments to the same effect.

[Solicitors—Edwin, Son, and Edgley; Field, Roscoe, and Co., for J. H. Mitchell, Worthing.]

Court of Appeal (Webster, M.R.,) 1900.
Rigby and Collins, L.JJ.) { May 30.

ELKINS V. THE CAPITAL GUARANTEE SOCIETY.*

Company—Winding up—Trust fund—Balance unclaimed by bondholders.

The balance of a fund set apart for the payment of bondholders in a company in liquidation, the bonds not becoming payable until 1950, not having been claimed for over 10 years in answer to advertisements, the Court refused to make an order that the unclaimed balance should be handed over to the liquidator on behalf of the shareholders.

This was an appeal against a decision of Mr. Justice Stirling's (reported in *The Times* of June 14 last). The action arose out of the failure of a company which was formed to carry out a scheme of a somewhat curious nature. The company was incorporated in 1874 with the object of collecting and investing at compound interest the small discounts usually allowed by tradesmen to their customers in respect of cash purchases, and to secure the accumulated amount to the customers, out of whose discounts the fund had arisen. The course of dealing of the company was as follows:—The company appointed certain tradesmen as "trade members," who agreed to give to all their cash customers coupons issued by the company of the full nominal value of the amount of the customer's purchases. The tradesmen paid the company 5s. for every £5 worth of coupons, which was to them equivalent to giving the customer 5 per cent. discount for cash. The customer paid nothing for the coupons, but took them in lieu of the usual cash discount. When a customer had received or accumulated coupons of the nominal value of £5 the company gave in exchange for those coupons a bond or promissory note, under which they became bound to pay that amount to the holder within a given number of years (ranging in the different series of bonds from 67 to 90), or whenever the bond should be drawn for payment, the drawings being half-yearly by ballot. By investing and accumulating the money received from the tradesmen in respect of the purchase of coupons it was calculated that the company would be able to provide a fund sufficient to pay the bonds when due or drawn for payment. The business of the company flourished for some years, but ultimately the company were advised that the provision for the half-yearly drawings of the bonds was illegal as a violation of the Lottery Act. This part of the scheme was thereupon abandoned, with the result that the business fell off, and ultimately the company went into volun-

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

tary liquidation. The funds which had been set aside to meet the bonds at maturity amounted to about £24,000, and a considerable proportion of that amount is still in Court, representing the security for bonds outstanding and unclaimed. The action was commenced in April, 1883, the plaintiff, who sued on behalf of himself and all the other bondholders, claiming to have the fund distributed under the direction of the Court. The total nominal value of the bonds outstanding at that time was £507,590. By the direction of the Court inquiries were prosecuted and advertisements issued inviting bondholders to come in and receive their proportion of the fund in Court, and as the result of these proceedings about three-fifths of the bondholders had come in and received dividends, but there still remained a considerable sum in Court. An application was made by the liquidator asking that the balance of the fund might be paid over to him on behalf of the shareholders of the company, on the ground that the time had now come when it must be presumed that those bondholders who had not come in had released their claims, and that the proceedings ought to be closed. It was contended by the plaintiff, on the other hand, that as the remaining bondholders might still come in (and it was shown that some had, in fact, come in quite recently) it would be unjust to shut them out from participation in a fund which really belonged to them. Mr. Justice Stirling said that he could only make an order in favour of the liquidator on the assumption that the bondholders, who had not come in, had released their claims. His Lordship could not make that assumption, and he could not at this stage make any order in favour of the liquidator. The inquiry as to the persons who were entitled to the outstanding bonds must therefore be continued. The liquidator appealed.

Mr. Haldane, Q.C., and Mr. A. H. Jessel were for the liquidator; Mr. Upjohn, Q.C., and Mr. Manby were for the plaintiffs.

The appeal was heard on the 10th and 14th inst., when the Court reserved their judgment.

LORD JUSTICE RIGBY now read the following judgment of the Court:—This is an action for the administration of the trusts of certain trust funds, which have been transferred or paid into Court, and which, with the investments and accumulations thereof, less certain portions applied under orders of the Court in payment of costs were standing in Court at the date of the order on further consideration made on July 12, 1889, hereinafter mentioned. Orders had from time to time been made directing inquiries, and certificates of the result of those inquiries had also been made, but it does not seem necessary to go further into the details of those inquiries and certificates than is hereinafter stated. The trust funds were the result of investments made by the Capital Guarantee Society (now in liquidation under a voluntary resolution passed after the commencement of the action and followed by a supervision order). The trust funds, known collectively as the "Redemption Fund," were to secure payment, at very remote periods, of bonds, or, alternatively, promissory notes, given by the company and made payable to bearer. The bonds or notes were divided into series according to the year in which they were issued, the first series being payable on demand within three years from the year 1850, and the other series within a similar period from later years extending at intervals up to 1970. There were in all nine such series, but as it appears that the security for each series was entirely independent of that of every other, it is only necessary to fix attention upon one of them, as what has been or is decided with reference to one will apply equally to the rest. The plaintiffs are bondholders, suing on behalf of themselves and all other the creditors entitled to the benefit of the respective

securities included in the Redemption Fund, and, in addition to the substantial relief sought in the action—viz., the administration of the trust funds under the control of the Court, they have from time to time raised, and pressed with more or less force, some contentions which it may be convenient to state, in order to show that they have not been overlooked. These contentions are (a) that the company failed in the investment of the full amount of trust funds which they ought to have invested according to their contracts; (b) that the company, having begun in accordance with their contract by half yearly drawing by ballot of a proportion of the bonds for immediate payment, ceased to continue those drawings, whereby the value of the security intended for the bondholders was seriously diminished; (c) that in no case have the company paid to bondholders even the full present value of their bonds. Whatever may have been or may yet be the worth of such contentions, they may, we think, be entirely dismissed from consideration in dealing with the actual trust funds to be administered in this action, as at most they would establish claims sounding in damages, which ought to have been, or perhaps might yet be, established against the company in the liquidation, with which we have no concern. The real question seems to turn upon what was the true effect of the order on further consideration of July 12, 1889. There have been subsequent orders on further consideration, applying the principle of that order, but in no respect departing from it. These need not be further referred to. At the date of the order of July 12, 1889, in answer to advertisements directed in the action, very numerous bondholders had established claims as bondholders, and those claims had been certified, but very many remained outstanding, no claims in respect of them having been brought in, still less certified. Subsequent advertisements have been issued at very great expense, but comparatively few claimants have come in in answer thereto, and no advertisements have been issued since 1895. To go back to the time of the order of 1889. In round numbers it may be stated that the whole amount of these bonds of all the series issued by the company, entitling the holders to the benefit of one or other of the trust securities constituting the Redemption Fund, was ascertained to be £500,000. In respect of about £300,000 out of this sum claims had been certified in this action. In respect of the remaining £200,000, though it was certain that claims in respect of them had existed, no claims had been brought in. In other words, three-fifths of the whole number of secured creditors were before the Court, and two-fifths were not before the Court. The three-fifths and two-fifths are ascertained by lumping together all the nine series. In each series, taken separately, the proportions would differ somewhat, but those differences need not be noticed. The trust funds could only be augmented by way of accumulation. If all the secured bondholders had been before the Court they might, at any rate with the consent of the company, have forestalled the time for payment of their bonds, have taken such dividends as would be forthcoming from the proceeds of sale of the securities, and proved in the liquidation for the balance (if any) of the present value of their bonds. The three-fifths elected to have the trust funds divided, taking three-fifths to divide among themselves in proportion to their respective claims as certified, and leaving two-fifths to answer the claims of those who had not come in, and, as this was consented to by the company, and was, apparently, not unfair to the bondholders who had not claimed, it was sanctioned by the Court, and the necessary result embodied in the order of July 12, 1889. What was the meaning of this transaction? The three-fifths, in effect, said, "We prefer to sever the joint interest in the Redemption Fund which we have down

to this time had with the bondholders of our respective series who have not claimed, and to withdraw for division among ourselves the whole of the trust funds upon which, after the severance, we have any claim." They got precisely what they would have had if the whole five-fifths had come in and claimed, and it seems to us that they can have no possible claim against the funds appropriated for the benefit of the two-fifths. Any further claim must have been a claim against the company for unpaid debt or damages. They admit, indeed, that they cannot establish any claim until the outstanding two-fifths have been satisfied, but they urge that after all who come in have been satisfied they have a right to come upon the trust fund in priority to the company. This would be a very special and peculiar security which could be created only by agreement, and we can find no trace of any such agreement. Mr. Justice Chitty, the learned Judge who made the order, could see no ground for any such claim, though, as the question was not directly in issue before him, he declined to decide it. If the bondholders who have proved and received dividends cannot, as we think they cannot, establish any claim to the two-fifths of the trust funds carried over for the benefit of the bondholders who have not claimed, it seems to us that those funds must be held upon the same trusts as they would have been held upon if the two-fifths of the bondholders had been the whole number of the bondholders—that is, to satisfy those bondholders, and, subject to the full satisfaction of their claims, for the company in liquidation. We should see no difficulty in arriving at this conclusion but for the doubt expressed by Mr. Justice Chitty whether the liquidator could take anything. That question did not arise for decision before him, and was in express terms left open. It may, however, be shown to have proceeded upon a misapprehension of the exact terms of the order of July 12, 1889, and the separate accounts to which the different moneys and funds were thereby directed to be carried over. The hypothesis which would exclude the liquidator could only be correct if the sum carried over to represent the share of the bondholders whose claims were not certified had been divided among them as tenants in common, as was done with those whose claims were certified. This could not properly be done, as no bondholder could, without his consent, have been compelled to take an immediate instead of a postponed share according to the contract. But it was not expressed to be done by the order. That order declared that the amount of the redemption fund applicable to the securities of each series ought to be divided into two parts, bearing the same proportion to each other as the amount of the bonds and other securities of such series, held by the persons certified to be the holders, bore to the amount of the securities of the same series the holders whereof were not certified, and that the sum certified to be applicable to the first mentioned of such proportions ought to be divided between such persons so certified, or other the then holders rateably and in proportion to the nominal amount of the securities held by them respectively. Directions for giving effect to this declaration were contained in the order, and the persons entitled were duly paid. But no declaration was made as to the sum to be certified as applicable to the securities the holders whereof were not certified, but directions were given to carry over the amount certified to be applicable to their securities on separate accounts entitled "balance of redemption fund, first series," and so on. The present appeal is brought from an order made on a summons of the liquidator, taken out as long ago as 1894, and asking, first, that the inquiry as to holders of bonds may be closed, and, secondly, that out of the funds set apart to meet the claims of

the bondholders who have not claimed a sum of money may be paid to the liquidator. To no such relief is the liquidator entitled. The Court has no power to deal with the rights of absent bondholders, nor has it any materials on which it could ascertain that there is now, or will be in the future, any sum payable to the liquidator. By the terms of the contract with the bondholders they are not entitled to payment until after 1950, and are in no way in default in not coming in, and cannot be compelled to come in earlier. The inquiry, therefore, must be kept open. It would be a distinct breach of contract if the liquidator were to interfere in any way with the funds before 1950, and this cannot be allowed. It may be inconvenient to wait for the time mentioned in the contract, but this cannot be avoided. The company chose to make a very extraordinary contract, and it is not strange that inconvenience should follow from it. It was argued that because counsel for the liquidator, when the summons taken out by him came before Mr. Justice Stirling in 1897, thought that he could show that the three-fifth bondholders who had proved had been paid the full present value of their bonds, and obtained time for evidence to be gone into on that point, with a direction from the Judge to the master to take the evidence, he is now estopped from denying that they can receive more out of the two-fifths, if it should turn out that they have received less than the full present value. We do not think that any such estoppel arises, but at most his demand that the evidence should be gone into might have some effect upon costs. Mr. Justice Stirling, in his judgment of 1899, quoted and approved what was said by Mr. Justice Chitty in 1889, to the effect that he could not understand how those who had come in (the three-fifths) would ever be able to get any part of the two-fifths of the redemption fund belonging to those who had not come in, and then said, "No claim is now put forward on the part of those who have come in." It seems plain, therefore, that, notwithstanding all that had taken place in and subsequently to 1897, as to ascertaining the actuarial value of the bonds, he did not consider the liquidator to have given up any of his rights. Mr. Justice Stirling also said, "It may be that at a distant period you (the liquidator) will be able to make a claim. I say nothing one way or another about that." The result is that Mr. Justice Stirling, while approving of the opinion of Mr. Justice Chitty, that the bondholders for three-fifths could not claim against the funds in Court, avoids saying a word in favour of the other opinion, that the liquidator could not claim. That opinion the learned Judge (Mr. Justice Chitty) must not be deemed to have imported into his order, since he expressly leaves the question open. We agree with the conclusions of law put forward by Mr. Justice Stirling. In the result, we think that we may now conveniently make the declaration asked for by the liquidator as to his rights, in the event of there being any ultimate balance subsequent to the year 1953 of the redemption funds, applicable to the bonds of any series. We think, therefore, that this declaration may be made. We think, however, that the order as to costs made by Mr. Justice Stirling should not be disturbed, and further, that the liquidator ought to pay the costs of the appeal.

[Solicitors—Dixon, Elkin, and Dixon; Aylward and Cobbett.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.J.J.) } May 30.

EVANS V. JUSTICES OF CONWAY.*

Licensing Acts—Licence—Refusal to renew—
Appeal to quarter sessions—No evidence

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

offered—Jurisdiction to refuse renewal—Alehouse Act, 1828 (9 Geo. IV., c. 61, s. 27)—Licensing Act, 1872, s. 42.

At the general annual licensing meeting the justices, upon an objection raised, refused to grant the renewal of a licence. Upon appeal to quarter sessions the appellant proved the service of the notice of appeal, but no evidence was given on the merits. The appellant thereupon contended that he was entitled to have the licence renewed. The quarter sessions refused the renewal and dismissed the appeal.

Held, that, as no evidence was given at quarter sessions in support of the objection to the renewal, the quarter sessions had no power to refuse to renew the licence.

Decision of the Divisional Court (*ante*, p. 190) reversed.

This was an appeal from the judgment of a Divisional Court, consisting of Mr. Justice Channell and Mr. Justice Bucknill, on a special case stated for the opinion of the High Court by the justices of Carnarvonshire, reported *ante*, p. 190. The appellant, William Evans, appealed to the Carnarvonshire quarter sessions against a decision of the licensing justices, sitting at the adjourned general annual licensing meeting held at Conway, in the county of Carnarvon, on September 25, 1899, refusing to renew the licence of the Royal Oak Inn, Conway. The appeal to quarter sessions came on for hearing on October 19, 1899. It was proved or admitted that the appellant was the holder of a licence for the sale of intoxicating liquors in respect of a house known as the Royal Oak Inn, Conway. The appellant appeared by counsel in support of the appeal and to apply for the renewal of the licence. No one appeared on behalf of the justices who sat at the adjourned general annual licensing meeting. A solicitor appeared for the Rev. T. Gwynedd-Roberts, who had objected to the renewal of the licence at the adjourned general annual licensing meeting. It was contended on behalf of the appellant that the solicitor for the Rev. T. Gwynedd-Roberts had no *locus standi* and that, as no one appeared on behalf of the justices, the appellant was entitled to have his appeal allowed and his licence renewed. The Court of quarter sessions overruled these contentions, and decided to hear the appeal; thereupon counsel for the appellant, having formally proved that due notice of the appeal had been served upon all the justices who sat at the adjourned general annual licensing meeting, and that the appellant, together with two sureties, had duly entered into the required recognizances, applied for the renewal of the licence; the Court thereupon, without hearing any evidence on behalf of the respondents or in opposition to the renewal of the said licence, dismissed the appeal and refused to renew the said licence. The question for the opinion of the High Court was whether the Court of quarter sessions were right. The Divisional Court were of opinion that the Court of quarter sessions had dealt with the matter rightly, and affirmed their decision. The appellant now appealed to the Court of Appeal.

Mr. J. A. FOOTE, Q.C., and Mr. TREVOR LLOYD appeared for the appellant, and contended that the quarter sessions had no power to refuse a renewal in the circumstances of the case. The licensing justices were the only persons who were entitled to appear as respondents on the appeal to the quarter sessions ("Boulter v. Kent Justices" [1897], A.C., 556; "Tynemouth Corporation v. Attorney-General"

[1899], A.C., 293). If they did not appear on the appeal the person who asked for a renewal of the licence was entitled to succeed. The Court of quarter sessions overruled the contention that the person who had objected to the granting of a renewal before the licensing justices had no *locus standi* on the appeal, and then decided against the applicant without hearing the objector. That was inconsistent. The objector ought at least to have been heard as a witness. The quarter sessions had no right, when the licensing justices did not appear, to refuse to grant a renewal without having evidence in support of the objection. The burden of proof was on the objector both before the licensing justices and before the quarter sessions ("Sharp v. Wakefield" [1891], A.C., 173; "Whiffen v. Malling Justices" [1892], 1 Q.B., 362). They referred to section 27 of the Alehouse Act, 1828 (9 Geo. IV., c. 61), and section 42 of the Licensing Act, 1872.

Mr. ASQUITH, Q.C., and Mr. ELLIS GRIFFITH, for the justices, argued that it was clear, from the cases of "Sharp v. Wakefield" and "Boulter v. Kent Justices," that the holder of a licence had no vested right to obtain a renewal. The licensing justices had as much discretion to refuse a renewal as to refuse an original application for a licence. The licensing meeting was not a Court; the proceeding before it was not a litigious proceeding at all. When the applicant came by way of appeal from the licensing justices to the quarter sessions, the quarter sessions had the same discretion as the licensing justices had as to whether they should grant a renewal. The quarter sessions were no more a Court, when dealing with applications for renewals, than the licensing meeting was ("Regina v. Staffordshire Justices" [1898], 2 Q.B., 231). The rules which governed proceedings before judicial tribunals did not apply. The doctrine of the burden of proof did not apply so as to bind the quarter sessions in any way, and there was no presumption in the applicant's favour.

The COURT, having taken time to consider, delivered judgment, allowing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment of the Court:—The Queen's Bench Division in this case has held, with very great doubt and inviting an appeal to this Court, that when a publican appeals to a Court of quarter sessions, which he is clearly entitled to do under section 27 of the Licensing Act of 1828, against the refusal of a licensing meeting to grant him a renewal of his licence, the Court of quarter sessions can refuse to grant him such renewal without any evidence whatever being given as to why such renewal should not be granted. It was argued by Mr. Asquith on behalf of the justices that the cases of "Sharp v. Wakefield" ([1891] A.C., 173), "Boulter v. Justices of Kent" ([1897] A.C., 556), and "Tynemouth Corporation v. Attorney-General" ([1899] A.C., 293) show that the Court of quarter sessions can do so. We will deal with these cases hereafter. It seems to us that, apart from these cases, a Court of quarter sessions cannot do so. The facts are these:—Evans, the publican, applied to the general annual licensing meeting for the renewal of the licence which he then held for the sale of intoxicating liquors in respect of a house known as the Royal Oak Inn, Conway, and the Rev. Mr. Roberts then appeared and objected to the renewal of the licence. It is not stated in the case submitted to the Court upon what grounds he objected, but the justices at the licensing meeting refused to grant the renewal; nor is it stated upon what ground the licensing justices refused. But it was said at the Bar that he objected upon the ground, first, that the house was not necessary for the requisites of the neighbourhood, and, secondly, upon the ground that the premises were incapable of effective police supervision; and it was also stated that it was thought that upon the latter ground it

was that the licensing justices refused the renewal. The publican then appealed to quarter sessions against this refusal. It was there proved on his behalf that due notice of appeal had been given and that he had entered into the required recognizances. The licensing justices did not appear at quarter sessions to oppose, nor was any evidence given in support of any objection to the renewal, and thereupon the Court of quarter sessions, without hearing any evidence, refused to renew the licence. Now, unless the provisions of section 42 of the Licensing Act, 1872 (35 and 36 Vict., c. 94), both as to the notice of objection which must be given and as to evidence which must be forthcoming, are complied with, it cannot, we think, be doubted that a renewal of a licence cannot be refused by licensing justices at a licensing meeting (see the observations upon this section by Mr. Justice Blackburn in "*Reg. v. Farquhar*," L.R. 9, Q.B., 258); and it has been held by Mr. Justice Hannen and Mr. Justice Quain that the requirements of this section apply equally to the Court of quarter sessions when a publican appeals thereto against the refusal of the licensing justices to renew his licence as to a licensing meeting ("*Ruddick v. Justices of Liverpool*," 42 J.P., 406). Apart, therefore, from the cases cited by Mr. Asquith, the Court of quarter sessions could not, in our judgment, without hearing some evidence, have done what they have done and refused offhand the renewal of the publican's licence. It was held in the case of "*Whiffen v. Malling*" ([1892] 1 Q.B., at page 368) that an appeal to the Court of quarter sessions against the refusal of licensing justices to renew a licence amounts to a rehearing, and not to a simple appeal; and, as was stated by Lord Bramwell in "*Sharp v. Wakefield*" ([1891] A.C., at page 184), "where an appeal is against a refusal of a first licence, the appellant (at quarter sessions) begins, the burden of proof is on him, he has to make out that he ought to have a licence. Where, on the other hand, the appeal is against a refusal to renew a licence, the respondents begin, the burden of proof is upon them, they have to make out that he ought not to have a licence, practically that his licence should be taken from him." And it is admitted that it is the practice of the Conway quarter sessions, in an appeal against the refusal of the licensing justices to renew a licence, for respondents to begin. If no one is at quarter sessions to give evidence upon an appeal against the refusal of the licensing justices to renew a licence, how is the burden of proof satisfied? It appears to us that it is not. My brother Channell says that a man who has a licence has a *prima facie* right to have it renewed. In this we agree. But he says that the Court of quarter sessions may take away this right if they know that the licensing justices have refused to renew the licence. In this we cannot agree, for, if so, what is the use of the appeal which is clearly given to the publican by section 27 of the Act of 1828? Apart from the cases relied on by Mr. Asquith, in our judgment some evidence must be forthcoming to justify the Court of quarter sessions in refusing the appellant a renewal of his licence. Now "*Sharp v. Wakefield*," the first case relied upon by Mr. Asquith, no doubt decided that justices had a discretion to refuse the renewal of a licence, though that discretion was to be exercised judicially (not according to private opinion); and Lord Herschell, at pages 185 and 186, points out that the procedure provided by section 42 of the Licensing Act, 1872, is still in force, and subject to its provisions being complied with the justices may exercise the discretion which the House of Lords held that they had. When the case of "*Boulter v. Justices of Kent*" is carefully read, it will be seen that it decided two things, and two things only—first, that a licensing meeting was not a Court of summary jurisdiction, so

that a Court of quarter sessions, upon appeal by a publican thereto against the refusal of a licensing meeting to grant him a renewal of his licence, could not mulct an objector in costs, because it was only in cases of appeals from a Court of "summary jurisdiction" that the Court of quarter sessions had this jurisdiction, and that a licensing meeting was not such a Court; and, secondly, that an objector to the renewal of a licence was not a party to the proceedings. It is a mistake to say that this decision in any way decided that a Court of quarter sessions was not a Court with all the incidents of a Court both as regards evidence and onus of proof. It did not touch this question at all; it left it just where it was before. What it did decide, as before stated, was that a licensing meeting was not a Court of summary jurisdiction, and therefore the Court of quarter sessions could not condemn an objector in costs, and that an objector was not a party to the proceedings. The third case cited by Mr. Asquith was that of "*Tynemouth Corporation v. Attorney-General*," which decided that a borough fund with no surplus could not be charged with the costs incurred by the chief constable opposing an appeal to quarter sessions by a publican against the refusal of licensing justices to renew his licence. The decision, in our judgment, has no application to the present case; but there are two passages, one in the judgment of Lord Morris and the other in Lord Davey's judgment, which are pointed to by Mr. Asquith. Lord Morris says "*Boulter's* case decided that the chief constable had no right to appear as a party," and Lord Davey says "that an objector does not become a party to the proceedings and has no right to appear and be heard on the appeal to quarter sessions. The only proper respondents are the licensing justices themselves, and if the objector be heard it is as *amicus curie*." How does this show that a Court of quarter sessions can refuse the renewal of a licence, or, as Lord Bramwell puts it, that the publican's licence could be taken from him, except upon evidence? In our judgment neither "*Sharp v. Wakefield*," nor *Boulter's* case, nor the *Tynemouth* case applies to the present case; and Lord Davey in the *Tynemouth* case certainly was not dealing with the question we have now to decide—viz., whether the Court of quarter sessions can refuse the renewal of a licence without hearing any evidence at all. In our opinion it cannot do so. It follows, therefore, that the question which is left to us must be answered thus—that the Court of quarter sessions was wrong and that the licence must be renewed. For the reasons above given this appeal must be allowed.

Chan. Div. }
(Cozens-Hardy, J.) }

1900.
May 30.

IN RE FENNINGS—BAILEY V. BEAVEN.*

Executor—Envelopes containing bank notes addressed to different persons.

This was a summons by executors for partial administration of and directions as to matters arising under the will of the late Mr. Alfred Fennings, of Salus Villa, West Cowes, manufacturer of proprietary medicines. The estate is a very large one; it comprises the goodwill of the businesses of making and selling a number of medicines professing to cure several human ailments, the most profitable of which seems to be one called "*Fennings' Stomach Strengtheners*." After giving annuities and legacies the testator gave the goodwill and benefit and also all his recipes, capital, and property employed in, belonging to, and accruing and

*Reported by D. FITZGERALD, Esq., Barrister-at Law.

resulting from his several proprietary medicines known as "Fennings' Children's Cooling Powders," "Fennings' Lung Healers," and three other specified medicinal powders to his executor and trustees, with the stock of those medicines in hand, and also the copyright and property belonging to his books "Fennings' Everybody's Doctor" and "Every Mother's Book" on trust to pay a number of annuities and to pay the balance to his two sisters, who are both dead, for life, and after the death of the survivor to pay the balance in perpetuity to the treasurer for the time being of the National Refuge for Homeless and Destitute Children, Shaftesbury-house, Shaftesbury-avenue, upon certain conditions, including a condition that the children provided for by his bounty should not be trained for a seafaring life, he gave his property connected with two other medicines to his executors, subject to a life interest given to George Augustus Beaven, and the interest to pay the income to the treasurer of the same society, and gave his property connected with "Fennings' Stomach Strengtheners" for the benefit of the same society, subject to certain life interests. He gave his residence to his two sisters; in consequence of their death it was undisposed of. The testator had directed envelopes to the number of some 126 to various persons, some of them open and some sealed; those that were open contained cheques in favour of the persons to whom the envelopes were addressed, those that were closed were supposed to contain cheques and bank-notes. The executors asked, for their own protection, directions as to these envelopes and their contents and other matters.

His LORDSHIP declared that the contents of the open envelopes were part of the testator's estate, there having been no complete gift thereof. He said the executors were the proper persons to open the closed envelopes. He gave liberty to the executors to carry on the various proprietary medicine businesses, and directed certain inquiries.

Mr. Eve, Q.C., and Mr. T. L. Wilkinson were for the executors, the plaintiffs; Mr. Vernon Smith, Q.C., and Mr. Sargent for the next of kin who were entitled to the residue; Mr. J. G. Wood for the treasurer of the National Refuge for Homeless and Destitute Children; Mr. Micklem, Q.C., Mr. Elgood, and Mr. C. P. Sanger for other parties.

Chan. Div. } 1900.
(Buckley, J.) } May 30.

SANDERS CLARK V. GROSVENOR MANSIONS COMPANY (LIMITED) AND GUGLIELMO D'ALLESANDRI.*

Nuisance—Heat and smell—Unreasonable user of premises.

The defendant was the occupier of premises underneath a residential flat, and he turned the premises into a restaurant and thereby caused a nuisance by heat and smell to the occupier of the flat above.

Held, that the alterations made by the defendant were not reasonable as regards his user of the premises, and he was liable for the nuisance.

The plaintiff, the wife of Mr. Herbert Sanders Clark, was the lessee of a flat, No. 10, Grosvenor-mansions, and the defendant, Mr. Guglielmo d'Allessandri, was the lessee of premises comprising the basement and *entresol* beneath the flat and occupied as a restaurant. The action was for an injunction to restrain the use of the restaurant in such a way as to cause a nuisance to the plaintiff. The three heads of complaint were heat affecting the plaintiff's

flat by means of the adjoining flue, smells from cooking, and noise. The heat had been remedied before the trial, and the only questions remaining for disposal were—whether there was a nuisance by noise or smell, or both; and as to the costs of the action. The action had been discontinued as against the Grosvenor Mansions Company (Limited).

Mr. Astbury, Q.C., and Mr. Bryan Farrer were for the plaintiff; and Mr. Ingpen, Q.C., and Mr. T. H. Attwater for the defendant d'Allessandri.

MR. JUSTICE BUCKLEY, in giving judgment, said that the plaintiff complained of nuisance caused by the defendant, d'Allessandri, in three ways—viz., by noise, heat, and smell. There had, no doubt, been a certain amount of noise, caused by plates and dishes, but it did not follow that that was a legal nuisance. It had been laid down by Lord Selborne in "*Gaunt v. Fynney*" ([1872] L.R., 8 Ch., 8, 12) that a nuisance by noise was emphatically a question of degree, and that to offend against the law the acts complained of must be done in a manner which beyond fair controversy ought to be regarded as excessive and unreasonable. In the present case the noise had not been excessive or unreasonable, although very likely it had been an annoyance. It must be borne in mind that the defendant himself would endeavour to prevent noise for fear of injuring his business. The plaintiff's case, therefore, failed on the first point. On the question of heat the evidence showed that the defendant's premises had been altered; that a large cooking-range had been put up instead of a small grate opening into a flue which was not large enough for the purpose. The result was an excessive and alarming amount of heat. After the action was brought the Grosvenor Mansions Company thought it necessary to take steps to remedy this by thickening the walls of the flue, and the nuisance had thus been removed. But the defendant had exposed his neighbour to an annoyance which she ought not to have been called upon to bear, and he was liable for that. In "*Ball v. Ray*" ([1873] L.R., 8 Ch., 467, 469) Lord Selborne said:—"In making out a case of nuisance of this character there are always two things to be considered—the right of the plaintiff, and the right of the defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, showing substantial injury, is entitled to protection." In "*Reinhardt v. Mentasti*" ([1889] 42 Ch.D., 685, 690) Mr. Justice Kekewich was reported to have said that, "notwithstanding some passages in some judgments to the contrary, the application of the principle governing the jurisdiction of the Court in cases of nuisance does not depend on the question whether the defendant is using his own reasonably or otherwise." His Lordship (Mr. Justice Buckley) only referred to that case for the purpose of saying that he preferred to guide himself by the judgment of Lord Selborne to the effect that the Court must have regard to whether the defendant was using his property reasonably or not. If he was using it reasonably, there was nothing which at law could be considered a nuisance; but if he was not using it reasonably, but was using it for purposes for which the building was not constructed, then

*Reported by F. EVANS, Esq., Barrister-at-Law.

the plaintiff was entitled to relief. In "Ball v. Ray" Lord Justice Mallish said:—"I entirely agree with what has been said by the Lord Chancellor—that when in a street like Green-street the ground floor of a neighbouring house is turned into a stable we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of a neighbour's children in their nursery, which are noises we must reasonably expect and must to a considerable extent put up with." In this case the alterations made by the defendant were not reasonable. He had used his premises for a purpose for which they were not intended, and he was, therefore, liable in respect of the second ground of complaint. On the question of smell his Lordship held that the defendant had unnecessarily, by altering his window, exposed the plaintiff to the smell from the restaurant. That was unreasonable, and was a substantial interference with the plaintiff's comfort. The defendant undertaking to carry out certain alterations which had been suggested by the plaintiff and embodied in a letter, there would be no order, except that the defendant must pay the plaintiff's costs of the action.

[Solicitors—Nicholson, Graham, and Graham; J. Rawes Brown.]

Chan. Div. } 1900.
(Farwell, J.) } May 30.

THE MANCHESTER SHIP CANAL COMPANY V. THE MANCHESTER RACECOURSE COMPANY (LIMITED) AND TRAFFORD PARK ESTATES (LIMITED).*

Vendor and Purchaser—Contract for sale—Option to purchase—Agreement scheduled to Act of Parliament.

An agreement giving the plaintiffs the first option of purchasing certain land was scheduled to an Act of Parliament. A clause in the agreement would otherwise have been void for remoteness.

Held, that the Act made the clause valid.

In this action the plaintiffs sought a declaration that the defendants were not entitled to enter into any contract for the sale and purchase of the Manchester Racecourse with any person or corporation other than the plaintiffs without first complying with a certain agreement made between the plaintiffs and the defendants, the Manchester Racecourse Company, and an injunction to restrain the defendants from carrying out any contract for the sale and purchase of the said racecourse in violation of the said agreement.

Mr. Fletcher Moulton, Q.C., Mr. Swinfen Eady, Q.C., and Mr. Leigh-Clare appeared for the plaintiffs; Mr. Warrington, Q.C., Mr. Hughes, Q.C., and Mr. A. L. Ellis for the Manchester Racecourse Company; and Mr. Upjohn, Q.C., and Mr. Stewart Smith for the Trafford Park Estates Company.

The plaintiff company was incorporated by the Manchester Ship Canal Act, 1885, for the purpose of making a canal between the Mersey at Eastham and Manchester, and for the construction of docks, railways, and subsidiary works. At the Manchester end the canal and the docks lie in part between the racecourse belonging to the defendants, the Manchester Racecourse Company, and the land of the other defendants, who purchased the Trafford Park Estate for development purposes in 1897. Before 1893 there had been various disputes and differences between the plaintiffs and the Racecourse Company, and in order to settle and determine such disputes an agreement, dated March 7, 1893, was entered into between the plaintiffs and the Racecourse

Company. By section 10 of the Manchester Ship Canal (Surplus Lands) Act, 1893, the said agreement, which was set forth in the schedule to the Act, was confirmed and declared to be valid and binding on the parties thereto. By Clause 3 of the said agreement it was provided:—

"If and whenever the lands and hereditaments belonging to the Racecourse Company and now used as a racecourse shall cease to be used as a racecourse, or should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes, then and in either of such cases the Racecourse Company shall give to the Canal Company the first refusal of the aforesaid lands and hereditaments *en bloc*." The plaintiffs alleged that on August 10, 1899, the Racecourse Company were expressly notified of the intention of the plaintiffs to apply to Parliament for power to acquire the racecourse for dock purposes, and that before that date the Racecourse Company had not negotiated with any other person or corporation with a view to the sale of their racecourse. Negotiations then followed between the plaintiffs and the Racecourse Company, which need not be set out in detail, and on October 20, 1899, the chairman wrote the following letter on behalf of the Racecourse Company to the plaintiffs:—"Referring to the overtures lately made by you through your agent, Mr. Wallis, for the purchase of our property at New Barns, Salford, at present used as the Manchester Racecourse, and to the interviews which have recently taken place between Mr. Wallis and myself as the chairman of the Racecourse Company, in which your desire to purchase the property subject to certain conditions has been expressed by Mr. Wallis, my company think it well to repeat in writing the terms already stated by me to Mr. Wallis on which we are willing to sell to you the property. The conditions which I understood Mr. Wallis to accept as the basis of negotiations are (1) that we should have reasonable time within which to prepare for the continuance of our racing business on the site belonging to us at Castle Irwell and (2) that the sale should be subject to the necessary licence being obtained for that purpose from the Jockey Club. Subject to the above two conditions we are prepared to sell to you the fee simple of our property at New Barns containing a little over 99 acres for the sum of £350,000. I shall be obliged by your informing me within one week from this date whether or not the offer is accepted and if not accepted by your stating what is the highest sum you are prepared to give for the property subject to the above-mentioned conditions." The plaintiffs alleged that when this offer was made the Racecourse Company were in negotiation for the sale of the property to the Trafford Park Company on other terms than those mentioned. On October 27, 1899, the plaintiffs replied to the following effect:—"You have been informed of the intention of this company to apply to Parliament forthwith for compulsory powers to acquire your company's property at New Barns, Salford, at present used as a racecourse; but in view of your suggesting that the negotiations for the purchase of the property should be continued we venture to hope that a satisfactory price will be arrived at in a friendly spirit and that there will be no need to have recourse to compulsory process in arranging terms between the parties." This letter was answered on October 30 by the chairman of the Racecourse Company in these terms:—"My letter was written not with a view that the negotiations should be continued, but that they should result in an agreement or come to an end as my company have other applications for the property. As, therefore, you have not accepted our offer or made any counter proposal, I now write to say that my company feel at liberty to deal with their property as they may think fit." On November 8, 1899, the plaintiffs issued

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

a formal notice of their intention to take the racecourse for dock purposes. The defendants admitted that on December 22, 1899, they had entered into an agreement by which the Racecourse Company was to sell the racecourse to the Trafford Park Company for £280,000 cash, but they pleaded that the said agreement was expressed to be subject to the rights of the plaintiff company under the agreement of March 7, 1893, and, further, that it was provided that the vendors should have the right to continue in occupation of the racecourse, free of rent, until December 31, 1909, and also that the Racecourse Company should have the option of acquiring a racecourse on the property of the Trafford Park Company, an option which the defendants alleged to be of great value. Both the defendants contended that Clause 3 of the agreement of March 7, 1893, was void for remoteness and for uncertainty, and that, if it was enforceable, neither of the events mentioned had happened, or, in the alternative, that the plaintiffs had been given the first refusal of the property and had not accepted the offer.

Mr. MOULTON, for the plaintiffs, contended that, though Clause 3 of the agreement might otherwise be void, the Act of Parliament had declared the agreement to be valid and binding. Under the agreement the plaintiffs had an interest in the land referred to—"Willmott v. Barber" (15 Ch.D., 96), and "London and South-Western Railway Company v. Gomm" (20 Ch.D., 562); they had a right to purchase the land at an ascertainable price—viz., the price offered by any other would-be purchaser. The defendants could not possibly contend that the plaintiffs had not fulfilled one of the conditions precedent by proposing to take the racecourse for dock purposes. Having fulfilled the condition, the plaintiffs had not been given the first refusal of the property, which meant the refusal of the property at the price offered by some one else.

Mr. WARMINGTON, for the Racecourse Company, argued that because an agreement was scheduled to an Act of Parliament and declared to be binding and valid it did not follow that the agreement thereby became a part of the Act—"Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company" (L.R. 2, H.L.Sc., 347), "Regina v. Midland Railway Company" (19 Q.B.D., 540), "Great Western Railway Company v. Halesowen Railway Company" (52 L.J., Q.B., 473). The agreement must still be construed as if it had not been so scheduled, and Clause 3 of the present agreement was clearly void both for remoteness and uncertainty. Moreover, the Racecourse Company had agreed to sell the racecourse to the other defendants subject to the rights of the plaintiffs.

Mr. UPJOHN, for the Trafford Park Company, said that the plaintiffs had not proved that one of the conditions precedent had been fulfilled. It was clear from the terms of the agreement that the only persons who could propose to use the racecourse for dock purposes were the owners, their successors or assigns. The plaintiffs had no *jus in rem*—"Haywood v. Brunswick Building Society" (8 Q.B.D., 403). They would not buy themselves and they asked for an injunction to restrain the Trafford Park Company from buying. There was absolutely no evidence of want of *bona fides* on the part of the defendants.

Mr. Howard Martin, a surveyor, was called by Mr. UPJOHN and gave evidence as to the value of the option to purchase a racecourse acquired by the Racecourse Company.

MR. JUSTICE FARWELL, in giving judgment, said that he had first to consider the effect of the private Act of Parliament to which the agreement of March 7, 1893, was scheduled. It had been argued that the Act merely gave the two companies a contracting capacity irrespective of the terms of the contract contained in the

schedule. He could not accept that view. It would be a *reductio ad absurdum*, if the contract itself was void. It was also contended that, though the agreement as a whole was valid, there might be a clause which was void. He could not accept that argument either. He took the Act to mean what it said, and it said that the agreement was valid and binding. The Legislature could do what it liked, it could make that legal which otherwise would be illegal, and he would follow what Sir George Jessel had said in "Sevenoaks, &c., Railway Company v. London, Chatham, and Dover Railway Company" (11 Ch.D., 625). On the face of it Clause 3 of the agreement was void for remoteness and also, he thought, for uncertainty, but the Legislature had said it was valid, and he was not going to say that the Legislature was *inops consilii*. Unless the words were absolutely senseless, the Court was bound to find some meaning in them. In the Caledonian Railway case and other cases that had been cited the problem before the Court was quite different—viz., whether the Court was bound by a statutory enactment that the agreement should be made effective by the parties to it. When the Legislature said "you shall do it," there was something over and above the agreement which was made valid by the Act. He had, therefore, now to construe the agreement. The wording of Clause 3 was doubtless inartistic, but on the strength of "London and South-Western Railway Company v. Gomm" he thought the clause gave the plaintiffs an interest in the land. In his opinion the price also was ascertainable—it was to be the same as that offered by any other person or company. There were two conditions precedent mentioned in the clause. The first had obviously not been fulfilled. The second was "If and whenever the land should be proposed to be used for dock purposes." It had been argued that this meant proposed by the Racecourse Company, its successors, or assigns. But the clause was in general terms, and the proposal, in his opinion, might be made by the plaintiffs, and he found as a fact that the plaintiffs had proposed and did propose so to use the land. Moreover, it was clear from the petition presented against the plaintiffs' Bill that the Trafford Park Company had also proposed to use the racecourse for dock purposes. One of the conditions precedent had, therefore, been performed. Then came the consideration of what was meant by "first refusal." Refusal implied an offer, and the offer contemplated by the agreement was an offer at a cash price which some one else was willing to give. He found that no such offer had ever been made to the plaintiffs. The offer made by the Trafford Park Company could not have been made by the Racecourse Company to the plaintiffs. There were conditions which would have made it impossible of acceptance, and he could not accept the view of the Trafford Park Company that their offer was really worth a great deal more than £280,000. Mr. Upjohn had argued that the Court had nothing to do with his clients, but, as the plaintiffs had an interest in the land, the Court had jurisdiction to interfere. He would grant injunctions (1) to restrain the Racecourse Company from selling the racecourse to any person or company without first offering it to the plaintiffs at the same cash price as the intending purchaser was willing to give, and (2) to restrain the defendants from carrying out their agreement until this had been done. There was no ground, however, for the charge of *mala fides* against the defendants, and therefore there must be a set-off in the matter of costs.

[Solicitors—Grundy, Kershaw, Samson, and Co., for the plaintiffs; L. W. Byrne, for Taylor, Kirkman, and Colley, Manchester, for the Racecourse Company; Ashwell, Browning, and Tutin, for Ashwell and Tutin, Notts, for the Trafford Park Company.]

Chan. Div. } 1900.
(Stirling, J.) } May 30.

ALEXANDER V. MANSIONS PROPRIETARY (LIMITED).*

Landlord and Tenant—Implied covenant—Residential flats—Common scheme.

Held, that the conversion of flats in a building into an hotel was a departure from the scheme in accordance with which the building was to be managed, namely, as residential flats suitable to the convenience of all persons who should be tenants of the flats.

This case was of some interest to tenants of flats in residential mansions, of which there are now so many in London. It raised the question whether a tenant of such a flat, under an agreement entered into at a time when the premises formed part of a block of mansions intended for private residential purposes, was entitled to any and what remedy in the event of the business carried on in the buildings being so altered as to convert what was originally a flat in a private residential mansion into a set of rooms in a public hotel. The plaintiffs, Colonel and Mrs. Alexander, in March, 1896, became tenants of a flat in St. Ermin's-mansions, Westminster, under an agreement for three years with an option at the expiration of that period of renewing the tenancy for a further term of three years. This option was duly exercised by the plaintiffs. The original agreement was entered into between the plaintiffs and the Ecclesiastical Commissioners, from whom the defendant company subsequently acquired the property. It was on a printed form and contained various stipulations binding the landlord to keep the building properly supplied with water, and to cleanse and light and keep in proper condition the entrance, staircases, and lifts, and provided that the passenger lifts were intended for the use of the tenants and their families, friends, and visitors, and not for servants or messengers, nor for any kind of luggage whatsoever, and that the landlord should keep on the premises hall porters to be in attendance at all reasonable hours. The plaintiff alleged that down to March, 1899, the whole block of buildings in which their flat was situated had been occupied as flats, but in that month most of the tenants gave up possession of their flats to the defendants, who had since, without the consent of the plaintiffs and contrary to the general scheme under which they contended the whole of the mansions were originally occupied, commenced to treat and deal with the building as an hotel. The plaintiffs further alleged that the terms of the agreement with regard to the use of the lifts and the attendance of the porters had been broken by the defendants, and also that certain structural alterations had been made in the buildings which deprived some of their windows of light and air which they had previously enjoyed. Upon these and other grounds they claimed (*inter alia*) an injunction to restrain the defendants from using the premises as an hotel, or otherwise than as residential flats, and from interfering in any way with the light and air and the privacy and enjoyment of the plaintiffs of their said flat. There were various minor subjects of complaint on the part of the plaintiffs, relating to alleged obstruction by the defendants of the plaintiffs' right of ingress and egress, and other matters. The defendants' case, as disclosed by their pleadings, was that there was never any general scheme under which the whole of St. Ermin's-mansions were occupied as residential flats. They alleged that, since September, 1896, the defendants had, so far as they could consistently with the rights of tenants of flats, including the plaintiffs, conducted the management of St. Ermin's-mansions as a residential

hotel without any objection by any of the residents or tenants of flats other than the plaintiffs. They further alleged that before September, 1896, their predecessors in title had provided common rooms for the residents and had acted as general caterers for them, and the business now carried on by the defendants was merely a continuation of the same thing on an improved and more extensive scale and for the greater accommodation of residents and their visitors. At the hearing it was suggested by the defendants that the plaintiff had acquiesced in the alteration in the management of the mansions, and in support of this suggestion it was endeavoured to show in cross-examination of the plaintiff that he himself had been a member of a club which was formed by the management for the convenience of residents. The plaintiff, however, gave evidence to the effect that, although he had at one time been on the committee of the club, he and a number of other gentlemen had resigned when it was discovered that from the mode in which the club was carried on it was in fact a bogus club. The managing director of the defendant company in cross-examination admitted that in the management of the club members were frequently elected for one night on payment of 10s., which was returned to them the next day. He further stated that he had had interviews upon the question of the club management with certain police officials and officers of Excise, and that it was upon their advice that the system of management was adopted. It appeared that the premises were now licensed as an hotel, and that the club had practically ceased to exist. The case occupied the time of the Court for a considerable number of days, and his Lordship now delivered his reserved judgment.

Mr. Abel Thomas, Q.C., Mr. C. E. Jenkins, Q.C., and Mr. E. S. Ford appeared for the plaintiffs; Mr. Upjohn, Q.C., Mr. Ingpen, Q.C., Mr. Kirby, and Mr. Stokes for the defendant company.

MR. JUSTICE STIRLING said that the plaintiffs complained of four different matters, two of which might be described as breaches of express terms in the agreement of tenancy, while the other two were in the nature of infringements of implied terms, or acts in derogation of rights granted by the agreement. St. Ermin's-mansions consisted of six blocks of buildings, numbered 1 to 6. The blocks numbered 1 to 4 opened on the same courtyard. They had separate entrances, but were now more or less connected internally, so that access might be gained from one block to another. The plaintiffs first went to reside there in 1892, when they became tenants of a flat, No. 66. In 1895 they became tenants of their present flat, No. 67. At that time the Ecclesiastical Commissioners were the landlords. His Lordship then referred to the terms of the agreement, remarking that it was in accordance with a printed form, and continuing, said that in December, 1896, St. Ermin's-mansions passed into the ownership of the defendant company. At that time the majority of the flats in the blocks numbered 1 to 4 were let to tenants under similar agreements. All the flats in No. 4 were so let, with the exception of one flat on the ground floor, the rooms in which were used as dining-rooms and other public rooms for the general benefit of residents. Soon afterwards the directors of the defendant company, of whom the most active was Mr. Harry Richardson, the managing director, began, as the tenancies of flats fell in, to cease re-letting the same as such, and to furnish the rooms and let them to persons occupying them for longer or shorter periods, and in this way gradually to convert the mansions into an hotel. In March, 1897, an application was made by the defendant company for a licence for the sale of intoxicating liquors, but was refused. On April 1,

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

1897, a company called the St. Ermin's Club (Limited) was formed under the Companies Acts with a capital of £1,000, divided into 2,000 shares of 10s. each, 1,500 of them being preference shares entitled to a dividend of 5 per cent., and 500 being ordinary shares. The main object of the company was to establish and maintain a club for the accommodation of members of the company and their friends. The directors of the club company were Messrs. Richardson and Blanckensee, who were also directors of the defendant company, to which all the ordinary shares in the club company belonged. The plaintiff, Colonel Alexander, became a member and chairman of the club committee; but in October, 1897, he and the members of the committee, except Richardson and Blanckensee, resigned their offices. The plaintiff, Colonel Alexander, gave his reasons for this step in cross-examination. He said that the committee had no power to elect members and it looked like a bogus club, members being elected one night, paying 10s., and having that sum returned to them next morning. "That," he said, "was a subject of discussion at the committee. I was informed the thing was done; it was open to the objection that a hotel business was being carried on under the guise of a club." It was admitted by Richardson that notwithstanding the resignation of the committee, the club was continued under the management of himself and Blanckensee; and that it was their practice to issue a share in the club company on one day to any person temporarily residing in the mansions, receiving from him 10s. as the price of the share, and to repay that sum next morning if he left and applied and signed a transfer of his share to the secretary of the company. "We wanted the club," he said, "for the purpose of not infringing the Excise laws, for supplying visitors and guests with wine, tobacco, and billiards." It was stated by Richardson that he was advised by counsel, and by the police and Excise authorities, that the course thus pursued was legal. Whether such advice was given on a full disclosure of the facts as they now appeared in evidence his Lordship was not satisfied. In March, 1899, the defendant company obtained a licence for the sale of intoxicating liquors, and having by that time converted the great majority of the flats into separate furnished rooms under their own management, the directors carried on a regular hotel business, and the name St. Ermin's Hotel was put up on the building, and it was advertised as such. On December 24, 1898, the plaintiffs gave notice to the defendant company that they exercised the right of renewal under their agreement, and they thus became tenants of the defendant company for the term of three years from Lady-day, 1899. Early in 1899 complaints were made by the plaintiffs as to the improper use of the passenger lift which by the agreement was intended for the use of the tenants and their families, friends, and visitors, and not for servants or messengers, and not for any kind of luggage whatever. The plaintiffs alleged that it was used for servants and for luggage. His Lordship then considered the evidence upon that point, and also upon the point whether the plaintiffs had been hindered in the exercise of their rights of ingress and egress to and from the mansions, and came to the conclusion that sufficient attendance at the hall door had not been provided as regarded Block 4 on certain specified occasions, but that the right of ingress and egress had not been interfered with except to that extent. Under those circumstances the remedy of the plaintiffs was not by way of injunction, as was established by "Ryan v. Mutual Tontine Westminster Association" ([1893] 1 Ch., 116). The plaintiffs were however entitled to damages in respect of this matter which his Lordship assessed at £1. With regard to the use of the lifts, there was no doubt that the passenger lift had been used in contravention

of the agreement, and in accordance with the principle laid down in "Lumley v. Wagner" (1 D.M. and G., 604), and more recently explained in "Whitwood Chemical Company v. Hardman" ([1891] 2 Ch., 416), the plaintiffs had a remedy by way of injunction. His Lordship next came to a more difficult subject—viz., that arising out of the use of the property as an hotel. At the time when the property passed into the hands of the defendant company, it was let out under tenancy agreements, all substantially in the same form. From these his Lordship drew the same conclusion as was drawn by Mr. Justice North in "Hudson v. Cripps" ([1896] 1 Ch., 265)—viz., that there was a scheme for the general management of the building, composed of several flats, in such a way as to be suitable to the convenience of all the persons who should be tenants of the respective flats. Then the question arose whether the scheme had been departed from. It was said that the scheme in this case differed from that in "Hudson v. Cripps." There were in this case provisions for attendance, meals, and public rooms, which went quite beyond anything in "Hudson v. Cripps." It was urged that no definite line could be drawn between the occupation of a building in flats and its use as a boarding house or an hotel; and no doubt it was difficult to say when the building ceased to be used as residential flats and when it began to be used as an hotel, but it did not follow that it was impossible to say that the original scheme had been departed from. It was observed in a recent case—"A.G. v. Brighton and Hove Corporation" ([1900] 1 Ch., 276)—by Lord Lindley, then Master of the Rolls, "Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? And yet who has any difficulty in saying that an oak tree is a plant and not an animal?" So here, his Lordship had no difficulty in saying that the use of this building as an hotel was a distinct departure from the scheme in accordance with which the building ought to have been managed. Having regard, however, to a certain amount of delay on the part of the plaintiffs and to all the facts of the case, his Lordship thought he might, in accordance with the law as stated in "Sayers v. Collyer" (28 Ch.D., 103), exercise his discretion by saying that justice would best be done by directing an inquiry as to damages. His Lordship lastly considered the question of destruction of the access of light and air to the plaintiffs' rooms, as to which there was considerable conflict of evidence, and came to the conclusion that some damage had been done to the plaintiffs by the acts of the defendant company. Having regard to all the facts of the case, however, he thought he ought not to grant an injunction, but he gave the plaintiffs damages to the extent of £10, and directed the defendant company to pay the costs of the action except those of the inquiry as to damages, which would be reserved.

[Solicitors—Phelps, Sidgwick, and Biddle; J. S. Blanckensee.]

Q.B. Div. (Darling } 1900.
and Bucknill, JJ.) } May 30.

SHERARD V. GASCOIGNE.*

Landlord and Tenant—Game—Agreement to leave ground game unshot—Validity—Ground Game Act, 1880, s. 3.

The plaintiff became tenant to the defendant of a farm, and during the negotiations for the letting the defendant's agent promised that, in the

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law

event of the plaintiff leaving the ground game on the farm unshot and undisturbed, the defendant would compensate the plaintiff for all damage done to the crops by the ground game. The plaintiff accordingly left the game unshot and undisturbed, and the crops were thereby damaged.

Held, that the agreement was void under s. 3 of the Ground Game Act, 1880.

This was an action brought by a tenant against the landlord to recover compensation under an agreement whereby, as it was alleged, the landlord agreed to compensate the tenant for damage done to his crops by ground game. The action was referred to this Court to decide a point of law raised upon the pleadings. The statement of claim alleged that in January, 1895, the plaintiff (Mr. Paul Sherrard) became and had since continued to be the tenant to the defendant (Major Frederick Gascoigne), of Huddlestons Farm and Newthorpe Farm in the West Riding of Yorkshire; that during the negotiations for the tenancy the defendant's agent represented to the plaintiff that the defendant was devoted to shooting and, with a view to induce the plaintiff to leave the ground game on the said farms unshot and undisturbed for the defendant's benefit, the defendant's agent, on his behalf, promised that, in the event of the plaintiff's so doing, the defendant would compensate the plaintiff for all damage done to the plaintiff's crops by such ground game; that the plaintiff was induced by such promise to accept the tenancy and during the year 1898, in reliance upon and induced by such promise, allowed the ground game on the farms to go unshot and undisturbed for the benefit of the defendant, who ultimately shot over the farms; and that the growing crops of the plaintiff were damaged by such ground game. The plaintiff claimed £178 15s.

Mr. SCOTT FOX, Q.C. (with whom was Mr. H. T. Kemp), on behalf of the defendant, admitting the alleged agreement and the alleged damage for the purposes of argument only, contended that the agreement was void by virtue of the Ground Game Act, 1880, section 1 of which declares that "every occupier of land shall have as incident to and inseparable from his occupation of the land the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the game land," and section 3 of which provides that "every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act, or which gives such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void." The learned counsel cited "*Anderson v. Vicary*" ([1899] 2 Q.B., 436).

MR. JUSTICE DARLING.—It appears that the friends of the tenant in 1880 took too great care of him.

Mr. C. WALSH (with whom was Mr. Macaskie) for the plaintiff, contended that though the plaintiff's agreement to forbear from shooting or disturbing the ground game was bad, yet the defendant's promise to compensate the plaintiff for damage done by ground game was good, because it was not made in consideration of the plaintiff's forbearance to shoot or disturb the ground game, but in consideration of the reservation to the defendant in the lease of the concurrent right to shoot the ground game.

MR. JUSTICE DARLING said that the agreement alleged in the statement of claim was an agreement which purported to alienate the right of the occupier to kill and take the ground game, and it also purported to give him an advantage in consideration of his for-

bearing to exercise such right. He was of opinion, therefore, that the whole agreement was absolutely void, and, the plaintiff having shown no claim against the defendant, the action would be dismissed.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—Vincent and Vincent, for North and Sons, Leeds, for the plaintiff; Wilkinson and Son, for Perkin and Perkin, York, for the defendant.]

Court of Appeal (Vaughan Williams and } 1900.
Romer, L.JJ.) } May 31.

LONDON AND NORTHERN BANK (LIMITED) v. GEORGE NEWNES (LIMITED).*

Practice—Particulars—Libel imputing insolvency to bank—Run on bank—Liquidation.

The plaintiffs were ordered to give particulars of the branches on which the run was made, and the period of the continuance of the run, but not particulars as to whether the run was made by depositors or ordinary customers, nor as to the quantum of damages claimed and how it was made up.

This was an appeal by the defendants from an order made by Mr. Justice Day at Chambers. The action was for libel. The statement of claim alleged that the plaintiff bank was, at the time of the matters complained of, carrying on business in the City of London, and having branches at Forest-hill, Greenwich, Birmingham, Harrogate, Huddersfield, Leeds, Peterborough, Scarborough, Sunderland, and York; that the defendants were the proprietors and publishers of a paper called the *Money Maker*; and that they printed and published of the plaintiffs in the issue of that paper for December 9, 1899, the following:—"List of contributories.—Dr. D. T. Jones, of Sheffield, has had a narrow escape from being saddled with a liability of £10,000 in the London and Northern Bank, now in liquidation." The statement of claim went on to allege that in consequence of the above publication there was a run upon the plaintiff bank, and it had been forced to go into voluntary liquidation. The plaintiffs claimed damages. The defendants took out a summons for particulars. Mr. Justice Day refused the application. The defendants appealed.

MR. MONTAGUE LUSH, for the defendants, said that the defendants published in a paper owned by them a paragraph which had been sent to them, and the words "now in liquidation" unfortunately appeared in the paragraph. The bank was not then in liquidation. When the defendants found out the mistake they published an apology, and did what they could to stop the publication. The defendants had no defence to the action. The only question was the amount of the damages. The defendants would have to pay money into Court, and they were entitled to have some particulars to enable them to judge how much they should pay in. The plaintiffs claimed damages generally without stating any amount. The defendants were entitled to know the quantum of damages claimed, and how it was made up. They were also entitled to know upon what branch of the bank the run was made, whether the withdrawals were made by the depositors or by the ordinary customers, and the period during which the run lasted.

MR. J. E. BANKES, for the plaintiffs, said that they were willing to give particulars as to the branches upon which the run was made and the period during which the run continued, but they objected to give the other particulars asked for.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

LORD JUSTICE VAUGHAN WILLIAMS said that the defendants could have particulars of the branches upon which the run was made, and the period during which the run continued, but they were not entitled to particulars of the *quantum* of damages claimed.

Mr. MONTAGUE LUSH.—Will your Lordships direct the plaintiffs to specify in the statement of claim the amount they claim as damages?

LORD JUSTICE VAUGHAN WILLIAMS.—No, you are not entitled to that.

The COURT accordingly made the following order :—Appeal allowed by directing the plaintiffs to give particulars of the name or names of the branch or branches on which the run is alleged to have taken place and the period of the continuance of the run. Costs here and below to be costs in the cause.

[Solicitors—Simpson, Hope, and Co., for Simpson and Simpson, Leeds, for the plaintiffs; G. H. Hoyle, for the defendants.]

Chan. Div. } 1900.
(Byrne, J.) } May 31.

WILLIAMS V. INGRAM.*

Practice—Discovery—Production of documents—Action against directors of company—Books of company.

In an action against two directors of a company, there being other directors, the Court refused to order the defendants to produce the books of the company in the absence of a consent by the company to their production.

This was a summons by the plaintiffs for discovery. The plaintiffs were the five daughters of the late Mr. Herbert Ingram, the founder of the *Illustrated London News*, and the defendants were Sir William J. Ingram and Mr. Charles L. N. Ingram, being the two surviving sons of Mr. Herbert Ingram, and there were also joined as defendants certain trustees. On Mr. Herbert Ingram's death his widow became solely entitled to the *Illustrated London News*, and it appeared that, by an agreement made in 1882, Mrs. Herbert Ingram (afterwards Lady Watkin) assigned the newspaper business to the two defendants upon certain terms, by which she was entitled to one undivided moiety and the defendants to the other. In July, 1887, Lady Watkin, who had then parted with one-fourth of her moiety, transferred the remaining three-fourths upon trusts as to two-fourths for herself and as to the remaining one-fourth (or one-eighth of the whole business) upon trusts, under which in the event which had happened the plaintiffs had become absolutely entitled. In February, 1892, a private company was formed, under the name of the *Illustrated London News* (Limited), with a capital of £300,000, divided into 15,000 preference shares and 15,000 ordinary shares of £10 each, Lady Watkin and the plaintiffs being entitled to 5,625 of each class of shares. The first directors were Sir Edward Watkin, Mr. E. Watkin, and the defendants Ingram. The defendants Ingram were appointed managers of the company. The plaintiffs stated that negotiations subsequently took place between Lady Watkin and the plaintiffs and the defendants Ingram for the purchase of Lady Watkin's and the plaintiffs' shares and interest in the business, and in June, 1895, it was agreed that the defendants Ingram should purchase such shares and interest in consideration of an annuity of £4,500, the annuity to be secured by a charge on the said shares. The plaintiffs stated that this purchase was on a basis that the then existing

annual profits of the business were only £20,000, and their case was that a mistake had occurred, or there had been some mismanagement, inasmuch as the defendants Ingram had in 1899 sold the company to a new company—namely, the *Illustrated London News and Sketch* (Limited)—for a total sum of £1,042,500, and by the prospectus of the new company it appeared that the profits had jumped up to quite £60,000 a year. The plaintiffs claimed a declaration that the agreement for sale of June, 1895, was not binding and should be set aside and an inquiry and an account. The defendants Ingram denied the statements and allegations of the plaintiffs and generally traversed their case. The present application by the plaintiffs was for an order for the production and inspection of the books, &c., of the *Illustrated London News* (Limited) and the *Illustrated London News and Sketch* (Limited). The defendants, by their affidavit, stated that they had the books in their possession and power, but objected to produce them because they were the property of the companies of which they were directors, but not the only directors, and that they had no property in or power to produce the same, and that the books were in their possession or power only in the sense that they had access thereto as directors of the companies and for the purposes of the business of the companies; and also because the ownership of the books relating to the *Illustrated London News* (Limited) had changed to that of the *Illustrated London News and Sketch* (Limited). The companies were not parties to the action, but appeared on the present application.

Mr. Levett, Q.C., and Mr. Mark Romer appeared for the plaintiffs in support of the application; Mr. Danckwerts, Q.C., and Mr. Martelli appeared for the defendants Ingram; and Mr. Ward Coldridge for the companies.

MR. JUSTICE BYRNE, after hearing counsel for the applicants, asked counsel for the companies whether they objected to the production asked for, and, having received an answer in the affirmative, delivered judgment without calling on the defendants. His Lordship said that in the case of "*Walburn v. Ingilby*" (1 M. and K., 61 and 79), which was relied on by the applicants, and which was a case where the respondent to an application for discovery had only a joint right and common interest with others in the documents sought to be inspected, Lord Chancellor Brougham came to the conclusion that the defence had the appearance of a contrivance to evade or defeat the jurisdiction of the Court, and therefore declined to set aside an order which had been made for production without the consent of the parties not before the Court. In the present case he (Mr. Justice Byrne) could not say that he was satisfied that there was any contrivance to defeat the course of the Court such as would justify him in making an order of the kind here asked for. He therefore refused the application, with costs.

Leave to appeal was given.

Q.B. Div. (Darling and } 1900.
Bucknill, JJ.) } May 31.

MASON V. COWDARY.*

Adulteration—Analysis—Dividing article into three parts—Sale of six bottles—Division of bottles into three parts—Sale of Food and Drugs Act, 1875, s. 14.

Where six small bottles of camphorated oil were purchased for analysis, and the purchaser did not open the bottles, but divided the six bottles into

* Reported by R. B. SCHOMBURG, Esq., Barrister-at-Law.

* Reported by O. G. WILBRAHAM, Esq., Barrister-at-Law.

three parts, each part containing two bottles: held, not a compliance with s. 14 of the Food and Drugs Act, 1875.

This was an appeal by case stated from the decision of justices of Bedfordshire dismissing an information under section 6 of the Sale of Food and Drugs Act, 1875, preferred by the appellant, an inspector under the Act, against Ellen Cowdary, the respondent, charging her with selling, to the prejudice of the appellant, a drug, to wit, camphorated oil, which was not of the nature, substance, and quality of the drug demanded. The question in the case arose under section 14 of the Act, which provides as follows:—"The person purchasing the article with the intention of submitting the same to analysis, shall, after the purchase shall have been completed, . . . offer to divide the article into three parts to be then and there separated and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent." It was proved before the justices that on November 16, 1899, the appellant purchased from the respondent, who keeps a small general shop, six 2d. bottles of camphorated oil. The oil was exposed for sale in bottles which were not, apparently, prepared by the respondent, but each of them bore a label with the name of a chemist in the neighbouring town of Luton upon it. There was no evidence whether the bottles were identical in character or appearance or whether or not the labels on all the bottles bore the name of the same chemist. The six bottles were all purchased at the same time. The appellant, having notified that he intended to have the oil analyzed, divided the six bottles into three lots of two bottles each, sealing each separate lot of two bottles in a separate bag. He handed one of the sealed bags to the respondent, taking away the other two sealed bags, one of which he subsequently forwarded to the public analyst, who found that the two bottles contained only 17.5 per cent. of camphor, whereas camphorated oil should contain at least 20 per cent. of camphor. The appellant did not open any or either of the bottles of camphorated oil or mix or divide the contents, and the two bottles handed to the respondent were in exactly the same state as when purchased. The justices were of opinion that the division of the bottles as described was not in compliance with section 14, and they were not satisfied that the contents of the two bottles analysed were identical with the other two lots of bottles in the hands of the appellant and respondent respectively.

Mr. BONSEY, for the appellant, contended that the article purchased by the appellant was the six bottles of camphorated oil, and that the method of division which he had adopted was, therefore, in compliance with section 14. It was the only practical method of division. The bottles contained so small a quantity of oil that the division of one bottle would not have produced a quantity of oil sufficient for the purposes of analysis. Nor would the mixture of several bottles of a drug of this kind into one for the purpose of division be practical, because some of the drugs which would have to be so treated were volatile, and liable to change their character on exposure to the air, and the operation of making a division in this manner would consequently require great care. In the case of *seidlitz* powders, which were sold in parcels containing several packets, the method of division adopted had been to divide the parcels into three portions of so many packets each. That was the fairest method of division in that case, and it was also

the fairest method in the case of the bottles in question. It was important to obtain a decision as to the proper course to adopt in these cases.

The COURT, without calling upon Mr. Muir, who appeared for the respondent, to argue, dismissed the appeal.

MR. JUSTICE DARLING said that what the appellant did was to buy six articles and then to divide those six articles into three. In his opinion each of the bottles purchased was an article within the meaning of section 14, for it did not matter for the purposes of the Act how small the article was. As the appellant did not divide any one of the bottles into three parts, he did not comply with the provisions of the statute.

MR. JUSTICE BUCKNILL concurred.

[Solicitors—Venn and Co., for W. W. Marks, Bedford, for the appellant; Wetherfield, Son, and Baines, for the respondent.]

Q.B. Div. (Darling and } 1900.
Bucknill, JJ.) } May 31.

REGINA V. HORROCKS AND ANOTHER (EX PARTE BOUSTEAD).*

Local Government—Nuisance—Order of justices to abate—Omission to specify requisite works—Public Health Act, 1875, ss. 96, 105.

An order of justices requiring a person to abate a nuisance must specify the works to be done for that purpose, whether the proceedings are taken by a private individual or by the inspector of nuisances. Part of the order of justices, prohibiting a recurrence of the nuisance, held good.

"Reg. v. Wheatley" (16 Q.B.D., 34) followed.

In this case cause was shown against a rule for a writ of *certiorari* to bring up and quash an order of two justices of Cumberland. On March 20 last a complaint was made to the justices under section 105 of the Public Health Act, 1875, by Mr. Alfred Hope, that on the premises of Mr. Samuel Boustead, at Shield-house, there existed a nuisance caused by his act or default, and consisting of an accumulation of slaughter-house offal and filth, so as to be a nuisance on the fields at and adjoining Petheril-bank, the residence of Mr. Hope, whereupon the justices made the order now sought to be quashed, the effective portion of which was as follows:—"We, in pursuance of the said Act, do order the said Samuel Boustead within one calendar month from the service of this order, or a true copy thereof according to the said Act, to take such steps as may be necessary to abate the said nuisance so that the same shall no longer be a nuisance or injurious to health as aforesaid, and to pay the sum of 35s. for costs to Mr. David Mans, the solicitor acting for the complainant. And we, being satisfied, notwithstanding the said cause or causes of nuisance may be removed under this order, the same is or are likely to recur, do therefore prohibit the said Samuel Boustead from doing any such acts as may lead to a recurrence of the said nuisance." The rule was obtained upon the ground that the order was bad in not specifying the works or things required to be done in order to abate the nuisance as required by section 96 of the Public Health Act, 1875, as interpreted in "Reg. v. Wheatley" (16 Q.B.D., 34). Section 96 of the Public Health Act, 1875, provides that, upon default being made by a person upon whom a notice to abate a nuisance has been served and upon complaint made by the local authority to the justices, such justices "shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance and directing the execution of any works necessary to prevent the recurrence; or an order both requiring abatement and prohibiting the recurrence of the nuisance." Section 105 provides that complaints may be made by any person aggrieved by a nuisance, and "thereupon the like proceedings shall be had with the like incidents and consequences as to making orders" and otherwise as in the case of complaint made by the local authority.

Mr. L. SANDERSON, in showing cause, contended that where the proceedings were taken by a private individual "*Reg. v. Wheatley*" did not apply, and that there was no necessity for the order to specify the works or things required to be done to abate the nuisance. In the present case no work within the meaning of the Act were required (see "*Millard v. Westall*" [1898] 1 Q.B., 342). It would have been quite sufficient if the justices had simply ordered Mr. Boustead to abate the nuisance. Even if the first part of the order was bad, the second part, prohibiting the recurrence of the nuisance, was good (see "*Mayor, &c., of Scarborough v. Rural Sanitary Authority of Scarborough*," 1 Ex. D., 344).

Mr. MACASKIE, in support of the rule, relied on "*Reg. v. Wheatley*," arguing that the person against whom such an order as this was made was entitled to know what were the steps the justices thought necessary to be taken by him to abate the nuisance. In the present case it might have been sufficient to cover the offal with earth, or it might have been necessary to remove it altogether.

The COURT quashed the order as to the abatement of the nuisance and confirmed it as to the prohibition of the recurrence of the nuisance.

MR. JUSTICE DARLING said that he did not agree with Mr. Sanderson's contention that different principles applied when the complainant was a private individual to those which applied when the local authority were the complainants. In his opinion the orders were to be made with the same particularity in each case. The order in this case did not follow the statute. It only said that Mr. Boustead must take steps to abate the nuisance, and did not specify the things or works which he was to do in order to abate it. That put him in a difficulty. He would not know what the justices intended him to do, and, having done what he himself thought to be sufficient to abate the nuisance, he would nevertheless be again liable to be proceeded against. The part of the order, therefore, which dealt with the abatement of the nuisance was bad. But the part dealing with the prohibition of a recurrence of the nuisance was good, for in preventing the recurrence of the nuisance there was no need to do any works at all. The prohibition in this case simply amounted to saying "Don't again accumulate offal or filth on this land."

MR. JUSTICE BUCKNILL concurred.

(Solicitors—Ullithorne and Co., for C. B. Hodgson, Carlisle, showing cause; Nicholson, Graham, and Co., in support of rule.)

Q.B. Div. } 1900.
(Mathew, J.) } May 31.

LEVITT AND THORNTON V. HAMBLET.*

Stock Exchange—Failure of broker—Liability of broker's client to jobber—Privity of contract.

Held, on the evidence, that the defendant was liable to the plaintiffs to take up shares bought

for him from the plaintiffs, jobbers on the London Stock Exchange, by a broker, who subsequently failed.

This action was brought by the plaintiffs, who are a firm of jobbers on the Stock Exchange, against the defendant, who is an outside broker, to recover £154 18s. 11d. damages for not taking delivery of 300 Southern Preference railway shares. The shares had been bought from the plaintiffs by E. Preston and Co., a firm of brokers on the Stock Exchange acting on behalf of the defendant, at 57. On December 15 E. Preston and Co. were declared defaulters, and thereupon the official assignee of the Stock Exchange, in accordance with Rule 177, declared the "hammering price" for Southern Preference shares to be 57. The plaintiffs at once ascertained that the defendant was the client on whose behalf E. Preston and Co. had bought these 300 shares. A member of the plaintiff firm had an interview with Mr. Detmold, the defendant's manager, on December 16, and asked him whether the defendant would close the shares or have them taken up by another broker. Mr. Detmold replied that the bargain was closed at the hammering price. At a subsequent interview on the same day the plaintiffs requested Mr. Detmold to give them a written memorandum that the stock was closed at the hammering price. He refused this, but repeated that the bargain was closed at the hammering price. On December 20 the plaintiffs' solicitors wrote to the defendant that they looked to him to pay for the shares on December 29, the settling day, and requested him to put them in communication with another broker if he desired to have the settlement effected by him. The defendant's solicitor replied that the proper course was for the official assignee of the Stock Exchange to render to the defendant an account of differences due on either side, according to the hammering price under rule 177 of the Stock Exchange Regulations; and added that in any case there was no privity of contract between the defendant and the plaintiffs. On December 29 the plaintiffs tendered the shares to the defendant, and they were refused. The plaintiffs then sold the shares in the market at 54½, and the present claim was for the loss incurred upon such sale. Between December 15 and December 29 there was considerable fluctuation in the market for these shares, which fell as low as 50. The chief question between the parties was whether by the usage of the Stock Exchange, upon the default of E. Preston and Co., the defendants had an option to close the bargain with the plaintiffs at the hammering price. The defendants further contended (1) that the plaintiffs offered the defendant an option of closing at the hammering price, which was accepted by Mr. Detmold, so that the case was covered by "*Hartass v. Ribbons*" (22 Q.B.D., 254); (2) that there was no privity of contract between the plaintiffs and the defendant. E. Preston and Co. had altogether 640 of these shares open with various jobbers for the defendant, and 250 for another client. All these had been carried over for several accounts. It appeared from the plaintiffs' books that at one account 250 shares open with a particular jobber were allocated to the defendant as part of his 640, whereas at the next account those 250 shares were allocated to the other client, and another block of 250 open with a different jobber were appropriated to the defendant's contract. It was contended that there was no evidence to show that the 300 open with the plaintiffs were ever allocated to the defendant as part of his 640, and therefore there was no privity of contract between plaintiffs and defendant; "*Beckhusen and Gibbs v. Hamblet*" (5 Com. Cas., 217); (3) in view of an appeal, that upon E. Preston and Co. being declared defaulters, Rule 177

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

applied as between plaintiffs and defendant, so that the only liability of the defendant was to settle with the official assignee upon the hammering price. This point was decided, so far as this Court was concerned, adversely to the defendants in "*Beckhusen and Gibbs v. Hamblet*."

Dr. Richardson, official assignee of the Stock Exchange, gave evidence that there was no usage or custom whereby, upon the default of the broker, his client had an option to close the bargain with the jobber at the hammering price. Also that there was nothing irregular in a broker who had allocated at one carrying over a parcel of shares open with a jobber to one client transferring this parcel to another client at the next carrying over, and that this was a usual practice.

Mr. Rufus Isaacs, Q.C., and Mr. McIntyre appeared for the plaintiffs; Mr. E. Morten (with him Mr. H. Reed, Q.C.) for the defendant.

MR. JUSTICE MATHURW, in giving judgment, said that the evidence in this case was more distinct than in the previous case decided by himself of "*Anderson and Co. v. Beard*" (*ante*, p. 367). In that case it was rather assumed that the broker's client had an option to close with the jobber at the hammering price. But the point was not really in issue, because the client there repudiated the whole transaction with the jobber. In the present case there was the clear and unchallenged evidence of Dr. Richardson that there was no custom or usage by which the defendant was entitled to such an option. Then it was said that, as a matter of fact, the plaintiffs had offered this option to the defendant and it had been accepted by him. But that was not made out. Mr. Detmold said the bargain was closed at the hammering price, but it was clear he was acting under what he supposed to be his rights under Rule 177. And that the plaintiffs did not intend to offer that option was evident from their solicitors' letter of December 20. Then it was said that the shares had been so dealt with by E. Preston and Co. that there was no privity of contract between the plaintiffs and the defendant. But the evidence was that they only acted in interchanging the parcels of shares between different jobbers in the customary manner. There seemed no objection to that, and the practice seemed reasonable. There was therefore privity of contract and there must be judgment for the plaintiffs for the amount claimed with costs.

A stay of execution was granted with a view to an appeal.

[Solicitors—Morley, Shirreff, and Co., for the plaintiffs; Albert Myers, for the defendant.]

Q.B. Div. }
(Ridley, J.) }

1900.
May 31.

GOODWIN V. SATURLEY.*

Landlord and Tenant—Covenant not to assign without consent—Consent not to be unreasonably withheld to a responsible assignee—Claim by tenant for withholding consent.

The defendant became tenant to the plaintiff of a house, and he covenanted not to assign the premises without the consent of the plaintiff, such consent not to be unreasonably withheld to a responsible tenant. The plaintiff refused his consent to an assignment. The plaintiff having sued for rent, the defendant counterclaimed for a declaration that the proposed assignee was a responsible person, or, alternatively, for damages for breach of covenant by the plaintiff in refusing the consent.

Held, that there was no covenant by the plaintiff to give his consent in the case of a responsible assignee, such words being merely a qualification of the defendant's covenant.

"*Sear v. House Property and Investment Society*" (16 Ch.D., 387) followed.

In this case the plaintiff sued to recover £50, being two quarters' rent for a shop known as 157, High-road, Kilburn. The defendant admitted the plaintiff's claim, subject to a counterclaim, in which he set out that the lease of the premises in question contained a covenant by himself, his administrators, executors, and assigns not to carry on or to permit to be carried on upon the demised premises any trade other than the trade of a confectioner, and not to assign the premises without previously obtaining the consent in writing of the lessor, but that nevertheless such consent should not be unreasonably or arbitrarily withheld to a respectable and responsible assignee. The defendant, in November, 1899, applied, by a person who was desirous of becoming his assignee, for the lessor's consent to the assignment. This was refused by the plaintiff, and the defendant asked for a declaration that the proposed assignee was a respectable and responsible underlessee, and that he was entitled to sublet the demised premises to him, or, in the alternative, for damages for the plaintiff's breach of his covenant not to refuse his consent to a respectable and responsible assignee. The plaintiff having replied that the counterclaim disclosed no cause of action, since there was no covenant by the lessor not to refuse the licence, the question of law was argued before his Lordship.

Mr. T. Willes Chitty appeared for the plaintiff; and Mr. Givven for the defendant.

Mr. CHITTY submitted that it was clearly established in "*Sear v. House Property and Investment Society*" (16 Ch. Div.) that where there was a covenant by the tenant not to sublet without the landlord's consent, such consent not to be unreasonably refused, there was no covenant by the landlord to give his consent. The proper course for the tenant was to let the premises, despite the refusal, and if the refusal was found to be unreasonable the letting would be a good one. He also referred to "*Treloar v. Bigge*" (L.R., 9 Ex., 151) and "*Hyde v. Warner*" (3 Ex. Div., 72).

Mr. GIVVEN argued that in the case of "*Treloar v. Bigge*" the words referring to the landlord's consent not being arbitrarily withheld only appeared in a proviso to the lessee's covenant, and it was said by Chief Baron Kelly in his judgment that if the words there used had been used in another part of the deed they might be properly construed as amounting to a covenant by the landlord. In the present case the words were not part of a proviso, but were in the covenant itself.

MR. JUSTICE RIDLEY.—What the Chief Baron said was that there was a covenant on the part of the lessee, and that the words in question contained a qualification of it. They were all part of the same covenant. If they were in a different part of the deed—for instance, among the lessor's covenants—they might be held to constitute a covenant on the part of the landlord.

Mr. GIVVEN, continuing, said he also asked for a declaration that the proposed assignee was a respectable and responsible person. This was a proper case for a declaration.

His LORDSHIP said he could not make a person respectable or responsible by making a declaration.

Mr. GIVVEN said that such a declaration would prevent the landlord from bringing ejectment against the

*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

assignee. The defendant was left with a lease on his lands which he could not get rid of because the landlord refused his consent to the assignment. He also claimed that such refusal was a breach of the landlord's covenant for quiet enjoyment. Part of the enjoyment was the right to assign, and anything done by the landlord in contravention of that right was an interference with the right of quiet enjoyment.

His LORDSHIP, in giving judgment, said he did not think the case was distinguishable in principle from "Sear v. House Property Investment Society." It was said in the argument that the words "but nevertheless such consent should not be unreasonably or arbitrarily withheld" must be read as an independent covenant on the part of the lessor that he would not unreasonably refuse his consent. It seemed to him that that exact point was raised and dealt with in the case he had referred to. The difference in the words used in the two cases was merely a grammatical variation which did not affect the matter. He thought it must be read, not as a covenant by the landlord, but as a qualification of the lessee's covenant. If the landlord did unreasonably refuse his consent the lessee could deal with the premises without restriction. With regard to the question of the declaration of right which was asked for, he was of opinion that it could not be given in the present case, nor did he think there was any breach of the covenant for quiet enjoyment. There would therefore be judgment for the plaintiff with costs.

[Solicitors—Stringer and Stringer, for the plaintiff; D. P. Soames, for the defendant.]

Q.B. Div. }
(Mathew, J.) }

1900.
June 1.

THE DRIEFONTEIN CONSOLIDATED MINES (LIMITED) v.
JANSON—THE WEST RAND CENTRAL GOLD MINES
COMPANY (LIMITED) v. DE BOUEMENT.*

Insurance—Marine—Restraints and arrests of
hostile Government—Commandeering of gold—
State of war, whether existing.

The cases arose out of the commandeering of upwards of £300,000 worth of bullion by officials of the Transvaal in October last. The defendants were underwriters at Lloyd's. The facts and the arguments were fully reported in *The Times* of May 26 and 29.

Mr. Lawson Walton, Q.C., Mr. Carver, Q.C., and Mr. T. E. Scrutton appeared for the plaintiffs; Mr. Joseph Walton, Q.C., Lord Robert Cecil, Q.C., and Mr. J. A. Hamilton for the defendants.

MR. JUSTICE MATHEW.—The first of these two cases was an action brought by the plaintiff company against underwriters at Lloyd's to recover a loss through the capture of gold while in transit from Johannesburg to the United Kingdom. The policy contained the usual clause against capture. The facts were these:—The gold was despatched from Johannesburg by train on October 2, and was seized at the frontier of the Transvaal by the orders of the Transvaal Government. On October 9 an ultimatum was issued by the Transvaal Government announcing that if certain demands contained therein were not complied with the conduct of the British Government would be treated as a declaration of war at 5 o'clock on October 11. The gold was taken absolutely out of the possession of the plaintiff company, and a demand was made on the underwriters for payment of the amount of the loss, but the underwriters refuse payment on the grounds stated in the points of defence, as follows:—"The plaintiffs

are a limited company incorporated according to the laws of, and domiciled within the territories of, the present South African Republic and are alien enemies or her Majesty, and the loss, if by any peril insured against, was by an arrest, restraint, or detention by the Government of the present South African Republic incidental to actual or expected hostilities against her Majesty and made for a purpose connected therewith—namely, to supply the said Government with funds with which to levy war upon her Majesty, as they were then purposing, and shortly afterwards proceeded, to do, whereby the plaintiffs' claim herein is for an indemnity which is contrary to public policy and is altogether barred and cannot be maintained." For the purposes of this action it was agreed that the Blue-books issued by the Government of this country should be treated as containing the evidence of all material facts, and it was further agreed that no dilatory plea should be set up based on the fact that the plaintiffs were an alien company, and therefore could not sue in this country while the war lasted. The case is to be dealt with as if the war was over. The first point raised on behalf of the defendant in argument was this. It was said that it was shown from what appears in the Blue-books that the Transvaal Government were, on October 2, resolved to go to war, and that the seizure of the gold was made with the object of obtaining the means of prosecuting the war effectively. The seizure was said, therefore, to be like an attack actually made by a belligerent Power upon enemy's territory. If that contention is right, all the serious consequences of a state of war would have followed from October 2. If war had then commenced, all commercial relations between the subjects of the two countries should have ceased, and every kind of communication that could relieve the pressure of hostilities was a violation of duty. I am clear that there was no state of war on October 2. What constitutes a state of war is well described in "Hall's International Law" (4th ed.), at p. 63:—"When differences between States reach a point at which both parties resort to force or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant." There was no evidence before me of the existence on October 2 of an intention to settle the dispute by force, and, in fact, the negotiations for a peaceful settlement continued for several days after that date. Moreover both Governments were aware of the seizure of the gold and neither treated it as an act of war. There is no evidence of any intention at that date to issue the sudden ultimatum which was eventually delivered on October 9. Under these circumstances it is quite clear that the subsequent intention to wage war cannot be treated as an act of war at that time. The seizure was not a hostile act, and therefore if there is no other valid defence the plaintiffs are entitled to judgment. But a second point was raised. It was said that when the war did actually break out the seizure of the gold, even assuming it to have been a neutral act before, then acquired a hostile character. The proclamation of war on October 11 dated back, it was said, to the previous seizure on October 2, with the same result as if the seizure had been made after war was declared. In support of this contention the cases of "The Herstdelder" (1 C. Rob., 113) and "The Boedes Lust" (5 C. Rob., 233) were cited. The case was said to resemble that of an embargo laid on alien ships followed by a declaration of war. In such a case the embargo would become a capture, and it is argued that here the seizure of gold ripened into a capture after the declaration

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

of war. There is, however, in my opinion, no analogy between a seizure such as this, which only applies to the owner of the property seized, and an embargo. In the case of an embargo the property remains in the owner's hands, but here the bullion was taken from the control of the plaintiff company by seizure *in invitum*. Again, the cases referred to relate to the acts of a belligerent and throw no light on this case, where the seizure was by the Transvaal Government of the property of its own subjects. There is no authority for this supposed doctrine of the relation back from the date of the declaration of war to the date of the seizure. Then it was said there was a further ground of defence. It was said that, even if the original seizure was not an act of war and that a right of action arose as soon as the capture was made, the subsequent war extinguished the liability of the underwriters. The principle of law contended for was that any contract which operates to protect the enemy's property from the calamities of war is against public policy and illegal. The cases cited in support of this principle were the well-known prize cases in the early days of this century—"Furtado v. Rogers" (3 B. and P., 191), "Kellner v. Le Mesurier" (4 East, 396), "Gamba v. Le Mesurier" (*ibid* 407), "Brandon v. Curling" (*ibid* 409), and the statement of the law in "Duer on Insurance," Vol. 1, p. 414. No doubt it is the law that insurances on ships by English underwriters against English capture is illegal. In the words of Lord Ellenborough in "Brandon v. Curling" at p. 417:—"When the insurance is upon goods generally, a proviso to this effect shall in all cases be considered as engrafted therein—viz., 'provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer,' because during the existence of such hostilities the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other." On the grounds stated in the earlier cases, to permit such insurance would be obviously repugnant to the interests of the State. Capture is intended to defeat and weaken the resources of the enemy, and the contract of indemnity would frustrate that purpose. It is said that this principle should be developed and extended to include this case, and that a further exception should be written into this policy—viz., the exception of capture by a belligerent Government of the property of its own subjects. There is no authority for that contention. It is said that to pay during the war the amount of the loss of the assured must increase the resources of the belligerent Power of which the assured is a subject. Without dealing at length with this proposition and without considering how far it could, in fact, be maintained, it is obvious that no such contention can arise when the war is over, and it has been agreed, as I have already said, that this case is to be treated as if the war were at an end. The supposed principle would wholly override the well-known rule of law that, when both the contract of indemnity is entered into and the loss occurs before the commencement of hostilities, the declaration of war only suspends the remedy whilst the war lasts, "Flinat v. Waters" (15 East, 260); "Alcinous v. Nigreu" (4 E. and B., 217); "Duer on Insurance," Vol. 1, p. 434. I am satisfied that my judgment in the first case must be for the plaintiff company. A point was argued at considerable length by Mr. Carver in his reply that the plaintiff company was not an alien enemy, on the ground that the majority of the shareholders were French, Germans, and subjects of the Queen, and that only a very few were the subjects of the Transvaal Government. In my opinion this company, being incorporated under the Transvaal law, must be treated

as a Transvaal subject, and it is clear from the decision of Mr. Justice Story in the case referred to by Mr. Walton, "Society for the Propagation of the Gospel v. Wheeler" (2 Gall., 104), that a company may be treated as an alien enemy. In the second action the only difference is that a point was raised by the defendant that at the time of the loss the goods were not covered by the policy. That is a question of fact. The course of business followed by the plaintiffs was that parcels of bullion were, from time to time, forwarded from the mine to a bank in Johannesburg in order that they might be sent on to the United Kingdom, and the bank would make advances against the parcels of bullion. On October 9 the bullion in question was sent from the mine to the bank, and, according to the terms of the policy, the gold was to be covered at and from the mines to its ultimate destination. At the time when the gold reached the bank it was known that other gold had been seized, and the bank manager refused to make an advance on the gold. It was agreed that the gold should remain in the bank until further arrangements could be made. It is said that the gold was never in transit, but I am of opinion that it was. It was further said that the leaving the gold in the bank amounted to a deviation. It was, however, the duty of the assured to make the necessary arrangements for the safety of the gold, and the arrangement made was the best that could be done at the time. There was, therefore, no deviation. My judgment in the second case must follow the first and must be for the plaintiffs.

A stay of execution was granted pending an appeal.

[Solicitors—Crump and Sons; Waltons, Johnson, Bubb, and Whatton.]

Q.B. Div. (Grantham and }
Channell, JJ.) }

1900.
June 12.

MACKRELL AND ANOTHER V. BRENTFORD JUSTICES.*

Licence—Renewal—Refusal to renew—Grounds of refusal—Wine and Beerhouse Act, 1869, sec. 8.

This was an appeal by way of special case from the refusal of the justices of Brentford to renew the licence in respect of the Britannia Tap Beerhouse at Twickenham. The justices at the general annual licensing meeting refused the renewal. The owner and occupier appealed to the quarter sessions, where the order of the licensing justices was affirmed, subject to the special case, which stated the following facts:—The Britannia Tap Beerhouse, owned by Charles Arthur Mackrell and occupied by Robert Henry Shepherd, had been licensed for the sale by retail of beer and cider to be consumed on the premises ever since May 1, 1869, the licence having been continuously renewed down to and including the year 1898. No beer, however, had been sold on the premises for 28 years. There were no fittings in the house for the sale of beer. No sign board was exhibited nor was there any indication of a licence, except that the words "licensed for the sale by retail of beer and cider to be consumed on the premises" were painted in small letters over the door. From the year 1895 the licence had been held by one L. L. Harbor the then resident occupier. He was underleasee of and acted as manager for Messrs. Lascelles, Tickner and Co., the lessees for 21 years, but had no instructions from them, and was not expected by them, to trade. In 1898 the lease of Messrs. Lascelles expired and the appellant Mackrell became owner. On January 14 he leased the house to the appellant Shepherd, who, at the special

*Reported by W. HUSKEY GRIFFITH, Esq., Barrister-at-Law.

transfer sessions, applied for a transfer of the licence formerly held by L. L. Harbor. The justices refused the transfer on learning that L. L. Harbor had not sold any beer on the premises and that the house was not therefore "an inn theretofore kept by another person being about to remove" within the meaning of section 4 of the Alehouse Act, 1828. The appellant Shepherd then applied to the licensing justices for a renewal to himself of the licence. Notice of objection was given on the ground that no beer had been sold and that the licence was not required by the needs of the neighbourhood; but no objection was made on any of the four grounds specified in section 8 of the Wine and Beerhouse Act, 1869. The application for renewal was refused. The owner, C. A. Mackrell, and the occupier, R. H. Shepherd, appealed to quarter sessions, where the justices held that the case of "Reg. v. Cotham" ([1898] 1 Q.B., 802) was in principle applicable and that, as no beer had been sold upon the premises, such premises had not been kept as a beerhouse; that no use had been made of the licence; that the successive transferees had not intended to keep nor kept an inn; that the licence was merely colourable; and that therefore there was no jurisdiction to grant a certificate by way of renewal to the appellant Shepherd, notwithstanding that he was the occupier of the premises at the time of his application. They therefore dismissed the appeal subject to the special case, which now came on for argument.

Mr. BRUCE WILLIAMSON, for the appellants, contended that this house being a privileged house—i.e., one licensed on May 1, 1869—the justices could only refuse a renewal upon some or one of the four grounds specified in section 8 of the Wine and Beerhouse Act, 1869. He cited sections 8 and 19 of that Act and section 7 of the Wine and Beerhouse Act, 1870; and argued that the case of "Reg. v. Cotham" ([1898] 1 Q.B., 802) was one of transfer and not of renewal of a licence, and was not, therefore, in point. It was not necessary to the success of an application for a renewal that the applicant should at the date of the application be a person licensed—"Symons v. Wedmore" ([1894] 1 Q.B., 401).

The justices were not represented.

The COURT allowed the appeal.

Mr. JUSTICE GRANTHAM, in giving judgment, said that the question before the Court was not whether the justices were bound to renew from year to year in a case where the applicant had no intention of carrying on the business of the occupier of a beerhouse. The Court had to deal with the facts of this particular case. This house stood licensed on May 1, 1869, and that licence had been annually renewed. The question was whether in these circumstances the magistrates could go outside section 19 of the Wine and Beerhouse Act, 1869, and refuse the renewal because the licence was not required by the needs of the neighbourhood. In his Lordship's view the magistrates could not do so. The section of the Act was express and clear and only enabled the magistrates to refuse the renewal for one of the four grounds mentioned in the section. The needs of the neighbourhood were not included among the specified grounds, nor was the fact that the licence had not been exercised. The licensing justices and the Court of quarter sessions were therefore wrong and ought to have granted the certificate.

Mr. JUSTICE CHANNELL concurred. Section 19 of the Act of 1869 preserved the rights of persons occupying houses licensed on May 1, 1869, by preventing the refusal of renewals except upon one or more of four specified grounds. That statute only preserved those rights for one year. But in the following Session the Act of 1870, by section 7, applied the provisions of the former Act to renewals of such licences from year to year. An applicant could, therefore, come for renewal

of the licence, which must be renewed except for one of these four grounds. The fact that there had been no sale was not one of those grounds. If a person licensed left the house and another person came in the newcomer could not get the existing licence transferred to him, "Reg. v. Cotham" ([1898] 1 Q.B., 802), because the machinery provided by statute did not apply to such a case. But his position at the end of the year when he came to have the licence renewed was very different. The case of "Symons v. Wedmore" ([1894] 1 Q.B., 401) made it clear that the tenant might come for a renewal though not at the time entitled to sell. "Reg. v. Cotham" ([1898] 1 Q.B., 802) was not applicable, and the justices ought to have granted the renewal.

The case was remitted to the justices with a direction to this effect.

[Solicitors—Charles Robinson and Co., for the appellants.]

Q.B. Div. (Grantham and } 1900.
Channell, JJ.) } June 13.
TRUSTEES OF SIR J. SOANE'S MUSEUM V. ST. GILES'S AND
ST. GEORGE'S VESTRY.*

Rating—Rateability—Sir John Soane's Museum
—Trustees—Beneficial occupation.

The question in this case was whether the appellants, the trustees of the Soane Museum, were liable to be rated in respect of their occupation of the museum premises, No. 13, Lincoln's-inn-fields. The respondents were the joint vestry of the parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, the rating authority for the district in which the museum is situated. On October 27 of last year the respondents rated the appellants in respect of the museum, assessing the rateable value at £292. They made a rate of 1s. 9d. in the pound for the relief of the poor, 1s. 7d. in the pound for purposes of the Metropolis Management Act, 1855, and 3d. in the pound for sewerage expenses. The appellants refused to pay these rates and gave notice of appeal to quarter sessions from the assessment. Subsequently, by consent of the parties and by an order of Mr. Justice Kennedy, a special case was stated between the appellants and respondents, the parties agreeing that judgment in accordance with the opinion of the Queen's Bench Division should be entered in the Court of quarter sessions. The special case now came on for argument, and stated the following facts:—The appellants were appointed pursuant to an Act of the third year of William IV., which recited that Sir J. Soane had collected a number of valuable effects deposited in the rated premises which were built for the purposes of a museum, and in the occupation of Sir J. Soane, who was desirous that the museum and collection should be kept together and preserved for the public use and benefit. It was then enacted that the rated premises and also the adjoining house, No. 12, Lincoln's-inn-fields, should be vested in the trustees appointed by the Act and their successors, upon the trust that they should exercise a due control over the museum and provide that free access should be given at least on two days in every week in the months of April, May, and June, and at such other times as the trustees should direct, to amateurs and students of painting, sculpture, and architecture, and to such other persons as should apply for and obtain admission thereto, at such hours and in such manner as Sir J. Soane should have established before his death, or as the trustees should establish relating thereto; and that the trustees should not alter the arrangement of the collection. Provision was then made by the Act for the payment of a yearly sum of

* Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

£500 to defray rates, taxes, and charges charged upon the rated premises. Section 3 of the Act provided that a curator should reside in the rated premises, and that the trustees should appropriate to him one bed room and one sitting room to enable him to perform his duties. The special case further stated that the trustees, who were also trustees of a charity established by Sir J. Soane in favour of distressed architects and their families, regularly held an annual meeting in the rated premises for the distribution of funds among objects of this charity.

MR. S. A. T. ROWLATT appeared for the trustees, and contended that there was no beneficial occupation of the premises, which, consequently, were not rateable. The museum was created by the Act which then called in the trustees merely as custodians. The case was covered by the Brockwell Park case, "*Lambeth Overseers v. London County Council*" ([1897] A.C., 625).

MR. WALTER C. RYDE, for the respondents, contended that the trustees could be in no better position than Sir J. Soane himself would have been in. Benefit and not profit was the test of the rateability of property. The Brockwell Park case was readily distinguishable, for there the County Council had only an occupation of the park subject to the overriding rights of the public, which took away all possible benefit from such occupation. He cited "*Greig v. University of Edinburgh*" (L.R., 1 H.L., Sc., 348); "*Mayor of London v. Stratton*" (L.R., 7 H.L., 477); "*Owens College v. Overseers of Chorlton-upon-Medlock*" (18 Q.B.D., 403); "*London County Council v. Churchwardens of Erith*" ([1893] A.C., 562).

MR. JUSTICE GRANTHAM, in giving judgment, said it was clear that the premises were rateable. This museum had been founded for 67 years, but until now no one had been found ingenious enough to argue to the contrary. Sir J. Soane had wished that the house and collection should remain as they had been in his lifetime, and that the public might have an opportunity of visiting them—not, however, the public at large, for admission to the museum was subject to restrictions. The rights of the public did not exhaust the beneficial user of the house. The chattels had to be housed and the curator supplied with rooms. This view was supported by "*Reg. v. Cockburn*" (16 Q.B., 480) and by "*London County Council v. Churchwardens of Erith*" ([1893] A.C., 562).

MR. JUSTICE CHANNELL, concurring, said that in the Act establishing the museum and appointing the trustees there was nothing which rendered the property incapable of beneficial occupation. The absence of beneficial occupation was the gist of the Brockwell Park case, where the rights of the public took away any possibility of beneficial occupation by the County Council. Here though the rights of the public did to a certain extent, they did not by any means entirely, deprive the trustees of the beneficial occupation. The appellants were, therefore, liable to be rated.

[Solicitors—Freshfields, for the appellants; Henry C. Jones, for the respondents.]

Q.B. Div. (Grantham and Channell, JJ.) } 1900.
June 13.

LANGLEY V. BOMBAY TEA COMPANY (LIMITED).
Merchandise Marks Act, 1887—False trade description—Words and conduct.

This case raised the question whether a tradesman who by words or conduct represents that goods which he is selling are of a certain weight, contrary to the fact, can be said to "apply a false trade description" to the

goods within the meaning of section 2 of the Merchandise Marks Act, 1887 (50 and 51 Vict., c. 28), so as to be guilty of an offence against that Act. The facts were as follows:—On December 2, 1899, the appellant, at the respondent's shop in Clayton-street, Newcastle-on-Tyne, asked for two half-pounds of tea. The tea was lying in packets on the counter. These packets were stamped on the outside in ink with the words "The weight of this package, including the wrapper, is half a pound." One of the respondent's salesmen took two packets, wrapped them in paper, and handed them to the appellant, who paid the sum of 2s. 6d. for them. Nothing was said by the salesman, who simply handed over the parcel to the appellant. The latter took it to an inspector of weights and measures. The parcel was then opened and there were found stamped in ink on each packet the words above set out. Placed under the string securing each packet was a ticket resembling a railway ticket, upon which was printed, "The Bombay Tea Company (Limited), 50, Bull-street, Birmingham. ½lb. cheque for Tea, Coffee, or Cocoa." On presentation of these cheques at the respondent's shop in Newcastle the appellant would be entitled to receive for each cheque some article as a present, or by way of discount on his purchase. The inspector weighed the packets and their contents. One packet was found to contain 144½ grains and the other 132 grains less than half a pound. In each case, however, the weight, including the paper wrapper, was more than half a pound by 24 grains in one instance and 35 in the other. Upon these facts an information was laid by the appellant against the Bombay Tea Company, the respondents, for unlawfully selling two half-pounds of tea to which a false trade description or statement as to the weight of the goods was applied, contrary to section 2, subsection 2, of the Merchandise Marks Act, 1887. The information was heard before a Court of Summary Jurisdiction for the city and county of Newcastle. The justices held that a trade description meant something written, printed, or stamped, and that a description expressed in words or implied by conduct was not sufficient to constitute an offence under the Act. They therefore dismissed the information. The appellant, being dissatisfied with this judgment, applied to the justices to state a case for the opinion of this Court. The case was accordingly stated, setting out the facts mentioned above. This case now came on for argument.

MR. ROBSON, Q.C., and MR. HERBERT JACOBS for the appellant, contended that a false description as to the weight of the goods had been given when the appellant asked for two half-pounds of tea and two packets containing each less than half a pound were handed to him in compliance with his order. That false description was applied to the goods. The word "apply" did not mean physically to attach to the goods. Such an attachment might have been necessary before the Act of 1887, the word used in the earlier statute of 1862 (25 and 26 Vict., c. 88, s. 8) being "put," which was now altered to "apply." Counsel alluded to sections 2, 3, and 4 of the later Act. Section 20 clearly contemplated a verbal misdescription. The dictum of Mr. Justice Wright in "*Coppen v. Moore*" ([1898] 2 Q.B., 300), to the effect that section 2, subsection 2, of the Act did not apply in case of a trade description which was wholly verbal, could not be supported. They also cited "*Budd v. Lucas*" ([1891] 1 Q.B., 408).

MR. JOSEPH WALTON, Q.C., and MR. A. CLARKE-WILLIAMS (Sir Edward Clarke, Q.C., and Mr. T. Willes Chitty with them), for the respondents, were not called upon.

The COURT dismissed the appeal.

MR. JUSTICE GRANTHAM, in giving judgment, said that in his view there had been no false trade descrip-

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

tion. The respondents had applied a description showing that what they were offering was less than half a pound. It could not, therefore, be said that they had applied a description to the effect that what they were offering was half a pound.

MR. JUSTICE CHANNELL concurred, saying that he agreed with the dictum of Mr. Justice Wright in "*Coppen v. Moore*" ([1898] 2 Q.B., 300), that the enactment did not apply to verbal descriptions. This, though a dictum, was a deliberate statement of opinion after consideration by a learned Judge, who during the course of the argument had inclined to the opposite view. That opinion was one which his Lordship would follow even if he did not assent to it, which he did. In his view it disposed of this case.

[Solicitors—Rowe and Maud, for the appellant; Crowders, Vizard, and Oldham, for the respondents.]

Q.B. Div. (Grantham and) 1900.
Channell, J.J.) June 14.

CHRISTIE, MANSON, AND WOODS V. COOPER.*

Merchandise Marks Act, 1887—Selling goods with forged trade marks—"Acting innocently."

This case raised a very important point under the Merchandise Marks Act, 1887 (50 and 51 Vict., c. 28), section 2, subsection 2. It was an appeal by Messrs. Christie, Manson, and Woods, the well-known auctioneers, from a conviction for unlawfully selling certain goods to which forged trade marks were applied. The appeal was by way of special case stated by the magistrate, which set out the following facts:—His Majesty Albert, King of Saxony, of the Royal Manufactory of Porcelain of Saxony at Meissen, in Saxony, is entered on the register of trade marks as proprietor of a certain trade mark, No. 1,137, in class 16, "in respect of china, porcelain, statuary, porcelain plaques on tiles, and bisque china," and such registration is now in force. The London agents of the Royal factory of Dresden are Messrs. Oppenheim, of 43, Farringdon-street, E.C. On January 9, 1900, and on the following day the appellants exposed to public view at their auction rooms in King-street for the purpose of sale, certain goods then advertised to be sold by them on January 11, by order of the executors of a deceased gentleman. The goods which were the subject of the complaint were lot 71, and were thus described in the catalogue—"71, a white Dresden centre dish, four smaller ditto; a pair of oval baskets on stems, with figures of cupids, children, and infant satyrs; and a pair of ditto candlesticks, with figure stems." The catalogues contained the conditions of sale by which the appellants stipulated that they should not be responsible for the correct description, genuineness, or authenticity of any lot. The pieces of china were in the white Dresden style, and had affixed to them marks resembling and being good imitations of the trade mark, No. 1,137, in class 16 above mentioned; but the magistrate found that the goods were not genuine Dresden china, and the marks on them were forged trade marks within the meaning of the Merchandise Marks Act, 1887. On the morning of the sale on January 11 a telegram was despatched by the solicitors of Messrs. Oppenheim, the agents to the Dresden Royal factory, at about 9 30, and was received by Messrs. Christie, Manson, and Woods in time to admit of full examination of the goods in question. This telegram referred to a letter sent in July, 1898, by the appellants to Messrs. Oppenheim, which contained the following passage:—"All things sold by us are placed on view

for two days preceding the sale, and our rooms are open to all, so that the Dresden factory's agents are at liberty to inspect every piece of china. Though we are quite ready to assist in stopping forgeries, we cannot undertake to be responsible in any way for the various articles that pass through our hands. Yours faithfully, CHRISTIE, MANSON, and WOODS." The telegram above mentioned was in these terms:—"Referring your letter, July 12, 1898, lot 71, to-day's sale; believed not genuine. Writing. HALSE and TRUSTRAM." After the receipt of this telegram the goods were examined by a member of the appellants' firm specially conversant with china, and he informed Mr. Anderson (the member of the firm who was about to conduct the sale) that he would advise the lot in question being sold "for what it is," as the goods had "to go"—i.e., be sold without reserve. Mr. Anderson thereupon made a memorandum on his own sale catalogue by putting his pen through the word "Dresden," and on lot 71 being reached he said to the assembled bidders, "our attention has been drawn to this lot and we sell it for what it is. You see what there is—what shall we say for it?" Bidding thereupon proceeded in the usual manner, and the lot was knocked down to the prosecutor, the respondent, for the sum of £4 10s. The articles comprised in lot 71 were lotted and described as they appeared in the catalogue by a person employed by the appellants as an expert in china, who at the time he so described them believed them to be Dresden and the marks upon them to be genuine. No attempt was made to establish that the articles were genuine Dresden china. The magistrate found that the appellants had sold goods to which a forged trade mark had been applied, and that, having failed to prove (a) that they had taken all reasonable precautions against committing the offence; and (b) that they had no reason to suspect the genuineness of the trade mark, they had not "acted innocently" within the meaning of section 2, subsection 2 (c) of the Act. He accordingly fined the appellants £10, and they, being dissatisfied with this decision, applied for the special case. The case now came on for hearing.

MR. MOULTON, Q.C., and MR. HORACE AVORY, for the appellants, submitted that the statute enabled a defendant to prove that he had acted innocently otherwise than by proving that he had taken all reasonable precautions against committing the offence and that he had no reason to suspect the genuineness of the trade mark. The facts in this case proved that the appellants were innocent of any intention to offend against the Act, and that was sufficient to exonerate them.

MR. ISRAEL DAVIES, for the respondent, cited the cases of "*Coppin v. Moore*" ([1898] 2 Q.B., 306), "*Wood v. Burgess*" (24 Q.B.D., 165), and contended that the state of mind of an appellant was immaterial. It was sufficient for their liability if they sold goods under a false trade mark, the Act being for the protection of owners of trade marks.

The COURT allowed the appeal.

MR. JUSTICE GRANTHAM, in giving judgment, said that the magistrate was wrong in the view he took of section 2, subsection 2. He had held that "acting innocently" involved fulfilling all the conditions mentioned in that subsection—viz., taking all reasonable precautions and having no reason to suspect the genuineness of the trade mark. But by subsection 2 (c) a defendant might prove that he had "otherwise acted innocently." The magistrate had not considered the possibility of innocence being proved otherwise than by taking all reasonable precautions and having no reason to suspect the genuineness of the trade mark. The conviction must therefore be set aside.

MR. JUSTICE CHANNELL concurred. The point of law in this case was what was the meaning of the words "that otherwise he had acted innocently." The effect

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

of this statute had been carefully considered in "Coppin v. Moore" ([1898] 2 Q.B., 306). The scheme of the Act was this:—Whereas in most criminal cases the prosecution must prove a guilty intention, such proof by the prosecution was not necessary in this statute. Yet this was not one of those cases where the Legislature, intending to prevent the commission of an act, absolutely had provided that any one doing the act, whether with a guilty intention or not, should be punished. This statute fell short of that class of enactments. There must be a guilty intention, but the burden of proving it was not, as usual in criminal cases, upon the prosecution. It was for the defendant to prove that he acted innocently. The question was, had the defendant proved his innocence? The magistrate had held there could be no innocence without absence of suspicion, but for the reasons pointed out by Mr. Justice Grantham that was not the correct view. Innocence of any intention to infringe the Act might co-exist with a suspicion as to the genuineness of the trade mark. The only doubt was whether, instead of quashing the conviction, the Court should not remit the case to the magistrate for a finding as to the innocence of the defendant. But upon this point his Lordship did not dissent from the view of Mr. Justice Grantham.

[Solicitors—Eardley, Holt, Hulbert, and Hubbard, for the appellants; Halse, Trustram, and Co., for the respondent.]

Chan. Div. }
(Kekewich, J.) }

1900.
June 14.

HALL V. DUKE OF NORFOLK AND OTHERS.*

Support—Mineral workings—Subsidence—Injury to buildings.

A lessee of mines is not liable for a subsidence causing damage which occurs during his tenancy, but was caused by the excavations of his predecessor in title.

This was an action brought by Mr. John Hall, the owner in fee of the Manor-house, Overseal, Ashby-de-la-Zouch, in the county of Leicester, against the Duke of Norfolk, the executor and trustee of the late Lord Donington, Messrs. Richard Wilkinson, Henry Newton, Christopher Spalding, and the Moira Colliery Company (Limited) claiming (1) to have it ascertained what damage the plaintiff's house had suffered by reason of the working of the main seam in the adjoining Moira Colliery of the defendants; (2) a declaration that the defendants were liable to make good such damage; (3) payment accordingly. It appeared that in the years 1889, 1890, and 1891 the late Lord Donington worked the seam. On April 2, 1892, Lord Donington made his will, appointing the Duke of Norfolk, Mr. George Edward Lake, and the Hon. G. T. C. Rawdon Hastings executors and trustees thereof. On July 24, 1895, Lord Donington died, and his will was proved by the Duke of Norfolk and Mr. Lake, Mr. Rawdon Hastings renouncing probate. The Duke of Norfolk and Mr. Lake carried on the business of the colliery until October 1, 1895, and afterwards as agents for the defendants, Messrs. Wilkinson, Newton, and Spalding. On November 16, 1895, the trustees granted a lease of the Moira Colliery to the defendants, Messrs. Wilkinson, Newton, and Spalding, for 21 years, and on November 20, 1895, the Moira Colliery Company (Limited) was formed and the lease and the interests under it were assigned to the defendant company. There was no covenant on the part of the lessees to prevent damage

by subsidence. In November, 1895, a subsidence occurred and the plaintiff brought his action. Mr. Lake had since died. The defence was that the defendants had not actively caused the damage, and therefore they were not responsible.

Mr. P. O. Lawrence, Q.C., and Mr. MacSwiney appeared for the plaintiff; Mr. Warrington, Q.C., and Mr. Kenyon Parker for the Duke of Norfolk; and Mr. Renshaw, Q.C., and Mr. Ashton Cross for the lessees.

MR. JUSTICE KEKEWICH, in giving judgment, said that some years ago, from 1889 to 1891, Lord Donington worked coal under land in his possession, which was a perfectly rightful act. Many years after, at the end of 1895, the working of the coal caused a subsidence to neighbouring land of the plaintiff's, injuring a house on the land, in respect of which he was entitled to recover if he could find out the proper persons to proceed against. It was not proved when the subsidence occurred, but on the evidence it did not occur until after November, 1895, or until after the trustees demised the coal to the defendants. The plaintiff endeavoured to recover damages against Lord Donington's estate, but that action failed because it was a personal action which was determined by the death of Lord Donington. He then sought to claim against the persons who represented Lord Donington, the trustees, and lessees. The executors and trustees worked the coal for a few months, and must be treated as owners; they then demised the coal to the other defendants, who came into possession and worked the coal. It was not suggested that the executors and trustees or the defendants, the lessees, caused the damage. That was traceable to the working of the seam by Lord Donington between 1889 and 1891. There was no damage until 1895, and the right of action did not accrue until then. The question now arose whether, in point of law, the defendants could be rendered liable because they allowed the nuisance to be continued. In the case of "Greenwell v. Low Beechburn Coal Company" (13 *The Times* L.R., 471 and [1897] 2 Q.B., 165) Mr. Justice Bruce stated the question and decided against the plaintiffs and in favour of the defendants. He might say that, Mr. Justice Bruce having considered the question, all he had to do was to follow that decision, but as there was no reported decision on the exact point, and it was said that Mr. Justice Bruce's decision was not consistent with "Darley Main Colliery Company v. Mitchell" (11 App. Cas., 127), he thought, under the circumstances, it was his duty to consider the question as if it was not once concluded as settled law, and to examine the question for himself. He had heard a full argument and considered all the cases, and it seemed to him that unless the question was controlled by the "Darley Main Colliery Company v. Mitchell" he was not at liberty to create a new right of action not recognized in a Court of law. Having read the decision of Mr. Justice Bruce, he entirely agreed with the learned Judge. Mr. Justice Bruce pointed out that there was no reported case in which defendants had been made liable under such circumstances so that it would be creating a new right of action. In "Darley Main Colliery Company v. Mitchell" the House of Lords decided that a new cause of action arose when a new subsidence took place; that was the sole question decided there, but in his Lordship's opinion that case was in direct contradiction to the plaintiff's claim. Upon the point of law, therefore, he was of opinion that the plaintiff's case failed, and it was not necessary to go into the question whether the defendants could do anything to stop the injury. It was not proved here that if the cavity had been filled up the subsidence could have been arrested, so if he had not decided against the plaintiff on the

*Reported by F. E. ADY, Esq., Barrister-at-Law.

point of law he should have decided against him on that point. There would be judgment for the defendants with costs.

[Solicitors — Woodcock, Ryland, and Parker, for Woodcock and Sons, Haslingden, for the plaintiff; Wordsworth, Blake, and Co., for the Duke of Norfolk; Kingsford, Dorman, and Co., for Smith, Mammatt, and Co., Ashby-de-la-Zouch, for the lessees.]

Q.B. Div. (Grantham and) 1900.
Channell, JJ.) June 14.

IN RE JOHN REID AND SONS (LIMITED).*

Company—Winding up—Liquidator—Companies (Winding Up) Act, 1890, secs. 4 and 6.

On a compulsory winding-up order being made the Official Receiver becomes *ipso facto* the provisional liquidator, and no other person can be appointed by the Court.

This was an appeal from an order of the County Court Judge at Leeds appointing one Henry Gaskell Blackburn as liquidator in the compulsory winding up of the above-named company. It appeared that the company had been formed in 1895 to carry on the business of furniture dealers. The capital consisted of £35,000 in shares of which practically nothing had been paid up. But little business had ever been carried on, and in March, 1900, the shareholders, who were the seven signatories, agreed to a voluntary winding up, Mr. Blackburn being appointed voluntary liquidator. Subsequently certain creditors presented a petition for a compulsory order. Upon the hearing of this petition Mr. Blackburn appeared and was represented by counsel. He did not object to the compulsory order's being made, but desired that he might be appointed permanent liquidator in the compulsory winding up. He had, on May 1, in his capacity of liquidator in the voluntary winding up, called a meeting of creditors who with four dissentient voices had voted for the continuance of the voluntary winding up with Mr. Blackburn as liquidator and a committee of inspection. The County Court Judge made the order for a compulsory winding up, and from this there was no appeal. But the learned Judge further acceded to Mr. Blackburn's request and appointed him permanent liquidator in the compulsory winding up. From this appointment the Official Receiver, as being by statute the liquidator under these circumstances, appealed.

Mr. ARTHUR RUSSELL, for the appellant, cited section 4 of the Companies (Winding Up) Act, 1890, and the case of "*In re North Wales Gunpowder Company*" ([1892] 2 Q.B., 220), and contended that by the Act the Official Receiver was the liquidator until the shareholders should meet and appoint the permanent liquidator. Consequently the County Court Judge had no power to appoint Mr. Blackburn.

Mr. P. S. STOKES, for Mr. Blackburn, argued that under section 92 of the Companies Act, 1862, the Court had power on the hearing of the petition to appoint a permanent liquidator. There was nothing in the Act of 1890 to take away that power. Further, there had in fact been a meeting of creditors who had given their approval to Mr. Blackburn's acting, and the County Court Judge had taken the only reasonable course in appointing him liquidator.

Mr. Muir Mackenzie appeared for the petitioning creditor.

The COURT allowed the appeal.

MR. JUSTICE GRANTHAM, in giving judgment, said that though the Act of 1890 did not expressly

take away the power formerly vested in the Court by the Act of 1862 of appointing a permanent liquidator on the hearing of a petition for a compulsory winding up, yet the scheme of appointment provided by the later Act was inconsistent with, and therefore abrogated, that of the earlier Act. The Official Receiver was now the liquidator until some other person appointed by a meeting of creditors duly convened by the Official Receiver was ready to act. The meeting of creditors called by Mr. Blackburn had not been summoned under the Act; what was done at it was therefore invalid. It might well be that when duly summoned the creditors might appoint some one other than Mr. Blackburn. The County Court Judge therefore had no power to appoint Mr. Blackburn. The appeal must therefore be allowed, with costs, to be paid out of the estate.

MR. JUSTICE CHANNELL concurred.

[Solicitors—Solicitor for the Board of Trade, for the appellant; Vincent and Vincent, for North and Sons, Leeds, for the respondent; Wrensted and Hind, for Scott and Hindes, Leeds, for the petitioning creditor.]

Q.B. Div. (Grantham and) 1900.
Channell, JJ.) June 15.

THE JENNER INSTITUTE OF PREVENTIVE MEDICINE V. ASSESSMENT COMMITTEE OF ST. GEORGE'S, HANOVER-SQUARE.*

Rating—Rateability—Exemptions—Society exclusively for purposes of science—Jenner Institute—Carrying on trade.

This case raised the question of the rateability of the Jenner Institute, Chelsea-embankment. The institute appealed by way of special case from an assessment by the respondents, the assessment committee, at a gross value of £1,000 and a rateable value of £834. The appellants were incorporated as a company in July, 1891, under the name of "The British Institute of Preventive Medicine." In December, 1898, they changed their name to the Jenner Institute of Preventive Medicine. The objects of the institute are to study, investigate, discover, and improve means of preventing and curing infective diseases, to provide instruction and education in preventive medicine to medical men and advanced students, to prepare and supply protective and curative materials for, and to treat persons suffering from, infective diseases. They have also provided laboratories, instituted lectures, issued publications, and founded a library. The examination of students and awarding prizes and certificates are among their objects, which include, subject to the provisions of the 21st section of the Companies Act, 1862, the purchase, sale, leasing, or holding of lands or other real and personal property and the mortgage of the same for the purposes of the institute. They have power to receive donations and subscriptions from persons desiring to promote the above objects and to hold funds in trust for the same, subject to the directions of the Charity Commissioners; and also to construct and maintain any buildings which may be necessary or convenient. Their memorandum of association provides that the income and property of the institute shall be applied solely for the promotion of these objects, and that no portion thereof shall be paid by way of dividend or otherwise by way of profit to the members, except to the extent of interest at 5 per cent. on loans made to the institute to promote its objects, or remuneration of professors or other officers and servants of the institute in return for services actually rendered. The institute is supported by interest on investments, fees for lectures, which have so

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

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far proved insufficient to defray the expenses thereof, receipts from sales of records and protective and curative medicines such as mallein, tuberculin, and antitoxins, fees for diagnoses, and also by donations. In the last five years donations to an amount exceeding £3,000 had been received and had been applied to current expenses and investments. In March, 1894, the appellants purchased the freehold and erected buildings which constitute the assessed premises. By an agreement, dated May 31, 1898, between the appellants and the Local Government Board, the former agreed to let and the latter to take certain rooms in the assessed premises from March 25 from year to year, in pursuance of which the Local Government Board entered into the occupation of the rooms and used them for the preparation of glycerinated calf lymph and investigations relating to vaccination. This agreement provided that the Local Government Board should not, without the consent of the appellants, use the rooms for any other purpose, and entitled the appellants to have access to the rooms at all times for the purpose of inspecting them. The rest of the assessed premises are exclusively used by the appellants. Antitoxin, mallein, and tuberculin are prepared for sale and sold by the appellants in pursuance of their memorandum of association. Mallein and tuberculin are prepared on the assessed premises. Antitoxin is prepared on the Poplars Farm, a branch establishment of the institute. Up to the present time the preparation and sale of antitoxin has been conducted at a loss to the appellants. For these reasons they appealed from the assessment made by the respondents, claiming to be exempt from parochial and other rates by virtue of the statute 6 and 7 Vict., cap. 36, section 1, as being a society established exclusively for the purposes of science and being supported in part by voluntary contributions. They had obtained the necessary certificate under that section, and a case was accordingly stated under section 40 of the Valuation (Metropolis) Act, 1869, which set out the above facts and now came on for hearing.

Mr. McCALL, Q.C., and Mr. ERNEST POLLOCK, for the appellants, contended that the institute was used exclusively for the purposes of science, and was supported by voluntary contributions. The making and sale of preventive medicines was a means of disseminating scientific knowledge. They cited "Churchwardens of St. Ann v. Linnean Society" (3 E. and B., 793); "Reg. v. Medical Society of London" (21 J.P., 789), "Bradford Library Society v. Churchwardens of Bradford" (1 E. and E., 88), "Royal College of Music v. Westminster Vestry" ([1898] 1 Q.B., 809). The letting of the rooms to the Local Government Board did not affect the exemption, as the Local Government Board, if an individual, would be rateable in respect of their occupation. "Reg. v. Overseers of Manchester" (16 Q.B., 449), "Earl Clarendon v. Rector of St. James's" (10 C.B., 806), "Purvis v. Traill" (3 Exch., 344). [MR. JUSTICE GRANTHAM.—If the Royal College of Music were makers and sellers of violins, would they not be rateable?]

Mr. DANCK WERTS, Q.C., and Mr. WALTER C. RYDE, for the respondents, contended that the special case showed distinctly that the appellants carried on a trade in addition to advancing scientific knowledge. They cited "Art Union of London v. Overseers of Savoy" ([1894] 2 Q.B., 609; [1896] A.C., 296), "Commissioners of Inland Revenue v. Forrest" (15 App. Cas., 384).

The COURT dismissed the appeal.

MR. JUSTICE GRANTHAM, in giving judgment, said that the case was an important and interesting one. The appellants were an institution to be commended in every way, and it was well to think that persons were to be found ready to subscribe to it. In the absence of

some such society curative and preventive medicines of the utmost value, the making and preparation of which required the greatest skill, would not have reached their present state of perfection. But the Court had to construe an Act of Parliament. The object of the appellants was mainly for the preparation and sale of medicines, and though the earlier cases had gone far in the direction of exempting scientific societies, none had gone so far as to justify the Court in exempting the appellants.

MR. JUSTICE CHANNELL concurred. One of the objects of the appellants was no doubt the promotion of science, but one and probably the main object was to dispense to the public the benefits of science. That being so, they were not instituted exclusively for the purposes of science and the case was not brought within the exemption. The expression "disseminating" used by Lord Justice A. L. Smith in "Royal College of Music v. Westminster Vestry" ([1898] 1 Q.B., 809) did not mean disseminating the products of scientific knowledge. The only difficulty in the case was caused by the occupation of the Local Government Board. But the correct view was that unless the occupation by the under tenant of part was such that he could be rated in respect thereof it would not exempt the occupier of the rest of the premises from liability. If there were a rateable occupation by the under tenant, and the rest of the premises were occupied for the purposes of science, the rest would be exempt; but if part were occupied by a tenant who was not rateable that would not exempt the premises. The occupation of the Local Government Board seemed more analogous to that of a lodger than that of a tenant rateable in respect of his holding.

[Solicitors—Hunters and Haynes, for the appellants; W. J. Fraser, for the respondents.]

Q.B. Div. (Grantham and)
Channell, J.J.)

1900.
June 15.

BENNETT V. HARDING.*

Metropolis—Public Health (London) Act, 1891, sec. 38, subs. 1—Sanitary accommodation—"Work-place," what is—Stable-yard of cab proprietor.

This case raised the question whether a stable and stable-yard constituted a "work-place" within the meaning of section 38, subsection 1 of the Public Health (London) Act, 1891, so as to make it necessary for the owner or occupier of such premises to provide sufficient and suitable accommodation in the way of sanitary conveniences for the persons employed in or in attendance at such premises. The respondent was the owner or occupier of premises in Ormond-yard, within the jurisdiction of the Holborn District Board of Works. The appellant, the sanitary inspector of the Board of Works, served a notice on the respondent requiring him to provide the necessary sanitary conveniences in accordance with section 38, subsection 2 of the Act. The respondent failed to comply with this notice, and thereby, as the appellant contended, rendered himself liable to a fine of £20, and a further penalty of 40s. for every day during which the non-compliance continued. He accordingly laid a complaint against the respondent. The premises in question consisted of ten stables and a stable-yard, and were in the occupation of the respondent, who was a cab proprietor in a large way of business. He kept on the premises 110 horses and a large number of cabs, of which he was the owner. He employed upon the premises a number of men as horse-keepers and cab-

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

cleaners. His business consisted in letting out cabs and horses by the day to drivers who were daily in attendance for the purpose of hiring, changing, and returning cabs and horses. The horse-keepers and cab-cleaners when not at work lived with their respective families in different rooms, having sanitary conveniences situate over different portions of the premises. In the stables and stable-yard there was no accommodation in the way of sanitary conveniences for the horse-keepers and cab-cleaners employed there. The magistrate dismissed the complaint, holding that the stables and yard did not constitute a "work-place" within the meaning of the Public Health (London) Act, 1891, section 38 (54 and 55 Vict., c. 76). The appellant being dissatisfied with this decision applied for, and the magistrate accordingly stated, a case, which set out the above facts.

Mr. H. COURTHOPE-MUNRO and Mr. W. H. LEESE, for the appellant, contended that the object of the Legislature was that factories, workshops, and places where persons are employed should be fitted with sanitary conveniences. This appeared from the Public Health Acts, 1890, section 22, and the Public Health Act, 1875, section 38. The word "work-place" was intended to have a wider meaning than factory or workshop. Counsel cited "Countess of Rothes v. Kirkcaldy Waterworks Commissioners" (7 App. Cas., 694); "Anderson v. Anderson" ([1895] 1 Q.B., 749); "Attorney-General v. Mutual Tontine Association" (1 Ex.D., 469).

Mr. MACMORRAN, Q.C., and Mr. ELLIS J. GRIFFITH, for the respondent, contended that the persons who frequented these premises were customers and not workmen, and that the Act did not apply to this case. "Work-place" must be taken to be a place in the nature of a factory or workshop.

The COURT allowed the appeal.

MR. JUSTICE GRANTHAM, in giving judgment, said that the magistrate had found as a fact that the hirers of cabs and horses were in attendance on these premises, which were clearly a "work-place" devoted to the work of cab-cleaners and horse-keepers within a confined area. The case therefore came within section 38 of the Act, and the respondent ought to have been convicted.

MR. JUSTICE CHANNELL concurred. If it were necessary to give to workshop a meaning similar to factory and workshop the similarity must be in relation to the objects of the Act. The stables were analogous to a factory or workshop, in so far as they held numerous persons at work permanently in a confined space. When once it was decided that the premises were a work-place, sanitary conveniences must be supplied, and it then became necessary to consider the sufficiency of those sanitary conveniences. For that purpose the needs of those in attendance on the premises had to be taken into account. The magistrate had found as a fact that the hirers of cabs were in attendance, and that being so, they were not the less so because they were customers.

Q.B. Div. (Grantham and Channell, JJ.) } 1900.
June 16.
STOKES V. SPENCER (HAYDON AND ANOTHER,
CLAIMANTS).*

Bill of Sale—Validity—Name of grantor—Real and assumed names.

This was an appeal from the decision of the Judge of the Marylebone County Court giving judgment for the claimants in an interpleader issue, in which the

*Reported by C. G. WILLIAMS, Esq., Barrister-at-Law.

claimants claimed under a bill of sale certain goods taken in execution by Stokes. One of the questions raised was whether the bill of sale was void by reason that the name of the grantor was wrongly stated. The grantor had for many years before the execution of the bill of sale been known under the name of Mrs. Spencer. Her real name was Ott, and the bill of sale was executed and registered in that name.

Mr. SHORTT, on behalf of the execution creditor, contended that there had, in fact, been no proper registration of the bill of sale, and that it was consequently void by section 8 of the Bills of Sale Act, 1878. He argued that the name by which the grantor was usually known ought to have been given. In "*Ex parte McHattie*" (10 C.D., 398) and again in "*Downs v. Salmon*" (20 Q.B.D., 775) it had been held that the Christian names of the grantor need not be correctly stated, the execution creditor not having been misled thereby, but no case had gone so far as to decide that the surname need not be correctly stated. A creditor searching the register would be misled by the bill of sale being entered under the wrong surname, though he might not be so misled if only the Christian names were incorrect.

Mr. SCARLETT, on behalf of the claimants, cited "*Central Bank of London v. Hawkins*" (62 L.T., 901), in which a bill of sale registered in a name assumed by the grantor and by which he was generally known was held to be valid.

The COURT dismissed the appeal.

MR. JUSTICE GRANTHAM thought that the case was governed by "*Central Bank of London v. Hawkins*."

MR. JUSTICE CHANNELL said that the bill of sale would have been good under the common law. The only question was whether it was affected by the Bills of Sale Act, 1878. The object of that Act was to prevent frauds upon creditors by secret bills of sale. That object was sought to be attained by means of various specific things which were required to be done. It was possible that some of the means of attaining the object in view were omitted from the provisions of the Act. The present case seemed to show that that was the case. Section 10 (2) of the Act provided that the affidavit filed with the bill of sale should contain a description of the residence and occupation of the grantor, but there was no corresponding requirement that the name of the grantor should be so dealt with, as was pointed out in "*Ex parte McHattie*." That got rid of the objection so far as the inaccuracy in the name was concerned. The only way in which an inaccuracy in the name could affect the bill would be where the giving of the wrong name went to show that the description of the residence or occupation was insufficient.

[Solicitors—T. King Warhurst, for the execution creditor; G. J. Fowler, for the claimants.]

Q.B. Div. (Grantham and Channell, JJ.) } 1900.
June 18.
NATIONAL TELEPHONE COMPANY V. TUNBRIDGE-WELLS CORPORATION.*

Telegraph—Laying wires—Refusal to allow opening up of streets—Jurisdiction of highway authority—Telegraph Act, 1892.

This case raised a question under the Telegraph Acts, 1862 to 1892, as to whether a stipendiary magistrate or a County Court Judge has since the Act of 1892 any jurisdiction to hear and determine an appeal from a refusal of the highway authority to allow a telegraph company to open up streets for the purpose of laying

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

wires or tubes. By the Telegraph Act, 1863, section 6, a telegraph company was empowered to break up any street or road, subject to the restriction that they could not place a telegraph under any street of any municipal borough except with the consent of the highway authority. By the Telegraph Act, 1868, section 2, the same provisions were made to apply to the Postmaster-General. By the Telegraph Act, 1869, section 4, the Postmaster-General was given the exclusive power of transmitting telegrams, with the exception of telegrams transmitted with his written licence. "Telegrams" has been held to include telephonic messages. ("Attorney-General v. Edison Telephone Company," 6 Q.B.D., 244.) By the Telegraph Act, 1878, section 3, if any highway authority having power to withhold consent to the Postmaster-General to place telegraphs under a street fail, within 21 days after being required, to give their consent, a "difference" shall be deemed to have arisen between such highway authority and the Postmaster-General; and that difference, by section 4, is to be referred to a stipendiary magistrate or to a County Court Judge, who is empowered to hear and determine such "difference" as if he were an arbitrator under the Regulation of Railways Act, 1868. The magistrate or County Court Judge may give the necessary consent, which is to have the effect of a consent given to the Postmaster-General by the highway authority under the Act of 1863. By the Telegraph Act, 1892, section 5, where the Postmaster-General has licensed any company to transmit telegrams, he may license the company to exercise his own powers under the Acts of 1863 and 1878, and thereupon those Acts shall apply. But, notwithstanding anything in the Act of 1878, a licensee shall not exercise any of these statutory powers without the consent of the urban sanitary authority or county council, and shall be subject to any terms and conditions which the county council or urban sanitary authority may attach to any such consent, and shall comply with any regulations of such council or authority from time to time in force in relation to telegraphic lines. By two deeds, the earlier dated in the year 1884 and the later in 1896, made between the Postmaster-General and the National Telephone Company, the company were authorized to work and use certain forms of telegraphs for the purpose of transmitting telegrams within the municipal borough of Tunbridge-wells. By a deed, dated March 10, 1896, and made between the Tunbridge-wells Corporation and the National Telephone Company the corporation consented to the company, "subject to the provisions of this agreement, exercising within the borough of Tunbridge-wells such powers as may from time to time and at any time be delegated by the Postmaster-General to the company in pursuance of the provisions of section 5 of the Telegraph Act, 1892." This deed contained the following stipulation:—"It is expressly agreed that the consent contained in the preceding clause is given upon the following conditions—(1) except as regards the work mentioned in the schedule the company shall not exercise any of the powers conferred on the Postmaster-General by the Telegraph Acts, 1863 and 1878, in respect of which the consent of the corporation is required under the said Acts, without obtaining the further consent in writing of the corporation to be from time to time given to the specific works for the time being proposed to be carried out under such powers, it being intended that the general consent contained in the preceding clause is not to operate to relieve the company from the obligations of obtaining the particular consent of the corporation to such specific work as required by and provided for in the said Acts." Clause 10 of this agreement contained a reference of all disputes and differences under its terms to two arbitrators or an umpire. The company wished to open a

street and lay telephone wires and execute works not mentioned in the schedule to the last-mentioned deed. With a view to this they applied for consent of the corporation. This leave was refused, and the company now contended that under section 4 of the Telegraph Act, 1878, they were empowered to refer this "difference" to the County Court Judge. The County Court Judge expressed his opinion that he had jurisdiction to hear and determine the difference, but refrained from doing so until the hearing of this motion, which was for a prohibition upon the ground that since the passing of the Telephone Act, 1892, section 5, the County Court Judge had no further jurisdiction in such cases.

Mr. JOSEPH WALTON, Q.C., Mr. MACMORRAN, Q.C., and Mr. BOXALL appeared for the corporation, and read a case stated by the County Court Judge which set out the above facts and sections.

The COURT then called on Mr. CRIPPS, Q.C., and Mr. CASSELL for the company, who contended that the effect of the deed of March 10, 1896, was that for all works other than those specified in the schedule the consent of the corporation "as required by the said Acts" was needed. That meant the consent subject to appeal to the County Court Judge. They further argued that the County Court Judge was constituted an arbitrator and that prohibition was not the appropriate remedy.

The COURT granted the prohibition.

MR. JUSTICE GRANTHAM said that on the passing of the Act of 1892 the Crown had delegated to private companies powers which, up to that time, it had retained in its own hands; accordingly, it had given to the highway authorities greater powers of consenting to or forbidding proposed alterations in their streets than they formerly possessed. With this object the jurisdiction of the County Court Judge had been taken away, and the power of imposing a veto on proposed works rested finally with the highway authorities. On the second question, whether the County Court Judge was an arbitrator, assuming he had jurisdiction, section 4 of the Act of 1878 referred the matter to him "as if he were an arbitrator." That did not make the County Court Judge an arbitrator, but only directed him as to how he should act. Prohibition was, therefore, the appropriate remedy.

MR. JUSTICE CHANNELL concurred, referring upon the second point to the case of "Hull v. M'Farlane" (2 C.B., N.S., 796).

[Solicitors—Cripps, Son, and Daish, for the Corporation; W. E. L. Gaine, for the National Telephone Company.]

Q.B. Div. (Grantham }
and Channell, JJ.) }

1900.
June 18.

HAYLEY V. TAYLOR.*

Weights and Measures—Unstamped beer barrels
—Weights and Measures Act, 1878, sec. 29.

This case raised the question whether beer barrels when used as measures for trade come within the operation of the Weights and Measures Act, 1878, so as to make it necessary that they should be stamped in accordance with the provisions of section 29 of that statute. The appellant was the chief inspector of weights and measures for the county council of the West Riding of Yorkshire. The respondent was a brewer carrying on business in the borough of Keighley. In the month of December last Mr. Thomas Eckroyd, an innkeeper in Keighley, ordered from the respondent's traveller in

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

the usual way a barrel of beer, and subsequently received from the respondent's brewery a barrel purporting to contain 35 gallons. The barrel was No. 1189 and stamped outside, "T. Taylor, 35 gallons." On the following day the respondent sent Mr. Eckroyd an invoice in which he charged for 35 gallons at 10d. per gallon, and he was paid for that quantity. One of the county council's inspectors afterwards tested the barrel with an imperial standard measure and found that when filled it would hold 33 gallons only, being two gallons less than the quantity stamped on the barrel and charged in the invoice. The barrel had not been verified and stamped as a measure as required by the Act. Neither the respondent nor his customer had measured the beer, and both relied entirely on the barrel as being an accurate measure of the quantity invoiced and delivered. By section 44 of the Weights and Measures Act, 1873, the local authority are required to fix times and places at which inspectors are to attend for the verification and stamping of weights and measures brought to them for the purpose of verification, but the county council have made no such provision as regards beer barrels used as measures for trade. It is computed that there are over a million such barrels in use within the jurisdiction of the council, but no office, room, or place has been provided where such barrels can be sent and stored for verification and stamping in accordance with the said section. It was admitted by the prosecution that at the present time it was impossible to carry out the verification and stamping of beer barrels if they were presented, and that no provision had, in fact, been made by them for those purposes. On these facts an information was preferred by the appellant against the respondent for unlawfully using for trade a certain measure, to wit, a beer barrel, not stamped as required by section 29 of the Weights and Measures Act, 1878. The justices found as a fact that the barrel had been used by the parties to the sale as a measure; but as the county council had made no provision for the verification or stamping of beer barrels used as measures, in accordance with section 44 of the Act, they dismissed the summons, but stated a case for the opinion of the High Court, which set out the above facts and now came on for argument.

Mr. Cripps, Q.C., and Mr. Roskill appeared for the appellant; the respondent was not represented.

The COURT sent the case back to the justices with an order to convict.

[Solicitors—Clements, Williams, and Co., agents for Trevor Edwards, West Riding Solicitor, Wakefield, for the appellant.]

Chan. Div. } 1900.
(Byrne, J.) } June 19.

IN RE HAYES, DECEASED—TURNBULL V. HAYES.*

Power—Execution—Limited power—Exercise by will before date of will creating the power—Validity.

Henry Hayes the younger, by his will made in December, 1884, after bequeathing certain legacies, gave all the residue of his property over which at the time of his death he should have a disposing power upon trusts in favour of his wife for life and after her death for his children. It appeared that the testator's father, Henry Hayes the elder, by his will made in June, 1893, after bequeathing his property in shares amongst his children had empowered each child to

appoint by will a life interest in his or her share to a wife or husband. Henry Hayes the elder died in April, 1895, and Henry Hayes the younger in September, 1899. Henry Hayes the younger had no power of appointment exercisable in favour of a wife under any instrument other than the will of his father. Under a settlement of previous date to his will he had a power of appointing certain property in favour of his issue. The question for determination was whether the power conferred by the will of Henry Hayes the elder was well exercised by the will of Henry Hayes the younger, although executed before the will of Henry Hayes the elder.

Mr. D. D. Robertson and Mr. Alfred Adams appeared for the parties.

MR. JUSTICE BYRNE said:—It is clear upon the authorities that the 27th section of the Wills Act applies to general and not to special powers of appointment—see "*Airey v. Bower*" (12 App. Cas., 263); "*Boyes v. Cook*" (14 C.D., 53); and "*Foulkes v. Williams*" (42 C.D., 93). So far as the reasoning of the Vice-Chancellor in the case of "*Stillman v. Weedon*" (16 Sim., 26) is founded upon the application of section 27 of the Act, such reasoning must be disregarded in view of later decisions. It is also clear that the combined effect of sections 24 and 27 of the Act is to enable a general power of appointment by will to be well exercised by a will executed prior to the date of the instrument creating the power. Unless "*Stillman v. Weedon*" is to be read as an authority to the contrary, I have been unable to find any case in which it has been decided that a special power of appointment by will can be well executed by a will dated prior to the creation of the power by virtue of the operation of section 24 of the Act, and the opinion of Mr. Justice Stirling in "*In re Wells*" (42 Ch.D., 646) and the actual decision of the Master of the Rolls in Ireland in the case of "*Doyle v. Coyle*" ([1895] 1 I.R., 205) are distinctly opposed to any such conclusion. The case of "*Stillman v. Weedon*" may, I think, perhaps be reconciled with the last-mentioned cases, either upon the ground that if specific personal property the subject of the power be referred to in the will section 24 of the Act applies, because that property may then be said to be comprised in the will, or, to use the interpretative words of Lord Justice Turner in "*Lady Langdale v. Briggs*" (8 De G. M. and G., 391, p. 436), "so far as the will comprises dispositions of real and personal estate," or upon the ground that independently of the Act, if specific personal property the subject of the special power be dealt with by the testator, he must be deemed to have intended to exercise the only power enabling him to deal with it, although such power be created subsequently to the will. I am not certain of the precise view taken by Lord St. Leonards in "*Sugden on Powers*," 8th edition, p. 307, s. 49, where he deals with "*Stillman v. Weedon*." Be this as it may, having regard to the opinions of Mr. Justice Stirling and of the Master of the Rolls in Ireland, in the cases I have mentioned, I do not think that I ought to deal with the present case (there being no specific description of, or reference to, the property in question) upon the footing that, not being within section 27, section 24 of the Wills Act applies. The difference in the result is that I cannot start with any presumption in favour of an exercise of the power by reason of the general words of disposition, looking only to see if there be a contrary intention expressed; but that I must approach the consideration of the terms of the will as though the Wills Act had never been passed. Acting on this view, and bearing in mind that the subject-matter is personal estate, and that such personal estate is not specifically mentioned or described in the will, bearing in mind also that the decisions in "*In re*

* Reported by R. B. SCHOMBERG, Esq., Barrister-at-Law.

Wells" and "Doyle v. Coyle" show that I should have regard to the date of the will, I will refer again to the case of "Foulkes v. Williams" (42 Ch.D., 93), a case dealing with the exercise of a special power over real estate, where Lord Justice Lindley says (p. 97):—"We must bear two things in mind. First, that section 27 only applies to a general power of appointment as to which a general devise operates as an exercise of the power unless there is some indication in the will of a contrary intention. Secondly, that as regards special powers the old law applies, which is that you must find some indication either by reference to the power or by reference to the property of an intention to exercise the special power. Anything which showed that the testator had the power in his mind would be enough. But if you cannot find anything to show that the testator had the special power in his mind it would be straining language to say that the devise would be an exercise of that power." The subject-matter in the present case is personal estate and, having regard to the old law before the Wills Act in reference to personal estate, I am unable to say that the property is so referred to as to show an intention to exercise a specific special power afterwards to be created. Then I have to consider whether there is any sufficient reference to the power. It is at least doubtful whether I am at liberty to have regard to the fact that the only power the testator could exercise in favour of his wife was the power in question. Even if I am I find no reference to any specific limited power either existing or to be afterwards created, although I do find an intention expressed to dispose of all property over which the testator shall have at the time of his death a disposing power in favour of his wife to the extent of giving her a life interest. Notwithstanding the expression of an intention to dispose of all that the testator should at his death have a power to dispose of, and notwithstanding the decisions bearing upon the ineffectuality of some similar expressions as showing a contrary intention in the cases of wills operated upon by the 24th and 27th sections of the Wills Act, I think, balancing as best I may the various considerations one way and the other, that the power has not in this instance been well executed. There are legacies given to the executors, who are no objects of the power, there is a trust for sale and conversion, and there is the use of the expressions "my estate" and "my trust estate," the latter being repeated several times over. I find a general intention shown to execute all powers of appointment and to benefit the widow, but upon the whole will I cannot find sufficient ground to enable me to hold her entitled as under an exercise of the subsequently created special power. I should like to mention that in some of the text-books the actual discussion and decision in "Stillman v. Weedon" has been treated as though it were only in reference to a general power. It is, however, clear to my mind that, rightly or wrongly, the Vice-Chancellor considered both sections 24 and 27 to relate to special powers, and that he was actually dealing with a case of a special power. His Lordship therefore held that the power was not well exercised.

[Solicitors—Bell, Brodrick, and Gray, for Buchanan and Sons.]

Q.B. Div. (Grantham } 1900.
and Channell, JJ.) } June 19.
SION COLLEGE V. LORD MAYOR, &C., OF LONDON.*

Rating—Reclaimed land—Exemption—7 Geo. III., c. 37—11 and 12 Vict., c. 163, sec. 169.

*Reported by F. B. DURNFORD, Esq., Barrister-at-Law.
No. 28.—VOL. XVI.

This was a special case stated by the parties by the leave of a Judge in the matter of an appeal by the plaintiffs to the Court of quarter sessions for the City of London from a rate made by the respondents. The facts set out in the special case were as follows:—On April 23, 1899, the respondents, acting in pursuance of the City of London Sewers Act, 1897, the City of London Sewers Acts, 1848 and 1851, and the Elementary Education Act, 1870, and the Acts amending the same, duly made a consolidated rate for the year 1899 at 2s. 5d. in the pound (including 1s. 2d. for the School Board). The premises which the appellants occupied, and in respect of which they were assessed, were partly on land which was reclaimed under the statute 7 Geo. III., cap. 37, the same having been previously, until so reclaimed, part of the foreshore of the river Thames. The residue of the appellants' premises was on land reclaimed under other Acts. The questions arising on the appeal were solely concerned with the former portion. Since the conveyance to the appellants, and prior to the present rate, they had not been assessed in respect of the portion in question to the consolidated rate, owing, as the respondents alleged, to an error. The appellants duly appealed against the rate to the Court of quarter sessions for the City of London on the ground that the portion of land reclaimed under the Act of 7 Geo. III., c. 37, was exempt by that statute from all rates, taxes, and assessments whatever. The land and buildings in question, known as Sion College, were acquired by the appellants in 1886 by a conveyance to them dated April 8 of that year. The appellants contended that the land in question, and the building thereon, were not rateable to the consolidated rate made under the Acts mentioned, but were exempt by virtue of the statute 7 Geo. III., cap. 37. The respondents contended that the land was liable to be assessed to the consolidated rate under those Acts, and was not exempt. The question for the opinion of the Court was whether the land was so exempt or not.

Mr. HORACE AVORY appeared for the appellants, and in support of their contention referred to the cases of "Garnett v. Bradley" (3 App.Cas., 967) and "Thorpe v. Adams" (L.R., 6 C.P., 125).

Mr. DANCKWERTS, Q.C., for the respondents, submitted that the Act of 7 Geo. III., c. 37, only provided that the land was to be free from existing rates and taxes. The provisions in all the Acts dealing with the subject indicated that the Legislature was careful to abolish all the exemptions it could think of. In the present case the rate was a new one which the land was liable to pay. He cited the cases of "Eddington v. Borman" (4 T.R., 4), "R. v. London Gas Light and Coke Company" (8 B. and C., 54), "Liverpool Library v. Mayor of Liverpool" (29 L.J., M.C., 221).

Mr. HORACE AVORY, in reply, submitted that, according to the respondents' contention, they could take away the benefit of the exemption by calling a tax by a new name.

MR. JUSTICE GRANTHAM, in giving judgment, said that the case was one of some difficulty and he thought that it was a pity that the intention of the Legislature to take away the exemption was not more clearly expressed. He thought that the general view of the authorities, which they were bound to follow, was that the words taxes and assessments, from which the Act of Geo. III. said the land was to be exempt, included only taxes and assessments of the character then assessed. They would have very great difficulty in holding that the Legislature did not intend by section 169 of the Act of 1848 to make every person liable for the present rate, quite irrespective of whether they had any exemption in the past.

MR. JUSTICE CHANNELL said he was of the same opinion. The cases were some guide to them in the construction of the Act of Geo. III., and they said that the true construction was that it was intended to relieve the land, which was embanked under that Act, from all rates and taxes which then existed, and which in the ordinary course of things would be renewed. It was intended to relieve the land from these burdens, although the form of the burden might be changed from time to time. He thought, however, that there was a sufficient intention shown by section 169 of 11 and 12 Vict., c. 163, to override the exemption that had been given, and their decision must therefore be in favour of the respondents.

[Solicitors—Clarke, Rawlins, and Co., for the appellants; Sir H. H. Crawford, for the respondents.]

Judicial Committee of the Privy Council } 1900.
(Lords Davey, Robertson, Lindley, Sir }
H. de Villiers, and Sir F. North) } June 19.

WILLIAMS V. SCOTT.*

Privy Council Appeals—New South Wales—
Vendor and purchaser—Sale of land—Title—
Sale of trustee to himself.

This was an appeal from a decree of the Supreme Court of New South Wales of July 24, 1899, reversing a judgment of the Chief Judge in Equity.

Mr. Warrington, Q.C., and Mr. W. B. Lindley were counsel for the appellant; Mr. Swinfen Eady, Q.C., and Mr. Morten for the respondent.

SIR FORD NORTH, in delivering their Lordships' reserved judgment, said on December 2, 1898, the respondent—a mortgagee with power of sale—agreed to sell to the appellant a piece of land at Sydney for £550. The purchaser paid a deposit of 25 per cent. The title was as follows:—By her will Mrs. Catherine Austin appointed her son David Austin and her daughter Catherine Neilan her trustees and executors, and devised the property in question and other property upon trust to sell and to divide the proceeds among her eight children. She died in 1888, and by a deed of June 28, 1889, made between David Austin and Catherine Neilan as executors and trustees of the first part, William Neilan (Catherine's husband) of the second part, David Austin as administrator of the estate of Mrs. Austin's late husband of the third part, Sydney John Bull of the fourth part, and David Austin as purchaser of the fifth part, the property was sold to David Austin for £550 and in 1897 mortgaged by him to the respondent for £500. The purchaser's solicitors objected to the title upon the ground that David Austin was incapable of purchasing from himself and his co-trustee, and that the title therefore was not a marketable one. The vendor's solicitors insisted that the title was good, and produced a copy of what they described as an absolute release to the trustees from all the beneficiaries under the will of Catherine Austin, such release being dated June 15, 1889. The purchaser's solicitors pointed out that the release was insufficient, as it did not show that the beneficiaries were aware, or knew the effect, of the transaction in question; to which the vendor's solicitors replied that the transaction was well known to and acquiesced in by all the beneficiaries, and that in fact it was because the sale was made in the form set out in the conveyance of June 28, 1889, that the release was executed. The purchaser's solicitors still insisting on a deed of confirmation, the vendor's solicitors declined to procure it, as they did not consider it necessary, and stating that they had discovered that the sale was not

made to David Austin but to John Austin, who was not a trustee. That explanation did not induce the purchaser's advisers to dispense with confirmation by the beneficiaries, and, as such was refused, they claimed to have the deposit returned, saying, however, that they were willing purchasers and if their objections were met in a fair way within the next week or ten days their client would still be prepared to purchase the land, to which the only reply of the vendor's solicitors was on January 16 that they had answered all the requisitions and that, under a power in the contract, the vendor would resell unless the purchase was completed during the week, and hold the purchaser liable for any loss on such resale. They accordingly advertised the property for sale, but that was stayed by an injunction in the present suit, commenced by the purchaser against the vendor for rescission of the contract, upon the ground that the vendor had failed to make out a good title to the property, and for a return of the deposit and other consequential relief. On March 3, 1899, the suit came before the Chief Judge in Equity who agreed by the wish of both parties to decide the one point as to the title raised by the requisition above quoted, and to leave it open to either party to ask for a reference to the Master as to the title on all other points. On the same day he made a decree declaring that the defendant had failed to make out a good title to the land and that the contract must be rescinded, directing that the deposit should be repaid to the purchaser with interest, and that the plaintiff's costs of the suit should be paid by the defendant, declaring that the plaintiff was entitled to a lien on the defendant's interest in the land for such deposit and interest; and restraining the defendant from dealing with the land to the prejudice of that lien. The vendor—the defendant in the action and present respondent—appealed from that decree, and the appeal was heard before Chief Justice Darley and Justices Owen and Walker. The two former agreed that the title was one which could be forced upon a purchaser, and that the decision of the Court below was wrong. The latter was of opinion that the appeal should be dismissed. It was clear undisputed law that a trustee for the sale of property could not himself be the purchaser of it. No person could at the same time fill the two opposite characters of vendor and purchaser. But the purchase by David Austin was attempted to be supported upon two grounds not quite consistent with one another—viz. (1) that he was the purchaser of the property from all the beneficiaries who agreed in the sale to him with full knowledge of all the circumstances, and (2) that he and his co-trustee sold the property to John Austin, one of the beneficiaries, who, not being a trustee, was under no incapacity to purchase, and that David Austin subsequently purchased it from John Austin. As to the first point, their Lordships thought no sufficient evidence was forthcoming that any of the beneficiaries knew of the circumstances under which David Austin acquired and took the conveyance of the property. The allegation that the sale by the trustees was really made not to David Austin but to John Austin, who was capable of being the purchaser, was absolutely inconsistent with the terms of the conveyance itself. The proposition seemed to have found some favour in the Supreme Court that if the documents were capable of an innocent interpretation in favour of the title and the Court could say that the parties had not infringed any principle of law and were not guilty of misconduct, it would rather put that interpretation upon it than assume that the parties had been guilty of some wrongdoing or breach of law; and that in the absence of evidence to the contrary the Court must assume that the release was a proper one, and that the *cestui que trusts* were informed of all necessary matters. Their

* Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

Lordships were unable to agree in that view. The conveyance itself was incapable of any interpretation but one, and that was unfavourable to the title. A trustee for sale of trust property could not sell to himself. If, notwithstanding the form of the conveyance, the trustee (or any person claiming under him) sought to justify the transaction as being really a purchase from the *cestui que trusts* it was important to remember upon whom the onus of proof fell. It ought not to be assumed, in the absence of evidence to the contrary, that the transaction was a proper one, and that the *cestui que trusts* were informed of all necessary matters. The burden of proof that the transaction was a righteous one rested upon the trustee, who was bound to produce clear, affirmative proof that the parties were at arm's length; that the *cestui que trusts* had the fullest information upon all material facts; and that, having that information, they agreed to and adopted what was done. Under these circumstances it would be inequitable to force such a title as that upon the appellant. It was not merely that the purchaser would be running the risk of proceedings being taken by the *cestui que trusts* to reopen the transaction. The purchaser would be saddled with a property which he would be unable for many years to put upon the market, unless recourse was had to some special restrictive condition which might seriously reduce the price a purchaser would be willing to pay for it. Their Lordships would humbly advise her Majesty to discharge the order of the Supreme Court and dismiss with costs the appeal to that Court, and to direct that the respondent repay to the appellant the costs which, by the decree of the Supreme Court, the appellant was ordered to pay to the respondent. Their Lordships directed the respondent to pay to the appellant her costs of this appeal.

[Solicitors—Young, Jones, and Co., for the appellant; Clapham, Fitch, and Co., for the respondent.]

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.JJ.) } June 20.

WILLIAMS V. INGRAM.*

Practice—Discovery—Documents.

The Court refused to compel defendants to produce documents which were in their possession solely as directors of a company to which the documents belonged.

Decision of Byrne, J. (*ante*, p. 434), affirmed.

This was an appeal against the refusal of Mr. Justice Byrne, as reported *ante*, p. 434, to order the production of documents in the possession of some of the defendants. The plaintiffs are the five daughters of the late Mr. Herbert Ingram, the founder of the *Illustrated London News*, and the defendants are Sir William J. Ingram and Mr. Charles L. N. Ingram, the two surviving sons of Mr. Herbert Ingram, and some trustees. On Mr. Herbert Ingram's death his widow became solely entitled to the *Illustrated London News*, and, by an agreement made in 1882, Mrs. Herbert Ingram (afterwards Lady Watkin) assigned the newspaper business to the two defendants upon certain terms, by which she was entitled to one undivided moiety and the defendants to the other. In July, 1887, Lady Watkin, who had then parted with one-fourth of her moiety, transferred the remaining three-fourths upon trusts as to two-fourths for herself and as to the remaining one-fourth (or one-eighth of the whole business) upon trusts, under which in the events which had happened the plaintiffs had become absolutely entitled. In February, 1892, a private com-

pany was formed, under the name of the *Illustrated London News (Limited)*, with a capital of £300,000, divided into 15,000 preference shares and 15,000 ordinary shares of £10 each, Lady Watkin and the plaintiffs being entitled to 5,625 of each class of shares. The first directors were Sir Edward Watkin, Mr. E. Watkin, and the defendants Ingram. The defendants Ingram were appointed managers of the company. The plaintiffs allege that negotiations subsequently took place between Lady Watkin and the plaintiffs and the defendants Ingram for the purchase of Lady Watkin's and the plaintiffs' shares and interest in the business, and in June, 1895, it was agreed that the defendants Ingram should purchase those shares and interest in consideration of an annuity of £4,500, the annuity to be secured by a charge on the shares. The plaintiffs allege that this purchase was made on the basis that the then existing annual profits of the business were only £20,000, and their case is that a mistake had occurred, or there had been some mismanagement, inasmuch as the defendants Ingram had in 1899 sold the company to a new company—namely, the *Illustrated London News and Sketch (Limited)*—for a total sum of £1,042,500, and by the prospectus of the new company it appeared that the profits had risen to quite £60,000 a year. The plaintiffs claim a declaration that the agreement for sale of June, 1895, is not binding on them and should be set aside and an inquiry and an account. The defendants Ingram deny the statements and allegations of the plaintiffs and generally traverse their case. The plaintiffs applied for an order for the production and inspection of the books, &c., of the *Illustrated London News (Limited)* and the *Illustrated London News and Sketch (Limited)*. The defendants, by affidavit, stated that they had the books in their possession and power, but they objected to produce them because they are the property of the companies of which they are directors, but not the only directors, and that they have no property in or power to produce the same, and that the books are in their possession or power only in the sense that they have access thereto as directors of the companies and for the purposes of the business of the companies; and also because the ownership of the books relating to the *Illustrated London News (Limited)* had changed to that of the *Illustrated London News and Sketch (Limited)*. The companies are not parties to the action, but they appeared on the application. Mr. Justice Byrne refused the application. In his opinion "*Walburn v. Ingilby*" (1 M. and K., 61), on which the plaintiffs had relied, did not justify him in making the order for production. The plaintiffs appealed.

Mr. Levett, Q.C., and Mr. Mark Romer were for the plaintiffs; Mr. Danckwerts, Q.C., and Mr. Martelli, for the defendants Ingram, were not called upon; Mr. Ward Colldridge was for the two companies.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that it was well worth consideration whether the power of the Court was sufficient with regard to the production before trial of documents in the possession of third parties. But as matters now stood his Lordship was satisfied that the decision of Mr. Justice Byrne was right. There was nothing to bring the present case within any exception from the general rule, as in "*Walburn v. Ingilby*" (1 M. and K., 61), the case on which the appellants had relied. As the law and practice now stood it was impossible to compel production of the documents in question. If any alteration was to be made in the practice, this could only be done by a new rule (if that were possible) or by fresh legislation.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS concurred.

[Solicitors—Ince, Colt, and Ince; Maddisons.]

Court of Appeal (Lord Alverstone, M.R.,) 1900.
Rigby and Collins, L.J.J.) } June 20.

THE ATTORNEY-GENERAL V. THE HANWELL URBAN
DISTRICT COUNCIL.*

Local Government—Urban District Council—
Land acquired for special purpose—Sale of
surplus land.

Decision of Kekewich, J. (*ante*, p. 10),
affirmed.

This was an appeal against the decision of Mr. Justice Kekewich reported in *The Times* of November 3 last and *ante*, p. 10. The action was brought by the Attorney-General at the relation of the Earl of Jersey, and by the Earl of Jersey as co-plaintiff, for an injunction to restrain the defendants, the Hanwell Urban District Council, from erecting an isolation hospital for the reception of patients suffering from infectious diseases on some land in the parish of Hanwell, Middlesex, which had been acquired by the rural sanitary authority of the Brentford Union, the defendants' predecessors in title, from the Earl of Jersey, in 1883 for the purpose of disposing of the sewage of the parish, and from using the land, or any part thereof, as the site of any such hospital. The plaintiffs claimed a further injunction to restrain the defendants from using the land as a site for any such hospital so as to be a nuisance to the earl or his tenants, or a nuisance or injury to his adjoining property. Lord Jersey is the owner of the Osterley estate in Hanwell, consisting of arable and pasture land, and also of building land. In 1883 the Brentford Union, as the then sanitary authority of the district, purchased from him a piece of land of about 12 acres forming part of the Park farm included in the Osterley estate for the express purpose of the disposal of the sewage of the parish of Hanwell. The purchase for that purpose was sanctioned by the Local Government Board on the petition of the sanitary authority, and after an inquiry as to its propriety. The greater part of the land so acquired was accordingly used exclusively for the sewage purposes contemplated; but in 1896 the defendants, as the successors of the Brentford sanitary authority, proposed utilizing about two acres of the land which they had purchased, and which had been found to be unsuitable for sewage purposes, for the erection of a hospital for infectious diseases other than smallpox. A public inquiry was then held, on December 17, 1896, by a Local Government Board inspector, and the result was that by an order under the seal of the Board, and dated April 3, 1897, the Board directed that the two acres should be retained by the defendants as a site for the erection of a hospital for infectious diseases other than smallpox. The plaintiffs thereupon brought the present action, contending that the defendants had no power, either statutory or otherwise, to use the land for any other purpose than that for which it had been originally acquired. The defendants relied on the order of the Local Government Board, and contended that they were entitled to use the two acres for an isolation hospital, although that was not the purpose for which they and the rest of the 12 acres were originally required. Section 175 of the Public Health Act, 1875, provides that "Any local authority may for the purposes and subject to the provisions of this Act purchase or take on lease, sell or exchange any lands, whether within or without their district. . . . Any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold. . . ." Mr. Justice Kekewich held that the defendants were

not entitled to use the land for purposes for which it had not been originally acquired, and that the plaintiffs were entitled to an injunction restraining the defendants from using the two acres as a site for a hospital for infectious diseases other than smallpox. The defendants appealed.

Mr. Warrington, Q.C., and Mr. Stallard were for the defendants; Mr. Renshaw, Q.C., and Mr. Howard Wright were for the plaintiffs.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that he had felt considerable difficulty during the argument, and the case had seemed to him by no means a clear one. But on consideration he thought that the decision of Mr. Justice Kekewich ought to be affirmed. Under the Public Health Act provisions were made for the protection of landowners, and the local authority was required to state the purposes for which it required to take land compulsorily. Unless section 175 altered the rights of the parties it must be taken that the defendants' predecessors acquired the land for statutory purposes—for the disposal of sewage. It was found that two acres of the land acquired were not fitted for the purposes of sewage, and then the idea occurred to the defendants that they might use the two acres not for any purpose connected with sewage, but for the purpose of erecting an isolation hospital—not a temporary hospital, but a permanent one. This led to the order which was made by the Local Government Board in April, 1897, which directed that the two acres should be retained by the defendants as a site for the erection of a hospital. It could not be implied or suggested that the Local Government Board had any power to enforce the erection of a hospital. The order was really made under section 175, and its effect was that the council might retain the land as their own, and then they could use it for any lawful purpose. In his Lordship's opinion, the language of section 175 was not sufficient to enable the local authority to apply the land permanently to a purpose for which they did not originally acquire it. The local authority had limited powers; they had power to acquire land compulsorily for specific purposes. They held the land subject to that restriction. The Local Government Board had directed that the land should not be sold. There might be many reasons why it would be desirable that the land should remain in the hands of the local authority, though they might not be able to use it permanently for any but the original purpose. At any rate, it would be too strong a thing to import a power of the Local Government Board to authorize the local authority to use the land for a purpose wholly inconsistent with that for which it was acquired. When there was a direction by the Local Government Board that the land should not be sold it could not be said that the local authority held the land free from any restriction. The Court was not now dealing with a merely temporary user, for it was admitted that the defendants intended to use the land for a permanent hospital.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS concurred.

[Solicitors—P. J. Dennis; Freshfields and Williams.]

Chan. Div. } 1900.
(Cozens-Hardy, J.) } June 20.

IN RE THE NEWSPAPER PROPRIETARY SYNDICATE
(LIMITED)—HOPKINSON V. THE NEWSPAPER PROPRIETARY SYNDICATE (LIMITED).*

Company—Winding up—Preferential payments—

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

*Reported by D. FITCAIRN, Esq., Barrister-at-Law.

Salary of "clerk or servant"—Salary of managing director.

This was a summons in a debenture-holders' action to determine whether a managing director was entitled as clerk or servant of his company to a preferential payment up to £50 over the debenture-holders in respect of arrears of salary. The preferential payments in the Bankruptcy Act, 1888, in a bankruptcy or winding up of a company, gave priority to all other debts to "all wages or salary of any clerk or servant in respect of services rendered to the bankrupt or company during four months before the date of the receiving order, or, as the case may be, the commencement of the winding up, not exceeding £50." The preferential payments in Bankruptcy Amendment Act, 1897, extended the priority to cases of the appointment of a receiver for debenture-holders with a floating charge on the assets of a company. By an agreement, dated October, 1897, Mr. James Kirby had been duly appointed managing director of the Newspaper Proprietary Syndicate (Limited) for three years at a salary of £600 a year. He had acted down to the time of the appointment of the receiver in this action as managing director and advertising manager, and not received any remuneration.

Mr. Martelli appeared for Mr. Kirby in support of the claim; Mr. Douglas opposed.

MR. JUSTICE COZENS-HARDY, in delivering a reserved judgment, held that a managing director is not "a clerk or servant" within the meaning of the Acts, and that Mr. Kirby was not entitled to priority; at the same time, as the point had been properly raised, he directed the costs of the summons to be paid by the receiver out of the assets.

[Solicitors—Ward, Bowie, and Co.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) } 1900.
June 21.

GREAT WESTERN RAILWAY COMPANY V. LONDON AND COUNTY BANKING COMPANY (LIMITED).*

Banker—Cheque—Crossed cheque—"Customer," who is—Bills of Exchange Act, 1882, sec. 82.

Decision of Bigham, J. (15 *The Times* L.R., 433), affirmed.

This was an appeal from the judgment of Mr. Justice Bigham at the trial of the action without a jury, reported in 15 *The Times* L.R., 433; 4 Com. Cas., 250. The action was brought to recover £142 10s., money had and received by the defendants to the use of the plaintiffs, or, in the alternative, to recover damages to a like amount for the conversion of a cheque.

The facts were as follows:—One Huggins had been for many years a rate collector in the employment of the Wantage Rural District Council and of other similar bodies. In this capacity he had been in the habit of receiving from the plaintiffs and others cheques for the amounts payable by them for rates, and the cheques so received he used frequently to cash through the defendants' branch bank at Wantage. He had been in the habit of cashing cheques in this way for 15 or 20 years, and a considerable number of such cheques (50 or 60) were cashed by him in the course of each year. Apparently Huggins, on receipt of the money for the cheques, distributed it among the local bodies to whom he had to account. He was well known to the manager and officials of the

bank at Wantage, and the bank were the bankers of the Wantage Rural District Council. Huggins, however, kept no account with the defendants, nor had he any pass-book; his transactions with the defendants were completely disposed of in each case as and when he brought the cheques. In November, 1898, Huggins falsely pretended to the plaintiffs that a rate had been made, and that the plaintiffs owed in respect of the same £142 10s. By, this means he induced the plaintiffs to give him their cheque for that amount. The cheque was drawn on the head office of the London Joint Stock Bank in favour of Huggins or order; it was crossed generally and marked "not negotiable." On November 16 Huggins, in accordance with his usual course of dealings with the defendants, took this cheque to their bank at Wantage to get it cashed. He handed it across the counter to the bank clerk, and the latter filled up a paying-in slip, which Huggins signed. This paying-in slip contained no reference to the cheque itself, but purported to show a payment into the bank of £142 10s. in money, a payment out to Huggins of £117 10s., and a payment to the credit of the district council's account at Huggins's request of £25. The learned Judge at the trial held that the business effect of this was that the bank handed to Huggins the amount of the cheque, £142 10s., which he then and there disposed of to his own use. Having thus obtained the cheque, the defendants crossed it to themselves, and sent it up to their head office in London for collection. On the next day, November 17, the cheque was duly presented and paid. Huggins's fraud was immediately discovered, and on November 18 he was arrested on a charge of obtaining the cheque by false pretences, and on January 2, 1899, he was tried, convicted, and sentenced. The plaintiffs then brought this action against the defendants. By section 81 of the Bills of Exchange Act, 1882, "where a person takes a crossed cheque which bears on it the words 'not negotiable' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had." By section 82, "where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." Mr. Justice Bigham found as a fact that the defendants received payment of the cheque in good faith and without negligence, and that they received it for Huggins; and he was of opinion that Huggins was a customer of the bank within the meaning of section 82. He accordingly held that, though Huggins had only a defective title to the cheque, and by section 81 could not give the defendants a better title than he himself had, yet by section 82 the defendants were protected from liability. He therefore directed that judgment should be entered for the defendants. The plaintiffs appealed.

Mr. H. D. Greene, Q.C., Mr. Asquith, Q.C., and Mr. Park Goff appeared for the plaintiffs; Mr. A. T. Lawrence, Q.C., and Mr. Guy Lushington for the defendants.

LORD JUSTICE A. L. SMITH read the following considered judgment:—This action is brought by the Great Western Railway Company to recover from the London and County Banking Company as money had and received by the defendant bank to the use of the plaintiffs a sum amounting to £142 10s., or, in the alternative, in trover for a cheque for the like sum, which cheque had been fraudulently obtained from the plaintiffs by a man named Huggins, and which had been cashed by the defendants for Huggins and its proceeds received by the

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

defendants from the plaintiff company under the following circumstances:—Huggins was a rate collector at Wantage, and by falsely pretending to the plaintiff company that certain rates were due from them obtained from the plaintiff company in supposed payment of the rates the cheque in question. It was a cheque drawn by the plaintiff company upon the London Joint Stock Bank in London in favour of Huggins or order, and was crossed “and Co.,” “not negotiable.” It was proved that the plaintiff company always paid Huggins the rates due from them by cheques in the above form. The cheque, it will be seen, was a cheque drawn upon the head office of the London Joint Stock Bank in London, and what I will call Huggins’s ordinary course of business with the defendant bank was to go to its Wantage branch when he received cheques from the plaintiffs, endorse them, and then present them at the Wantage branch to be cashed. And this the defendant bank was accustomed to do for Huggins. This was the course of business between the defendant bank and Huggins; and at times, at Huggins’s request, the branch bank would place some portion of the cash, which would otherwise have been handed to Huggins, to accounts named by Huggins. The branch bank then forwarded the cheque so cashed for Huggins to its head office in London, which then presented and obtained payment of the cheque from the drawers, in this case the plaintiffs in this action. This as regards the cheque in question had all taken place before the fraud of Huggins was detected by the plaintiffs, and when they did afterwards discover it they demanded the cheque or its proceeds from the defendants, which was refused. The plaintiffs thereupon brought this action. The plaintiffs in the first instance attempted to show that the defendants, when they took the cheque, took it with notice of Huggins’s fraud, but in this they wholly failed, and this was abandoned at the trial. I will assume that money had and received or trover will lie in the circumstances of this case; but in the view I take it is not necessary to decide this, for supposing, as I will, that such actions or either of them will lie, if the question decided by my brother Bigham is rightly decided, as I think it is, this question becomes immaterial, for the real question is, Did the defendant bank in cashing the cheque for Huggins as they did, though crossed and with the words “not negotiable” thereon, come within the protection afforded to bankers by section 82 of the Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61)? It is true that section 81 of the Act enacts that “where a person takes a crossed cheque which bears on it the words ‘not negotiable’ he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had”—in this case no better title than Huggins, which after disaffirmance of the transaction by the plaintiffs would be no title at all. But section 82 protects a banker who receives payment for a customer of a crossed cheque as follows:—“Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.” Two points are made by the plaintiffs upon this section 82. The first is that Huggins was not a customer of the bank within the meaning of this section; and, secondly, if he were, the bank did not receive the proceeds of the cheque from the plaintiffs for their customer but for themselves. It was proved that the course of business between Huggins and the defendants—viz., the defendants’ cashing cheques for Huggins whether crossed and with the words “not negotiable” thereon, or without being crossed, at the Wantage bank, and collecting them—had been in existence for some 20

years, and that this was the way, as between Huggins and the branch bank in which he obtained cash for the cheques received by him as rate collector. I agree with my brother Bigham that whether or not a man is a customer of a bank is a question of fact. I do not agree with the suggested reading of the section that the word “customer” is confined to the case of a person who keeps a current account with a bank. I can find no such limitation in the section. This is not like the case of a stranger coming to a bank upon an isolated occasion to get a cheque cashed, which was the case in “*Matthews v. Brown*” (63 L.J., Q.B., 494), where it was held that such a person was not a customer within the section, Mr. Justice Cave saying that the word “customer” involves something of use and habit. In the present case there has been use and habit for 20 years. It was upon the same principle that Mr. Justice Collins, in “*Lacave and Co. v. Crédit Lyonnais*” ([1897] 1 Q.B., 148), decided that one Ponce was not a customer, the learned Judge saying (at page 155) that to constitute him one his relations must be much nearer and closer than those of Ponce in that case. I think that the cashing of the cheques for Huggins and then the collecting of the cheques by the defendant bank during a period of 20 years as a matter of fact constituted Huggins a customer of the bank, and I agree with Mr. Justice Bigham as to this. Then comes the next question, Did the bank receive payment of the cheque from the plaintiff company for their customer, Huggins, or for themselves? If they received such payment for Huggins I do not see how it can be even argued that Huggins was not their customer. It is said for the plaintiffs that the defendant bank did not do so, for it purchased from Huggins the cheque in question, and took it for better or for worse. I cannot think so. The defendant bank charged nothing for undertaking the suggested liability. Why should they have done so? I heard no reason, and I cannot conceive why they should have done so. The truth is that the branch bank, to accommodate Huggins and possibly themselves, in being able thus to pass money to London, cashed the London cheque at Wantage, undertaking to collect it for Huggins, he and not the bank standing the risk of the cheque not being met by the drawers. In my judgment they did not purchase the cheque at all. They collected it for Huggins, and not for themselves as argued. This is the inference Mr. Justice Bigham drew, and I draw the same. For the reasons above I am of opinion that the defendants are entitled to the protection afforded to bankers by section 82 of the Act, and I agree with my brother Bigham in the conclusion at which he arrived. The appeal must be dismissed with costs.

LOED JUSTICE VAUGHAN WILLIAMS read the following judgment:—Apart from the Bills of Exchange Act, 1882, I think there can be no doubt but that the defendant bank would, in the circumstances of this case, have become holders for value to the extent of the amount of the cheque, and would have been able to sue in their own right for that amount. The defendants would in no sense have had to sue as trustees for Huggins. This would have been their right and position as endorsees *bona fide* for value, and that value being the full amount of the cheque it seems to me immaterial for the question to be decided in the present case whether you speak of the defendants as discounters or purchasers or holders for full value. In any view they, apart from the Bills of Exchange Act, 1882, would have been holders of the cheque able to sue in their own right for the whole amount. See “*Thiedeman v. Goldschmidt*” (1 De G. F. and J. 4, at p. 11). Now of such persons it seems to me that it would be *prima facie* wrong to draw the inference that they were bankers receiving payment for a

customer of a cheque endorsed generally by the payee and payable on demand, not being post-dated. Apart from some evidence of a contrary intention the right inference to draw in such a case would be that the bankers received for themselves and not for the customer. Now what is the evidence of contrary intention—that is, of an intention that the defendant bank should collect and receive payment of the cheque as agents for Huggins? Nothing that I can see, except the fact that they made no charge for cashing a cheque payable on demand. Against this is the fact that there are no entries in the bank books and no receipt or other document such as one would expect if the bank were really acting as collecting agents for Huggins. The bank were willing to give cash for the cheque because they trusted Huggins. The mere absence of an express bargain in the series of years leaves the *prima facie* presumption where it was. To draw the inference of agency in the absence of evidence is very like repealing the 81st section in the case of bankers. If this is the right view, does the fact that this cheque was marked “not negotiable” make any and what difference in the position of the bank? Are the defendants, notwithstanding these words “not negotiable,” holders for value? I think they are. Section 81 runs thus:—[His Lordship read the section.] The section does not say that the person to whom the payee of the cheque gives a crossed cheque marked not negotiable shall not become transferee of the cheque, but merely that he shall not take a better title than that which the person from whom he took it had. The transferability of the cheque is not affected by the words “not negotiable,” but only its negotiability. Such being the effect of section 81, I see nothing in this case to induce me to draw the inference that the defendants, after they ceased to retain the cheque by presenting it at the bank on which it was drawn and received the amount, received or held that amount as agents for Huggins; but Mr. Justice Bigham and my brethren take a different view of the facts, and draw the inference that the defendant bank received the amount of the cheque for their customer Huggins. Notwithstanding the fact that when they took the cheque from him they paid him the full amount by paying for him £25 to the Wantage Rural District Council and giving him the balance of £117 10s. in cash, I do not think that I ought to differ from three Judges on a question of fact, and it therefore becomes unnecessary to consider the question of the right of action of the plaintiffs, the drawers, on the assumption that section 82 affords the defendants no protection; but I see no reason to doubt but that the plaintiffs, as true owners of the cheque, would have an action for the money obtained by the presentation of the cheque, notwithstanding the fact that the cheque when issued was a voidable and not a void instrument. It would have been otherwise but for the statutory effect of the words “not negotiable,” but I am inclined to think that the effect of those words is to place the person taking the cheque bearing those words in exactly the same position as the person from whom he takes it; but in the view of the facts taken by my brethren it is not necessary to decide this question.

LORD JUSTICE ROMER read the following judgment:—This is a curious case, and one of difficulty; but I have come to the conclusion that Mr. Justice Bigham was right in holding the defendant bank protected by section 82 of the Bills of Exchange Act, 1882. I think on the facts the preferable view of the arrangement between Huggins and the bank with regard to the cheque in question is that the latter was to forward the cheque for collection and to receive the proceeds on behalf of Huggins in the sense in which the section

speaks of a bank receiving payment for a customer, and that in anticipation of such receipt the bank advanced to Huggins the amount of the cheque. Of course the bank had the right to apply the proceeds in repayment of the advance, and had a lien on the cheque for the amount of the advance; but this, while establishing that the bank had a beneficial interest to the fullest extent in the cheque, does not conflict with the position taken up by the bank that in a legal sense, in the sense of the wording of section 82, the bank, when receiving the proceeds of the cheque, did so on behalf of Huggins. Suppose in this case Huggins had a current account with the bank, which was not in credit, and that the cheque had been paid in by him in the ordinary way as a customer, and that the bank had credited him with the amount at once, and allowed him to draw against that amount before the bank received payment of the cheque—in that case, equally with this, the bank might have had a beneficial interest in the cheque even to the extent of its full value; but it would clearly, in my opinion, have received payment of the cheque for its customer within section 82. In that case, as in this, the bank, as against the world, would have been a “holder for value” of the cheque within the definition of holder for value in the Act. But this is perfectly consistent with the view that in both cases, within the meaning of section 82, the bank received payment of the cheque for Huggins. The chief facts which lead me to the conclusion that in this case the bank received payment of the cheque for Huggins are that throughout the long period during which Huggins's cheques were cashed by the defendant bank there is no evidence or suggestion of any bargain being come to between them, or of any contract of purchase being negotiated or really intended. It is clear that no remuneration was paid to the bank by Huggins for advancing the amounts of the cheques, and I cannot think that it was intended that the bank should run any risk in the matter of title, or any risk whatever other than that involved in the mere advance of the amounts of the cheques. It must be remembered that what the bank cashed for Huggins were cheques payable immediately and drawn to his order, and were not even like short bills; and the true intent of the parties is, in my opinion, further shown by the fact that the bank advanced to Huggins the full amounts of the cheques without charge, even though some were, like the one in question in this action, crossed “not negotiable,” which to a bank must necessarily have caused hesitation or doubt if the bank was doing anything more than acting as a bank in receiving payment of the cheques on behalf of a customer. If I am right in the view that the true arrangement between Huggins and the bank in cashing his cheques was that the bank should receive payment of them for Huggins and apply the proceeds in repayment of its advances, then I cannot doubt, bearing in mind how long and continuously that arrangement had existed and been acted on, but that at the time the cheque in question in this action was cashed the relation of banker and customer existed between Huggins and the defendant bank, and that the bank received payment of that cheque for a customer within the meaning of section 82. It cannot have been essential that a current account should have been opened, into which the advances on the cheques on the one hand and the payments to the bank on those cheques on the other hand should be entered. This view renders it unnecessary for me to consider whether, if the bank could not avail itself of the provisions of section 82, it could as an innocent party escape liability on the ground that the payment of the cheque to it was by the act of the plaintiff company itself.

[Solicitors—R. R. Nelson, for the plaintiffs; Harries, Wilkinson, and Raikes, for the defendants.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.J.J.) } June 21.

BURGER V. INDEMNITY MUTUAL MARINE ASSURANCE
COMPANY (LIMITED).*

Insurance—Marine—Collision clause—Construction—Cost of dispersing wreck.

Decision of Mathew, J. (15 *The Times* L.R., 506), reversed.

This was an appeal from a judgment of Mr. Justice Mathew's on the trial of an action without a jury, reported in 15 *The Times* L.R., 506; 4 Com. Cas., 328. The action was brought by shipowners on a policy of marine insurance granted by the defendants, and dated April 1, 1897, for £3,500 on the hull and machinery of the plaintiffs' steamship *Durward* for 12 months from April 1, 1897. The policy contained, *inter alia*, the following clause:—"Collision clause. Cross-liability. And we further agree that if the ship hereby assured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof be found liable to pay, and pay, any sums (not exceeding the value of the ship hereby assured) in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel, we will severally pay the assured such proportion of three fourth parts of said sums as our respective subscriptions hereto bear to the value of the ship hereby assured. . . . But this agreement is in no case to be construed as extending to any sums the assured may become liable to pay in respect to loss of life or personal injury to individuals from any cause whatever." On November 25, 1897, the *Durward* came into collision with, and sank, the tug *Victory* in the River Tees, and the *Victory* became a wreck, which was subsequently dispersed by the River Tees Conservancy Board acting under its statutory powers, and the costs of dispersing such wreck—viz., £1,178 19s. 10d.—were claimed by the board under their statutory powers, and were duly paid by the owners of the *Victory*. In an action arising out of the collision brought in the Admiralty Court the *Durward* was held alone to blame, and her owners were held liable to pay, and did pay, to the owners of the *Victory* the value of the tug and also the aforesaid sum of £1,178 19s. 10d. The plaintiffs claimed from the defendants the defendants' proportion of the amount which they had been obliged to pay in the Admiralty action. The defendants paid in respect of the value of the tug only, and the plaintiffs brought this action for the defendants' proportion of the payment of £1,178 19s. 10d. The defence was that the payment was not a sum paid in respect of an injury to the *Victory* within the meaning of the policy. Mr. Justice Mathew gave judgment in favour of the plaintiffs. The defendants appealed.

Mr. Carver, Q.C., and Mr. T. E. Scrutton appeared for the defendants; Mr. Joseph Walton, Q.C., and Mr. J. A. Hamilton for the plaintiffs.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said it was with great diffidence that he felt himself unable to agree with Mr. Justice Mathew in the conclusion to which he had come in this case. They had to construe a collision clause contained in a policy by which the owners of the steamship *Durward* had insured their vessel with the defendants. The *Durward* collided with the tug *Victory* in the River Tees and sent it to the bottom, and it had

been found that this happened by reason of the negligence of those on board the *Durward*. The owners of the *Durward* were accordingly held to be liable to pay the owners of the *Victory* the damage sustained by them through the collision. The *Victory* having sunk in the fairway, the Commissioners of the Tees, acting under their statutory powers, dispersed the wreck and claimed the expenses of so doing from the owners of the tug. The owners of the tug paid the amount so claimed, viz., £1,178, and sought repayment of it from the owners of the *Durward*. The owners of the *Durward*, in accordance with their liability, besides paying the owners of the *Victory* the value of the tug, also paid them the sum of £1,178, and they now claimed to be indemnified by their underwriters, contending that their liability to make this payment was covered by the collision clause. Mr. Justice Mathew held that it was covered, and the underwriters appealed. By the collision clause the underwriters agreed that, if the ship assured should come into collision with any other ship or vessel, and the assured should in consequence thereof be found liable to pay, and should pay, any sum in respect of one or other of three subject-matters, then the underwriters would pay the assured three-fourths of such sums. In his opinion it was clear that the clause was limited to those three subject-matters. The first was "in respect of injury to such other ship or vessel itself." The second was "in respect of injury to the goods and effects on board thereof." The third was "for loss of freight then being earned by such other ship or vessel." The three subject-matters were quite clear, and the liability to indemnify was limited to them. He could see no reason for construing the words "in respect of" as meaning "in consequence of," as the plaintiffs contended ought to be done. The word "itself" seemed to him to be strongly in the defendants' favour; and with regard to that the assured had already paid a sum in respect of injury to the "other ship itself," and had been repaid by the underwriters. With regard to the third subject-matter, it was argued by the plaintiffs that the words "freight then being earned" were not words creating a liability on the part of the underwriters, but were words limiting their liability. Whether that were so or not, the point did not seem to him to avail the plaintiffs. The plaintiffs also relied on the proviso at the end of the clause as showing that the earlier words ought to be construed as bearing an enlarged meaning. In his opinion the insertion of the proviso was not really necessary. He came to the conclusion that the payment now in question was not covered by the collision clause, and that the appeal must be allowed.

LORD JUSTICE VAUGHAN WILLIAMS said he was of the same opinion. The assured had been held liable to pay to the owners of the tug *Victory* the expenses of dispersing the wreck of the tug; and they sought to recover the amount from their underwriters under their policy. Whether they could do so depended on the following words contained in the collision clause:—"In respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel." These words seemed to him so clear as to require no explanation. They catalogued the injuries in respect of which the underwriters undertook to pay the assured if the assured had to pay any sum in respect of them. In his opinion it was impossible to say that a sum which the assured had to pay in respect of the expense of clearing the tideway of the River Tees of a vessel which had been wrecked was a sum of money paid in respect of injury to the vessel itself.

LORD JUSTICE ROMER delivered judgment to the same effect.

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

Q.B. Div. (Bigham and)
Phillimore, JJ.) }

1900.
June 21.

BOOTS, CASH CHEMISTS (LANCASHIRE) (LIMITED), AND
OTHERS V. GRUNDY AND ANOTHER.*

Action, cause of—Trade combination—Interference with business—Inducing persons not to deal with plaintiffs.

An action will not lie against persons who, for their own benefit, combine to induce others to refrain from dealing with a particular person.

This case raised a most important question on the law of conspiracy. It was an argument on a point of law raised on the pleadings in the action, the defendants alleging that the statement of claim showed no cause of action. The plaintiffs and defendants were both sellers of etchings and engravings. The statement of claim alleged that the defendants in combination with others had maliciously and without just cause or excuse interfered with the plaintiffs in carrying on their business by inducing customers not to deal with them, through publishing a circular in these terms:—"Private and Confidential.—In view of the combination of several of the London publishers it is time that all *bona fide* printsellers throughout the provinces became united to defend themselves. It is known that two or three firms have admitted that they supply 'Boots and Co.' (meaning the plaintiffs), the Stores, Drapers, and others (who are non-subscribers to the Printsellers' Association) at half-price, and we think it very unfair when we know that these people want them to sell to the public at 25 per cent. off the published prices and advertise the fact. If the provincial trade would all agree not to order any goods from the travellers representing houses whose publications are systematically shown and offered by these notorious undersellers then their reports of no success will show their principals how very seriously we take it, and, although the measure proposed at the general meeting of the Printsellers' Association will not go to the root of the evil, we feel sure it is bringing the aggressor into a smaller radius and will to some extent mitigate this pernicious system of underselling. This matter is becoming so serious throughout the provinces that we venture to bring this suggestion before your notice in the hope that with your assistance it will have the desired effect. We are, yours faithfully." Then followed the names of 21 signatories. The defendants and the signatories were members of the Printsellers' Association. The plaintiffs alleged that the intention of the defendants and the signatories was to induce printsellers to refrain altogether from dealing with any print publisher who might sell any goods to the plaintiffs and to coerce print publishers into refusing altogether to supply the plaintiffs with any goods at all. That the defendants had coerced the majority of publishers in this country into refusing to sell any of their publications or any goods at all to the plaintiffs and that the plaintiffs had suffered damage through these acts. They claimed an injunction restraining the defendants from wrongfully and maliciously interfering with the plaintiffs in the free conduct of their business, and from continuing to do so by repeating the acts complained of. They also claimed damages.

Mr. RUFUS ISAACS, Q.C., and Mr. T. E. SCRUTTON, for the defendants, contended that the statement of claim disclosed no cause of action, as it only alleged an unfair competition on the part of the defendants. That was a perfectly lawful act—"Mogul Steamship Company v. McGregor, Gow, and Co." (23 Q.B.D., 598; [1892] A.C., 25). It did not become unlawful if done

by one person with a malicious motive—"Allen v. Flood" ([1898] A.C., 1); nor yet if done by many—"Kearney v. Lloyd" (26 L.R. 1, 268); "Huttley v. Simmons" ([1898] 1 Q.B., 181); "Scottish Co-operative Society (Limited) v. Glasgow Fleshers' Association" (35 *Scottish Law Reporter*, 645). A combination to do a lawful act was legal unless the act was done by illegal means. They also cited "Reg. v. Warburton" (L.R., 1 C.C.R., 274); "Reg. v. Aspinall" (2 Q.B.D., 48); "Reg. v. Turner" (13 East, 228); "Temperton v. Russell" ([1893] 1 Q.B., 715). Mr. JOSEPH WALTON, Q.C., and Mr. ARTHUR COLEFAX, for the plaintiffs, argued that there still existed causes of action, the gist of which was combination. Combination might render illegal an act which without the combination would not be illegal. This class of action was expressly left untouched in "Allen v. Flood" ([1898] A.C., 1), but was recognized in "Mogul Steamship Company v. McGregor, Gow, and Co." ([1892] A.C., 25), per Lord Halsbury at p. 38, per Lord Bramwell at p. 45. The acts of the defendants in this case went far beyond what was done in the case last cited.

MR. JUSTICE PHILLIMORE.—If a strange butcher comes to a village and the existing butchers to prevent his effecting a foothold agree to undersell him that is quite lawful.

Mr. JOSEPH WALTON.—No doubt. But if they publish the fact that they will not supply any one who has dealings with him that is actionable, if done in combination.

MR. JUSTICE BIGHAM.—A tradesman may refuse to supply any one without giving any reason. Why should his expressing his reason make his refusal actionable?

Mr. JOSEPH WALTON.—His intent is then manifest. Even if it were lawful to force the defendants here to keep up the prices of prints this object is being attained by illegal means. It is not lawful to attain a lawful object by means of insult and annoyance.

Mr. RUFUS ISAACS, in reply, cited "Tarleton v. McGawley" (1 Peake N.P.C., 270), and contended that nothing short of a tort in attaining a legal object would make its attainment unlawful. The argument for the plaintiffs involved an examination by the Court of the question what is reasonable trade competition, a question which the Court would not enter upon.

As the learned Judges differed in opinion, the judgment of the junior Judge was delivered first.

MR. JUSTICE PHILLIMORE read the following judgment:—The motion before us is to strike out the statement of claim as disclosing no cause of action, and the only cause of action upon which in the argument before us the plaintiffs placed reliance may be summed up in these words. The plaintiffs complain that the defendants have combined with others to prevent them from carrying on their trade by effectually inducing third parties not to sell to them, and that they have done this maliciously without just cause or excuse. The words "maliciously without just cause or excuse" probably add nothing to the strength of the plaintiffs' complaint; but they anticipate, and by anticipation repel, that which, if alleged and proved, would be a sufficient defence—namely, that the acts of the defendants were acts of trade competition and in furtherance of their own trade (see "Mogul Steamship Company v. McGregor" [1892] A.C., 25). When regard is had to the detailed allegations with which this framework of complaint is clothed in the statement of claim, it seems not improbable that the defendants would, if the case went to trial, prove this defence and win the cause. But for the moment we have not to consider this. The question for us appears to be whether a combination by several against one, not for their own advantage, but for the purpose of depriving him of his trade or doing

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

him some other pecuniary injury, gives to the person so injured a cause of action against the confederates. That any single person can use his utmost endeavour to prevent third persons from dealing with another man, and thus deprive him of his trade and even of his means of livelihood, is settled by the decision of the House of Lords in "*Allen v. Flood*" ([1898] A.C., 1), and I presume that what one could do any number of persons acting separately and without concert could equally do. But the effectual strength of one, or even of a number acting separately, is as nothing compared with the force of a combination which may be irresistible. If in such a case the injured person has no cause of action either for damages or an injunction he is without remedy; for if the combination be not actionable, it certainly is not criminal, and, conversely, wherever an act is criminal the person injured has (subject to the rule of public policy which postpones civil proceedings for a felony) a right of action for the civil injury. Now there are certainly some injurious acts which one person may do towards another without committing a crime, and which when done by several persons in combination become criminal. The books give several classes of indictable conspiracy. Some of them may be obsolete, or may, upon a more careful analysis, appear to be not substantive crimes, but only modes of looking at other crimes, or the evidence of an attempt to commit crimes. But when all deduction is made, there remain some cases of conspiracy which are criminal solely because of the combination. Knowingly to charge a man falsely with the commission of a crime is cruel and wicked, but if the accuser avoids giving evidence and committing perjury he will escape the criminal laws. The combination, however, of several to charge an innocent person with a crime is laid down to be an indictable conspiracy. The books also say that a combination to injure a man by fraud is an indictable conspiracy; and, though it seems difficult to say, with the modern improvements in our criminal law, that there are many cases in which a single person can injure another by fraud without committing a crime, still there are some, and at one time there were more, and to them, when done in combination, the law of conspiracy was applied. "*Reg. v. Robinson*" (1 Leach, 37) is a case in point; and in the more modern case of "*Reg. v. Warburton*" (L.R. 1, C.C.R., 274) the Court for Crown Cases Reserved assumed that for the act charged at the time it was committed an individual would have been scathless, but held confederates liable. If and where the practice of boycotting "maliciously and without just cause or excuse" was carried on to such an extent as to deprive a man or woman of the means of livelihood, it would be a blot upon our law if the confederate boycotters could not be punished. In these instances, therefore, confederacy would be indictable and therefore actionable. Now that the case of "*Reg. v. Turner*" (13 East, 228) has been disapproved and the authority of it, I think, destroyed by "*Reg. v. Rowlands*" (17 Q.B., 671), I should hold that all confederacies to injure a man by committing torts, which would be actionable against individuals committing them separately, become indictable by reason of the combination. It seems, further, that confederacies to injure without committing actionable torts, but by doing acts punishable only in the Ecclesiastical Court, are also indictable conspiracies ("*Reg. v. Best*," 2 Ld. Raym., 1,167; "*Reg. v. Lord Grey*," 9 St. Tr., 127). It remains to consider whether a confederacy to injure, which can be carried out without the commission of any tort actionable against an individual and without any breach of the old ecclesiastical law, may not, nevertheless, be a conspiracy. I say the old ecclesiastical law because it may be that the abolition of the ecclesiastical jurisdiction in defamation has made what

was relied upon in "*Reg. v. Best*" (2 Ld. Raym., 1,167) as an ecclesiastical offence one no longer. It is true that the language of the Judges who charged the jury in "*Reg. v. Parnell*" (14 Cox C.C., 508) is, with regard to their third division of the crime of conspiracy, hesitating and varying, and even the same might be said of the judgment of Lord Justice Bowen in "*The Mogul Steamship Company v. McGregor*" (23 Q.B.D., 598). Sometimes the learned Judges speak in the most general language of any combination to do any form of injury, and sometimes they seem to speak of combinations to commit actionable wrongs. But the observations of Lords Bramwell, Hannen, and Field when deciding the last-named case in the House of Lords, and the reservation of Lords Herschell and Macnaghten when giving their decision in "*Allen v. Flood*" ([1898] A.C., 1), lead me to conclude that they recognized the wider view of conspiracy taken in the older cases. I do not see that in "*Reg. v. Robinson*" (1 Leach, 37) there was any actionable wrong, or that in "*Reg. v. Warburton*" (L.R. 1, C.C.R., 274) the injured partner would have had any civil remedy except in the Court of Chancery. I have made my observation on "*Reg. v. Best*" (2 Ld. Raym., 1,167), and I can see that in a conspiracy falsely to charge a man with crime some at least of the conspirators might take an effectual share without uttering slander or committing any actionable wrong. I think, therefore, that if the confederacy in this case for the motives and purposes alleged in the statement of claim were proved as laid it would be indictable, and at least equally, if not *a fortiori*, actionable. In other words, given the confederacy, the motive and purpose make all the difference. If a number of persons, because of political or religious hatred, or from a spirit of revenge for previous real or fancied injury, combine to oppress a man and deprive him of his means of livelihood for the mere purpose of so-called punishment, I think the sufferer has his remedy. If the combination be to further their own prosperity, if it be constructive, or destructive only as a means to being constructive, the case is otherwise.

MR. JUSTICE PHILLIMORE then read the following judgment of Mr. Justice Bigham:—It is necessary to read this statement of claim with care in order to ascertain its true legal effect. It begins by alleging that the plaintiffs and the defendants are both engaged in the trade of printers, and it proceeds to state that the defendants "with others" (which I take to mean with the co-operation of others) issued to a number of persons in the trade, both printers and print publishers, the circular set out in paragraph 2. The pleader then goes on to impute to the defendants and to the other signatories of the circular an intention in issuing the circular "to induce printers to refrain altogether from dealing with any print publisher who might sell any goods to the plaintiffs, and to coerce print publishers into refusing altogether to supply the plaintiffs with any goods at all." This intention is alleged to be expressed in the circular itself, but for my part I do not find it there. The only intention I find is an intention to induce printers to refrain from dealing with publishers who continue to supply the plaintiffs on such terms or at such prices as will enable the latter to resell at the low prices objected to, and in that way, and to that extent only to coerce such publishers to refuse to supply the plaintiffs. No intention is expressed in the circular to coerce publishers to refuse altogether to supply the plaintiffs. I do not, however, rely on this distinction for the purpose of my judgment. The fifth paragraph alleges that the defendants have, by means of the said circular, in concert with the other signatories, induced persons not to buy from publishers willing to sell to the plaintiffs,

and have thereby "coerced" the publishers into refusing altogether to sell any publications at all to the plaintiffs, to the damage of the plaintiffs in their business. The only meaning of this paragraph is that the object with which the circular was issued has been attained, and that loss has resulted to the plaintiffs. It is not suggested that the defendants have done more than issue the circular and abstain themselves from buying of the offending publishers; and, if it be true (as for the present purpose I must assume) that the publishers have refrained altogether from dealing with the plaintiffs, I doubt if such action on their part can be said to flow naturally from the acts of the defendants. So far the statement of claim amounts to nothing more than a charge against the defendants of requesting a particular body of traders not to give orders for goods to another body of traders—the "provincial trade" is requested not to give orders to those publishers who supply the plaintiffs—and an allegation that the request has been followed by compliance. In my opinion, the charge amounts to nothing which can be described as a wrong done to the plaintiffs. If true it does not violate any right of the plaintiffs, and, therefore, it affords them no cause of action, for one man is entitled as against all the world to ask another to refrain from doing an act which that other may lawfully omit to do. But it is said (paragraph 6) that the defendants' acts were calculated to damage and were done with the intention of damaging the plaintiffs in their business, and, further, that they were unlawful and in restraint of the plaintiffs' right to trade freely, and were done maliciously and without just cause or excuse. These allegations do not better the plaintiffs' position. The intention is immaterial if the acts themselves are not wrongful, and merely to say they are unlawful does not make them so. That they resulted in loss to the plaintiffs or in a restriction of their trade is equally immaterial, for no one is responsible to another for the consequence of a lawful act. It is useless to say that lawful acts are malicious or are done without just cause or excuse, for no lawful act can be malicious in a legal sense nor does it require to be defended by any just cause or excuse. It carries its just cause or excuse with it. Causes of action arise out of acts done, not out of intentions, nor out of consequences; and though morally a man may be blameable for exercising his rights for the mere purpose of hurting his neighbour, it is better, in my view, that he should be condemned in the tribunal of public opinion than that his intention should be the subject of inquiry in a Court of law. With reference to the intention with which the acts charged against the defendants were done, I notice that the statement of claim does not allege that it was merely to damage the plaintiffs. The allegation of intention is consistent with a concurrent intention to benefit the defendants' own trade. I draw attention to this, not because I think it makes any difference in point of law, but because it has in some cases been said (I think erroneously) that when a right is exercised for the mere purpose of damaging another the act may become a tort. It was however, upon the concluding words of paragraph 6 of the statement of claim that the plaintiffs really relied. Those words are as follows:—"Further, the defendants have, as the aforesaid acts show, maliciously combined with one another and with others to induce the publishers of engravings not to enter into contracts or deal with the plaintiffs, and to induce others not to deal (except upon terms which did not allow the plaintiffs to do profitable business) with the plaintiffs. Such combination was unlawful, without just cause or excuse, and has occasioned damage to the plaintiffs." The plaintiffs' counsel admitted that upon the authorities the statement of claim probably disclosed no cause of action apart from the allegations of combina-

tion and conspiracy. It remains, therefore, only to consider whether in the present case the acts, being lawful if done by one, become tortious if done by several in combination. It is necessary, in my opinion, to define the word "conspiracy." A conspiracy exists when two or more combine to do an unlawful act, or to do a lawful act by unlawful means. No conspiracy is, in my opinion, known to the law which has not for its object the accomplishment of an unlawful act (not necessarily a criminal act), or which does not involve the use of unlawful means. This, I think, is the result of the judgments in "*Kearney v. Lloyd*" (26 L.R., Ir., 268) and "*Mogul Steamship Company v. McGregor*" ([1892] A.C., 25). Further, I think that, though probably all conspiracies, as I define them, are criminal, and therefore indictable, no conspiracy can give rise to a civil action unless it violates, or threatens to violate, the rights of an individual as distinguished from the rights of the public at large. If it does violate the rights of an individual, he may sue for damages; if it threatens such a violation, he may sue for an injunction. But before any action can lie a right in the individual must be violated or threatened. To use the words of Lord Halsbury in "*Mogul Steamship Company v. McGregor*" ([1892] A.C., 25), "If no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons." In the same case Lord Watson says, speaking of the combined action of the defendants, "I apprehend that in order to substantiate their claim the plaintiffs must show either that the object of the agreement was unlawful, or that illegal methods were resorted to in its prosecution. If neither the end contemplated by the agreement nor the means used for its attainment were contrary to law, the loss suffered by the plaintiffs was *damnum sine injuria*." I ought, I think, to refer to the judgment of Lord Hennen in the same case. He says, at p. 59, "I arrive at the conclusion, therefore, that the objects sought and the means used by the defendants did not exceed the limits of allowable trade competition, and I know of no restriction imposed by law on competition by one trader with another with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one—viz., to injure the plaintiffs, whether the defendants should be benefited or not. That is a question on which it is unnecessary to express an opinion." As to this part of this judgment, I think, for reasons which will be found in Lord Herschell's judgment in "*Allen v. Flood*" ([1898] A.C., 1)—first, that the fact that the case was one of trade competition is of no significance; and, secondly, that the acts complained of being lawful the object with which they were done could in no case be material. In the present case I can find no act alleged against the defendants which amounts to a violation of any right in the plaintiffs, nor can I find any act alleged against the defendants which is unlawful as against any other individual or against the public at large, and I come, therefore, to the conclusion that the statement of claim discloses no cause of action. I am, moreover, quite satisfied that to allow such an action as this to go to trial would merely cause unnecessary loss to the parties and a waste of public time.

MR. JUSTICE PHILLIMORE thereupon withdrew his judgment, and the action was dismissed, the plaintiffs asking for, and obtaining, leave to appeal.

[Solicitors—Tyrrell Lewis, Lewis, and Broadbent, for the plaintiffs; Lewis W. Taylor, for the defendants.]

House of Lords (Lord Halsbury, L.C.,
Lords Morris, Shand, Davey,
Brampton, and Robertson) } 1900.
June 22.

THE MAIN COLLIERY COMPANY (LIMITED) V. DAVIES.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—"Dependent," meaning of.

This was an appeal under the Workmen's Compensation Act, 1897, and the question was as to the meaning and effect of the word "dependent" in section 1, subsection A. 2 (2) of the First Schedule to the Act. The Court of Appeal—Lords Justices A. L. Smith, Rigby, and Vaughan Williams—on June 5, 1899, affirmed the judgment and confirmed the award of Judge Bishop, of the Glamorganshire County Court, dated March 23, 1899. The application was by William and Catherine Davies, the father and mother of William Rees Davies, who was killed by an accident arising out of and in the course of his employment by the appellant company, for compensation under the Act. The father was an able-bodied collier, earning the usual wages in the locality, and the boy was a hauler in the appellants' employ, earning 2s. 6d. a day. By reason, however, of strikes, stoppages, and other causes, his actual wages averaged 8s. a week only for the preceding 115 weeks worked. The boy lived at home with his parents and gave them all his wages, but they found him in food, lodgings, clothes, &c., and gave him an occasional sixpence for pocket money. The respondent had five other children, two of whom earned weekly wages, which were given to their mother. The County Court Judge found that the parents were in part dependent on the son's earnings, and after taking into consideration the amount necessary for the boy's keep and clothing awarded £23 8s.

Mr. Ruegg, Q.C., Mr. C. A. Russell, Q.C., and Mr. St. John Francis-Williams were counsel for the appellants.

Sir Robert Reid, Q.C., Mr. Brynmor Jones, Q.C., and Mr. S. T. Evans, for the respondent, were not heard.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said that a short question of fact had been determined by the County Court Judge, who had found that there was a dependency in this case. The extent to which such dependency existed was not a matter for their Lordships to consider. The learned County Court Judge might have been right or wrong as to the exact degree to which that state of things existed; but if it existed at all the appeal must be dismissed. His Lordship did not think the Legislature had ever intended that any sharp, defined line should be drawn. In each case the question must be judged on the facts. What was the meaning of "dependent"? The notion that because a person who was under a legal obligation to keep the whole family, and who earned a considerable part of the total income himself, whilst, it might be, the others contributed only a small part, appeared to be the reason why the Legislature had introduced not only the word "dependent," but also "partially dependent." He had no doubt whatever that there was dependency in this case. The whole family relied on the wages earned. Whose wages? Clearly in part those of the boy. It appeared to have been forgotten that the obligation was upon the head of the family, who would be punished if he did not maintain his wife and children. The family being thus dependent upon the father, he in turn partly

depended on the wages earned by those for whose maintenance he was responsible, and who made a contribution to the general fund. If it was true that the boy earned 8s. a week, it was clear that the father was dependent to some extent upon the boy's earnings in order to discharge his legal obligations. He was unable to see that there was anything in this case beyond the mere question of fact. He declined to assume that the Legislature had created a standard in the matter. No broad principle could be laid down, and no human intellect could define what the standard should be applicable to all cases. The problem was extremely obscure. The only things which the County Court Judge could regard were, what the family were in fact earning, and what they were in fact spending, for the purpose of maintenance. The learned Judge had taken those matters into consideration, and properly answered those questions. Lord Justice Rigby had said that he would have come to the same conclusion as the County Court Judge, and his Lordship quite concurred in that opinion.

LORD MORRIS entirely concurred in the motion for the reasons assigned by his noble and learned friend on the woolsack.

LORD SHAND said that in this case he had no difficulty in concurring with the motion of the Lord Chancellor. The facts showed that the father was in part dependent on the son's wages for his maintenance. He also agreed in thinking that, although the members of the household might not be dependents within the meaning of Lord Campbell's Act, still the fact of the father's having a large family was a circumstance which the County Court Judge was entitled to take into account. But, with deference to the Lord Chancellor, he was unable to accept the view that cases might not arise in which it would be necessary to adopt some standard for the decision of the question whether the father was or was not dependent on his son's wages. On that question he did not think that the mere circumstance that the father spent the money he received was conclusive of dependency. A father who was very well off and yet spent the money received as a child's wages could not be described as dependent. He agreed in the view expressed in the passage cited from Messrs. Minton-Senhouse and Emery's treatise on Accidents to Workmen by Lords Justices Collins and Romer in the case of "Simmons v. White" (15 *The Times* L.R., 263; L.R. [1899], 1 Q.B., 1,005; 68 L.J., Q.B., 507). It was there stated, page 156:—"Dependent probably means dependent for the ordinary necessities of life for a person of that class and position in life." That was the test to be applied.

LORD DAVEY also concurred, and observed that it was more satisfactory to look at the actual expenditure of the family than to introduce some vague canon which it would be impossible to express with precision.

LORD BRAMPTON and LORD ROBERTSON also concurred.

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } June 22.

THALMANN FRÈRES AND CO. V. TEXAS STAR FLOUR MILLS.*

Sale of Goods—Contract—Construction—"Clearance," what is—Certificate of clearance issued before loading completed.

Decision of Bigham, J. (15 *The Times* L.R., 471), affirmed.

This was an appeal by the plaintiffs from the judg-

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

ment of Mr. Justice Bigham, reported in 15 *The Times L.R.*, 471; 4 Com. Cas., 265. The action was brought to recover damages for breach of contract and for the return of money paid under a mistake of fact. The contract in question was for the sale by the defendants to the plaintiffs of Colorado wheat to be shipped at Galveston, in the United States, by the steamship Highfield. The contract contained the following condition:—"Clearance not later than May 31, 1898." The question was whether that condition had been complied with, the fact being that the clearance was given on May 28, but the loading was not completed and the ship did not sail until June 2. The following are the facts as stated in the judgment of Mr. Justice Bigham:—The plaintiffs were corn merchants carrying on business in Paris, and the defendants were corn shippers in Galveston. On May 10, 1898, the defendants telegraphed to the plaintiffs offering to sell two parcels of wheat on c.i.f. terms by the steamer Highfield for Havre, shipment within 21 days. On May 11 the plaintiffs answered:—"Highfield steamer clearance not later than May 25 we accept, &c." On the same day the defendants replied:—"Highfield now on passage from Las Palmas since May 5, expected ready to load May 22, steamer clearance early as possible, steamer clearance not later than end of this month; cable immediately if in order." On May 12 the plaintiffs closed the negotiation by wiring, "Highfield, we accept your offer." Thus the contract was made on the condition that the steamer's clearance should be as early as possible, and not later than the end of May. Contracts were subsequently exchanged on the forms of the London Corn Trade Association, and in these contracts the expression used was "Clearance not later than May 31 inst." The question in the case was whether the condition as to clearance by May 31 was complied with. No doubt the stipulation was made by the plaintiffs because it was necessary to have an early delivery of the wheat in Havre. The French Government had temporarily suspended the import duty on wheat, and, in order that the plaintiffs might obtain the benefit of this remission, it was necessary that the wheat should arrive in Havre by the end of June. After that date the duty would become again payable. The vessel was not under the control or in the management of the defendants; she was a general ship managed by her own agents. She arrived at Galveston on May 26, and at once began taking in cargo—cotton and grain. She continued taking in cargo on May 27 and 28, and on the latter date she was moved to another pier, where further cargo was waiting for her. There she completed her loading, the last cargo being taken on board on June 2, on which date the vessel sailed. She was delayed on her voyage by a breakdown of machinery, and consequently did not arrive in Havre until July 1, a day too late to enable the plaintiffs to secure the benefit of the remission of the duty. Meanwhile the plaintiffs had paid the defendants drafts for the price of the wheat and had obtained the shipping documents. This action was brought to recover back the money so paid, on the ground that the vessel had not "cleared" on May 31, according to the contract. Now "clearance" in his (the learned Judge's) opinion had a well known and definite meaning. It was a certificate issued by the Customs showing that the vessel named in it had complied with the Customs requirements and was authorized to proceed to sea; and the acts which had to be done at the Customs to procure such a certificate constitute the process of "clearing" the vessel. In this case the clearance was issued to the Highfield on May 28. The document certified that W. Richardson, master or commander of the steamship Highfield, had entered and cleared his said vessel according to law. This document was issued

before all the cargo was on board, but it was issued at a time when all the cargo was alongside and waiting to be put into the ship. The affidavits from America, which were read, satisfied the learned Judge that it was issued in the ordinary course of business, and that it was customary to obtain the clearance of vessels before the loading was actually complete, so that there need be no delay in putting to sea. The learned Judge held that the clearance was not void because the cargo was not "on board," as required by the statute law of the United States, the affidavits showing that it was the practice of the Customs authorities to treat cargo as on board if in fact it was already alongside the ship. He further held that "clearance" was not equivalent to "being ready to sail." He accordingly held that the condition in the contract had been performed, and he gave judgment for the defendants. The plaintiffs appealed.

Mr. Crve, Q.C., and Mr. J. A. Hamilton appeared for the plaintiffs; Mr. B. M. Bray, Q.C., and Mr. E. Bray, for the defendants, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether the ship had "cleared" not later than May 31. The word "clearance" meant the document of clearance. It was said that by the statute law of the United States a "clearance" could only be given when the cargo was on board. In his opinion "clearance" in the contract did not necessarily mean a clearance given in strict accordance with the statute law of the United States; it meant a valid and effective clearance given according to the practice of the Customs authorities at the port of Galveston. That was done in the present case. The parties had not made it a condition that the ship should be ready to sail by May 31. The plaintiffs therefore failed in their appeal.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

[Solicitors—Hollams, Sons, Coward, and Hawksley, for the plaintiffs; Tillicards, for the defendants.]

Chan. Div. } 1900.
(Kekewich, J.) } June 22.

IN RE DE NICOLS—DE NICOLS V. CURLIER.*

International Law—Husband and wife—French law as to community of goods—English domicile—Will—Real property in England.

An interesting question arose in this case as to the rights of husband and wife of French nationality married in France and afterwards domiciled in England to real and leasehold property acquired in England. The testator, Monsieur Daniel Nicolas de Nicols, and his wife, Madame Celestine, both of whom were French, were married in France on May 30, 1854. They entered into no express contract on their marriage, so, according to French law, their rights to property were governed by the law of *Communauté de biens*. In 1863 they came to England where they became permanently domiciled. Their whole property when they came over was only about £400; but Monsieur de Nicols, as the proprietor of the well-known Café Royal, Regent-street, amassed a large fortune in England, part of which he invested in freehold and leasehold estate. He died in 1897, and by his will he gave his residuary estate to his executors and trustees upon trust for sale, and to hold the proceeds upon trust for his wife for life, and, after her death, upon trusts for his only daughter, her husband, and children. The widow took out an originating summons to ascertain

*Reported by F. E. ADV., Esq., Barrister-at-Law.

her rights and interests in the property of the testator by reason of their having, while domiciled in France, married there without any contract. The question formulated in Chambers for decision was, "Did the change of domicile alter the legal position of the parties to the marriage in reference to property?" The case was argued before Mr. Justice Kekewich, the argument being confined to the effect of the change of domicile as to the personal property. On February 3, 1898, Mr. Justice Kekewich made a declaration that the change of domicile by the spouses did not affect their respective rights under the French or matrimonial domicile in and to the movable property acquired by the spouses or either of them after such change (L.R. [1898], 1 Ch., 403). The result of this was to make the widow entitled to half the testator's personal estate. The daughter and her husband and children appealed, and on May 19, 1898, the Court of Appeal reversed the decision of Mr. Justice Kekewich, holding that the change of domicile altered the rights of the husband and wife as to unsettled movable property and that, as at the time of the husband's death the parties were domiciled in England, their rights were governed by English and not by French law, so that the personal property of the testator was effectually disposed of by his will (L.R. [1898], 2 Ch., 60). On December 15, 1899, the House of Lords reversed the decision of the Court of Appeal and restored the decision of Mr. Justice Kekewich (L.R. [1899], A.C., 21). The case then came on for argument again before Mr. Justice Kekewich as to the effect of the change of domicile, on the rights of husband and wife with regard to real and leasehold property in England, and his Lordship reserved judgment.

Mr. Renshaw, Q.C., and Mr. Ingle Joyce appeared for Mme. Celestine de Nicols; Mr. Warrington, Q.C., and Mr. E. J. Elgood for the executors and trustees of the will; Mr. P. O. Lawrence, Q.C., and Mr. Whinney for the daughter of the testator and her children.

MR. JUSTICE KEKEWICH, in delivering judgment, said,—Undoubtedly the House of Lords considered and determined merely the question whether the marriage contract affected movable goods notwithstanding the change of domicile, and all that was said must be read with reference to that question, as the only one to which attention was directed. Albeit so restricted, the decision proceeded on the broad principle that a contract operating by force of law in the absence of expression by the parties is as complete and as obligatory as a contract expressed, and must have effect given to it on the same footing. Unless, therefore, there is some inherent disability in some particular property to be bound by such a contract, it must equally be applied to and enforced against all falling within its scope, and this is according to the language of the code and the evidence given in explanation of it. On the present occasion the Court is asked to determine whether in enforcing the contract it is right to include freehold and leasehold estates in England—that is, what we term real estate and chattels real, as distinguished from personal estate other than chattels real which is covered by the decision of the House of Lords. Assuming that these freehold and leasehold estates are within the scope of the contract, it is impossible to avoid the conclusion that they are affected by it, unless, to repeat what has been already said, there is a disability inherent in this species of property. There are, therefore, two questions for consideration—one of fact—viz., whether these estates are within the scope of the contract; the other of law, whether they can be affected by it. The first question depends on the evidence which was before the House of Lords, some further evidence given by affidavit and orally on the hearing of the present application, and additional

evidence adduced under leave given after the hearing in consequence of a letter from one of the witnesses which was communicated to the Court. This evidence was directed to the proper meaning of "immeubles" in the French code. There is no difficulty about the meaning of the word as regards the character of property comprised in it. It means, broadly, the soil itself and that which is attached to the soil as distinguished from that which, being unattached, is therefore movable. As in our own system of law so in that of France some things are, from their close connexion with the land, treated as attached to it, and, therefore immovable, but these exceptions do not impair the general description and are of no importance here. The difficulty which arose was whether the term comprised immovables abroad—that is, beyond France. The words of the code are, apparently, wide enough to cover all, wherever situate, and if it were an instrument which the Court is competent to construe it would be impossible to avoid the conclusion that this is its real meaning. The construction of the code, however, is beyond the competence of the Court. It is a matter of fact with which the Court can only deal according to the testimony of those qualified to give it. Hence the oral and the additional evidence subsequently given, to which reference has already been made. That evidence has set the matter at rest and removed all difficulty. It may be stated in general terms that, unless an exception is established in a particular case on the ground of public policy (and there is no suggestion of that here), the provisions of the code as regards "immeubles" are of universal application, that is, apply equally to immovable property situate in France and to that situate in a foreign country. Turning now to the question whether there is any objection in law to the contract operating according to the intention of the parties so as to bind the freehold and leasehold estates, one is at once confronted by the principle which distinguishes obligations respecting real estate from those which affect personal estate. That principle is well established, and is to be found stated in different language in many books. It will suffice to cite one. In Story's Conflict of Laws, section 158, the learned author says this:—

"The result of this reasoning (and it certainly has very great force) would seem to be that in the case of a marriage without any express nuptial contract the *lex loci contractus* (assuming that it furnishes any just basis to imply a tacit contract) will govern as to all movable property, and as to all immovable property within that country, and as to property in other countries it will govern movables but not immovables, the former having no *situs*, and the latter being governed by the *lex rei sitæ*."

In the following section, 159, he expounds this subject in a manner so opposite to the case in hand that it is worth while to quote it at length. It runs thus:—

"Perhaps the most simple and satisfactory exposition of the subject, or at least that which best harmonises with the analogies of the common law, is that in the case of a marriage where there is no special nuptial contract, and there has been no change of domicile, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property wherever that is acquired and wherever it may be situate, but real or immovable property ought to be left to be adjudged by the *lex rei sitæ* as not within the reach of any extra territorial law. Where there is any special nuptial contract between the parties that will furnish a rule for the case, and as a matter of contract ought to be carried into effect anywhere under the general limitations and exceptions belonging to all other classes of contracts."

According to the decision of the House of Lords there

is here a special nuptial contract between the parties ascertained by reference to the code, but not less precisely ascertained because it was not reduced into writing in connexion with the particular marriage. It ought, therefore (to adopt the language just quoted), to be carried into effect everywhere, but under the limitations and exceptions belonging to all other classes of contracts, one of which is, that as regards immovables, the *lex rei sitæ* must prevail. There is nothing in the common law of England to make the contract which we have already seen to be definite unenforceable respecting the freeholds and leaseholds in question, and if there be any obstacle, it must be found in some statutory provision. There is none but the Statute of Frauds, but that does not raise a formidable objection. Reference was made in argument to both the 4th and 7th sections of the statute. I do not propose to consider which of them is the more applicable, because, without doubt, either one or the other prohibits the creation of equitable interests in land, such as sought to be established here, except by writing under the hand of the creator of the trust. Nevertheless, it is insisted that the statute has no application to the circumstances of this case, and that the agreement between the parties made in consideration of marriage is sufficiently obligatory notwithstanding the absence of any writing. That is the point I am called upon to determine. It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the Statute of Frauds will not avail. In such an action therefore the rights of the parties to the land, their respective interests in it, and their mutual obligations respecting it, may and must be determined and enforced notwithstanding there has been no compliance with the statutory provision. The authorities for this are not numerous, but they are conclusive—namely, “*Forster v. Hale*” (3 Ves., 696; 5 Ves., 308) and “*Dale v. Hamilton*” (5 Hare, 369). In the latter case Wigram, V.C., applied this ruling to a case where the partnership was intended to deal exclusively with land. Lord Lindley in his work on Partnership (6th edition, page 89) says that the latter case goes a long way towards repealing the Statute of Frauds, and that it is difficult to reconcile it with sound principle or the more recent decision of “*Caddick v. Skidmore*” (2 De G. and J., 52). This is a strong adverse comment, but yet I am bound to treat the decision as sound, and I did so in “*Gray v. Smith*” (43 Ch. Div., 411). Whether it is competent for the Court of Appeal now to disturb the ruling above quoted, or whether being competent the Court would be willing to do so, is not for me to say, but at any rate I must take the ruling to be established. It by no means follows that I ought to extend it, and it is fairly open to question whether the rule obtaining in contracts of partnership is properly applicable to a contract of marriage. In one sense no doubt that is also a contract of partnership, but no one would, I think, venture to rely on this, the ruling in the two cases referred to having reference to commercial partnerships with which the Court was there exclusively concerned. Nevertheless, the reasoning of the Lord Chancellor in “*Forster v. Hale*” seems to me to show that he intended to lay down a general rule, which may be applied without extension to the case in hand. This, I think, was the view of Vice-Chancellor Wigram in “*Dale v. Hamilton*,” and also, as it seems to me, of Lord Lindley, who cites the passage from the Vice-Chancellor’s judgment in “*Forster v. Hale*,” which supports it. The Lord Chancellor held that the question whether there was a partnership or not must be tried as a fact, and if it were established by evidence that there was a partnership, then the premises necessary for the purposes of

that partnership would by operation of law be held for the purposes of that partnership. It is established here by evidence that land acquired by either of the two parties to the contract would by force of the contract be held by him or her in certain terms described briefly by the phrase, community of goods. Any lands subsequently acquired are an acquisition brought within, and are required to fulfil the purposes of the contract, and according to the Lord Chancellor’s reasoning they are by operation of law held for those purposes. There may be error in this way of stating the case and applying the Lord Chancellor’s ruling, but I am unable to discover it, and must, therefore, hold that the freehold and leasehold estates are as much subject to the community of goods as the movables which have been held subject to it by the decision of the House of Lords.

[Solicitors—Hicks, Arnold, and Morley; Tyrrell Lewis, Lewis, and Broadbent.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } June 25.

BARNETT V. CORPORATION OF ECCLES.*

Local Government—Public health—Sanitary works—Damage sustained by reason of exercise of powers of Public Health Act, 1875—“Full compensation,” what is—Costs.

Decision of the Divisional Court (*ante*, p. 316) affirmed.

This was an appeal from the judgment of a Divisional Court, consisting of Mr. Justice Bigham and Mr. Justice Phillimore, on a special case stated by an arbitrator acting under section 308 of the Public Health Act, 1875.

The case is reported *ante*, p. 316. The question raised by the case was whether the “full compensation” to which a person is entitled who is damaged by the exercise of the powers of the Act includes costs reasonably incurred as between solicitor and client in defending himself before justices and appealing to quarter sessions and to the Queen’s Bench Division upon a charge made against him by the local authority. The case stated the following facts:—William Barnett was the owner of certain cottages in Ellesmere-street, in the borough of Eccles, the sanitary arrangements in which constituted a nuisance, for which it was alleged that Barnett was liable. Accordingly the Corporation of Eccles, under section 94 of the Public Health Act, 1875, caused a notice, dated May 6, 1897, to be served on Barnett requiring him to abate the nuisance and for that purpose to execute certain works. This notice not being complied with, a complaint was laid by the corporation under section 95 of the Public Health Act alleging that the nuisance was caused by the act, default, or sufferance of Barnett. The complaint was heard and determined by a Court of summary jurisdiction in October, 1897. Barnett called several witnesses, and in the result an order was made requiring him to comply with the requisitions of the notice of May 6, 1897. Nothing was said as to costs at that hearing. Barnett appealed to quarter sessions, and in January, 1898, the appeal was heard and dismissed subject to a special case stated for the opinion of the Queen’s Bench Division. That special case was heard before a Divisional Court, who ordered that the order of the quarter sessions dismissing the appeal should be quashed with costs, and judgment entered for Barnett. The order of the justices was also quashed, and it was further ordered that the corporation should pay the

*Reported by W. HUSSEY GRIFFITH, Esq., Barrister-at-Law.

costs of the appeal and the costs of the proceedings before the petty sessions, such costs to be taxed by the Master of the Crown Office, the Court at the same time holding that the nuisance arose from the default of the corporation themselves, and that there had been no default on the part of Barnett. The cost of the appeals to the Queen's Bench Division and to the quarter sessions were taxed at £62 5s. 6d. and £83 8s. 5d. respectively, and paid to Barnett. The costs of defending himself before the justices in petty sessions were not paid. By section 308 of the Public Health Act, 1875, a person who is not in default is entitled to full compensation for any damage sustained by reason of the exercise of the powers of the Act. The Divisional Court were of the opinion that Barnett was not entitled to more than his taxed costs of the proceedings before the petty sessions, quarter sessions, and the Queen's Bench Division. His actual expenses reasonably and properly incurred in proceedings before those Courts largely exceeded the amount allowed or recoverable on a taxation as between party and party. Barnett accordingly appealed. There having in fact been no order for costs made by the petty sessions, the appellant contended that on the principle of the cases "*Walshaw v. Brighouse Corporation*" ([1899] 2 Q.B., 286) and "*Bater v. Birkenhead Corporation*" ([1893] 1 Q.B., 679) he was entitled to his reasonable expenses of the proceedings before that Court. The argument was in part directed to the question whether his right to such expenses had been waived before the Divisional Court. Counsel for the respondents suggested, in order that the real question between the parties might be decided, that the costs before petty sessions should be taxed by an officer in the Crown Office.

Mr. Marshall, Q.C., and Mr. Clarke Hall appeared for the appellant; Mr. Danckwerts, Q.C., appeared for the respondents.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH, in giving judgment, said that the real dispute between the parties was whether the words "full compensation" entitled the appellant to recover as part of that compensation the difference between taxed costs and costs as between solicitor and client in the proceedings before the petty sessions, quarter sessions, and the Queen's Bench Division. The Divisional Court had held that he was not so entitled, but that the words "full compensation" entitled him to what the law allowed and not what the law did not allow. That judgment was right. The real question between the parties being as above stated, the cases cited of "*Walshaw v. Brighouse Corporation*" ([1899] 2 Q.B., 286) and "*Bater v. Birkenhead Corporation*" ([1893] 1 Q.B., 679) did not apply.

LORD JUSTICE VAUGHAN WILLIAMS concurred. The decision of the Divisional Court upon the only real question in the case was absolutely right. To decide otherwise would open the door to the discussion of a question of law long settled, that when once there had been an assessment upon taxation there should be no further assessment unless there were some contract or statute giving an absolute indemnity.

LORD JUSTICE ROMER agreed.

[Solicitors—Chester and Co., for Marriott and Co., Manchester, for the appellant; Ridsdale and Son, for G. W. Bailey, Town Clerk of Eccles.]

Q.B. Div. (Grantham and) 1900.
Phillimore, JJ.) June 25.

ATTORNEY-GENERAL V. PENRYN.*

Revenue—Estate duty—Settlement—Disposition

for life of settlor—Exemptions—Finance Act, 1894, sec. 15.

This was an information, filed by the Attorney-General, against Mr. Edward H. Leynster Penryn and Mr. Frederick G. Simpkinson, trustees of the settlement on the marriage of Charles James Vaughan, the late Dean of Llandaff, and Catherine Maria Stanley, claiming estate duty in respect of property passing under the settlement upon the death of the dean.

By the settlement, which was dated April 1, 1850, Mrs. Vaughan settled her share in a sum of £10,500 3½ per cent. bank annuities, to which she was entitled in remainder upon the death of her mother, in the following trusts:—To pay out of the income £100 a year to Mrs. Vaughan during the joint lives of herself and her husband; to pay the residue of the income to her husband during his life and after the death of either to the survivor for life; on the death of the survivor to divide the capital among the children of the marriage and in the event of there being no children of the marriage to hold the property in trust for Mrs. Vaughan if she should survive her husband. Mrs. Vaughan's mother died in the lifetime of Mrs. Vaughan and her husband, and the share so settled fell into possession and was received by the trustees. The dean died on October 15, 1897, in the lifetime of Mrs. Vaughan, leaving no issue of the marriage. Mrs. Vaughan died subsequently. The trustees of the settlement claimed that the trust funds settled by Mrs. Vaughan, amounting in value to £19,228 16s. 6d., which passed to her absolutely on the death of her husband, were exempt from estate duty by virtue of section 15 (1) of the Finance Act, 1896. That section provides that, "where by a disposition of any property an interest is conferred on any person other than the disposer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof, to the entire exclusion of the disposer, or of any benefit to him by contract or otherwise, and the only benefit which the disposer retains in the said property is subject to such life or determinable interest, and no other interest is created by the disposition, then on the death of such person after the commencement of this Act the property shall not be deemed for the purpose of the principal Act (the Finance Act, 1894) to pass by reason only of its reverting to the disposer in his lifetime."

On behalf of the Crown it was contended that the section did not apply (1) because an interest was reserved to the disposer—namely, the £100 a year; (2) because other interests beside the life interest were created by the disposition—namely, the limitation in favour of the children, though in point of fact no children were born. On behalf of the respondents it was contended that the property in which Mrs. Vaughan's husband took a life interest was the residue after the payment of the £100 a year to her, and that in that property no benefit was retained by Mrs. Vaughan except such as was subject to her husband's life interest. It was also contended that the life interest in favour of the children of the marriage was not an "interest created" within the meaning of the Act unless and until children were actually born of the marriage. "*In re Dawson*" (39 C.D., 155) was cited.

The Attorney-General and Mr. Vaughan Hawkins appeared for the Crown; and Mr. Haldane, Q.C., and Mr. Rashleigh for the respondents.

MR. JUSTICE PHILLIMORE said that he had been unable to agree with his learned brother on either of the points raised. He had come to the conclusion that the only property in which an interest was conferred by the settlor upon her husband was so much of the property

* Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

settled by her as was free and unencumbered. He was also of opinion that no other interest in the property was created by the settlement, because there never was a person to receive an interest. It was similar to the case of an interest in favour of a corporation which never existed, or whose powers were restricted so that it could not take the interest. The question whether an interest was created in favour of the children would not arise until the death of the life tenant. He met the case put in argument of a man dying leaving a widow with young children in favour of whom there was reserved an interest contingent upon their attaining the age of 21 or marrying, by saying that in that case the property would become taxable at the moment of the husband's death, for then there would be an interest in the property other than the husband's life interest. For these reasons he thought that the property was exempt from the payment of duty by virtue of section 15 of the Act of 1894, and his judgment was in favour of the respondents.

MR. JUSTICE GRANTHAM said that the sort of case contemplated by section 15 was where a person granted to an old servant the use of a cottage for his life. It was thought a hardship that in such a case the grantor should be liable to pay duty upon the death of the servant. He had come to the conclusion, applying the words of the section to Mrs. Vaughan's settlement, that she was excluded from the benefit of the provision. For it was not the case that the only interest retained by her in the property in which her husband took a life interest was such as was subject to his life interest, because the payment of the £100 a year to herself was not subject to his life interest at all. With regard to the other point, he was of opinion that the words "no other interest is created by the disposition" meant interest created at the time of the settlement. The purport of the deed was that Mrs. Vaughan divested herself of everything except her life interest. It was true that it provided that if there were no children the property should revert to her. But how could it be said that no other interest in the property was created than her husband's life interest, when the most important interest created by the settlement was that in favour of the children? His judgment was, therefore, in favour of the Crown.

Judgment was entered for the Crown, with costs.

MR. VAUGHAN HAWKINS said that if no appeal was entered the costs would not be claimed.

[Solicitors—The Solicitor to the Inland Revenue, for the Crown; Tatham and Pym, for the respondents.]

Q.B. Div. } 1900.
(Bigham, J.) } June 25.

MELLOR V. BRITTON.*

Building Contract—Quantity surveyor—Charges
—Liability of builder.

This was an action by a quantity surveyor against a builder to recover £411 for preparing quantities. A Mr. Sanderson had entered into a building agreement with the freeholder of certain land at Chelsea to erect thereon flats, to be called Burton-court, which when completed were to be leased to Sanderson. He employed the plaintiff to prepare plans and to take out quantities on which builders were invited to tender. The defendant was amongst the builders who tendered. His tender, amounting to £28,000, was accepted by the building owner. The defendant in the usual way included in his tender the amount of the plaintiff's charges, and in the ordinary course the plaintiff would

have been paid by the defendant out of the first instalment of the contract price received by the defendant from the building owner, but when the first instalment became due it was not paid, and the defendant thereupon entered into an arrangement with Sanderson by which the defendant took over the latter's agreement with the freeholder, and released him from all claims, present and future, under his contract, but Sanderson was given an option to purchase the building when completed on paying the defendant the contract price and interest. Up to the present time the building had not been completed, and in these circumstances the defendant denied his liability to pay the plaintiff the amount of his charges.

MR. BAILHACHE, for the plaintiff, said that the custom of the trade that the quantity surveyor should be paid by the builder out of the first instalment of the contract price, although the contract of employment in the first instance was with the building owner, had been judicially recognized (see "*North v. Bassett*," [1892] 1 Q.B., 333). Here the defendant had not been paid in money by the building owner, but he had received an equivalent in kind, having taken over the whole adventure and given the building owner an absolute release.

MR. W. H. STEVENSON, for the defendant, contended that his client was not liable. The case was like "*Campbell v. Blyton*" (Hudson's Building Contracts, vol. 2, p. 105), where the building owner had given a mortgage to the builder, and Mr. Justice Wills there held that the builder was not liable to the quantity surveyor. The undertaking of the defendant was to pay out of a particular fund—namely, the first instalment—and that fund had not as yet come into existence.

MR. JUSTICE BIGHAM, in giving judgment, said that the plaintiff was entitled to judgment. In the first instance the plaintiff could call upon the building owner to pay his charges, but as soon as the latter had entered into a contract with a builder and had put him in a position to pay by providing him with money, the building owner's liability to the plaintiff came to an end. Then what were the contractual relations between the plaintiff and the defendant? The defendant had undertaken to pay him as soon as he himself received his first instalment from the building owner. That placed on the defendant the obligation to get the first instalment. He was not bound to try and get blood out of a stone, and if he could not get payment from the building owner he was under no liability to the plaintiff; but if he could get the money or an equivalent he was liable. A difficulty arose in this case about the payment of the first instalment, but it was not an insurmountable difficulty, for having regard to the amount of work which had been done the building owner might have raised the money. If proper steps had been taken the building owner would have been able to pay. What happened was that the defendant for reasons of his own took from the building owner an out and out assignment of the agreement with the freeholder in full satisfaction of all the defendant's claims under his contract. The position was, therefore, that the defendant had chosen to accept, instead of cash, the assignment of the building agreement, carrying with it the benefit of all the work done up to that point (which far exceeded the plaintiff's claim) and also the possibility of future benefits. If the builder chose to vary his relations with the building owner he might do so, but not so as to prejudicially affect the claim of a third party who had nothing to do with the arrangement. There would be judgment for the amount claimed with costs.

A stay of execution was applied for and refused.

[Solicitors—Riddell and Co.; J. T. Rositer.]

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

House of Lords (Lord Halsbury, L.C.,
Lords Morris, Shand, Davey,
Brampton, and Robertson) } 1900.
June 26.

POWELL V. THE MAIN COLLIERY COMPANY (LIMITED).*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897.

It is not necessary that the "claim for compensation," which is required by sec. 2, subs. 1, to be made within six months of the occurrence of the accident, should be made in some form of legal procedure.

Decision of the Court of Appeal (*ante*, p. 282) reversed.

This was the first appeal under the Workmen's Compensation Act which has reached the final tribunal. It stood, at the beginning of the present sittings, last but two on the list, but its hearing was accelerated; and the case affords an illustration of the rapidity with which legal proceedings can, as will be seen from the dates below, in favourable circumstances be carried from the first Court to the last. The report of the hearing in the Court of Appeal only appeared in the month in which the appeal to the House has been disposed of. The arguments were heard on the 21st inst., when their Lordships reserved judgment.

The appeal was from an order of the Court of Appeal of March 16, 1900, setting aside an award under the Workmen's Compensation Act, 1897, made by Judge Bishop, the Judge of the County Court of Glamorganshire, holden at Neath and Aberavon on October 27, 1899, whereby it was ordered that the respondent company should pay to the appellant the weekly sum of 13s. 11d. as compensation for personal injury caused to him on December 21, 1898, by accident arising out of and in the course of his employment as a workman employed by the company in coal mining, such weekly payment to commence as from the 7th day of January, 1899, and to continue during the total or partial incapacity of the appellant, or such time as is prescribed by the Act. On May 2, 1899, the appellant duly gave to the respondents notice of the accident, as required by section 2 of the Act. On the same date the appellant also delivered to the respondents a document in the following terms:—

"Notice of Claim.

"To the Main Colliery Company (Limited), Skewen.

"Take notice that I claim the sum of 13s. per week, from the 4th day of January, 1899, until such date as I shall be able to resume work, as compensation for injuries received by me on the 21st day of December, 1898, at your colliery at Bryncoch.

"(Signed) WILLIAM POWELL.

"Address. Mount Pleasant, Clydach, R.S.O."

On October 2, 1899, the appellant filed in the County Court of Glamorganshire, holden at Neath, in accordance with Rule 8 of the Workmen's Compensation Rules, 1898, a request for arbitration under the Act, embodying the same claim. The respondents by their answer, filed on October 19, 1899, pleaded that the claim for compensation, not having been made within six months from the occurrence of the accident, was barred by section 2, subsection 1, of the Act, which is as follows:—"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the em-

ployment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause." It was contended on behalf of the respondents that the word "claim" must be interpreted to mean the initiation of proceedings before the arbitrator, and that in this case the only claim made within the meaning of the subsection was the request for arbitration filed by the appellant nine months and 11 days after the accident. The appellant contended that it meant any definite demand for compensation made by an injured workman upon his employer, and was satisfied by the above "notice of claim" of May 2, 1899. The County Court Judge overruled the respondents' objection, and awarded the appellant a weekly payment of 13s. 11d. for such time as is before mentioned. On appeal Lords Justices A. L. Smith and Collins, Lord Justice Romer dissenting, adopted the respondents' interpretation of section 2, subsection 1, of the Act, and allowed the appeal. The case is reported *ante*, p. 282; L.R. [1900], 2 Q.B., 145; 69 L.J., Q.B., 542.

Sir R. T. Reid, Q.C., Mr. S. T. Evans, and Mr. Redwood Davies were for the appellant; Mr. Ruegg, Q.C., Mr. C. A. Russell, Q.C., and Mr. Anton Bertram for the respondents.

The LORD CHANCELLOR, in moving that the judgment appealed from be reversed, said that the question arose within a narrow compass, but was of great importance. The whole case might be stated very shortly by reading the subsection on which it depended. [His LORDSHIP read the section above set out.] Nothing, he continued, very much turned upon the service or the person upon whom the notice was served. Reading the actual claim which was made in this case, no one could reasonably doubt that, unless there were some circumstance extrinsic to the actual words, this was a claim for compensation, and it was not contested that it was made within the period limited by the Act. It was made by the person injured, served by him upon the employers, and the claim was stated and described as made for a definite sum in respect of an accident referred to by its date. Without giving an artificial meaning to the words, no one could doubt that this was a claim for compensation under the Act, as it purported to be. The sole argument urged against this view before their Lordships was that a claim for compensation must be made in some form of legal procedure. That was the proposition. It might be conceded that with lawyers the ordinary form of taking proceedings would be some form of legal procedure. But the answer was that under this Act we had not the ordinary form of legal procedure. The Judges had all admitted that the word "proceedings" was used in a sense different from that which would be described as ordinary legal procedure. But it was said that the word was used in a different sense in this initial stage of the proceedings. This argument involved two assumptions. First, something must be found in the statute to justify this artificial meaning, or the Legislature must be assumed to have used the phrase "claim for compensation" with the implied addition of the words "in some form of legal procedure." He entirely repudiated the need of either assumption. There was nothing in the statute which intimated that the claim for compensation must

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

be technical in form and application. For himself, he declined to add words which would be inappropriate to the subject-matter. A Court had no right to add words to a section in an Act of Parliament unless the exigency of the case compelled. Upon that short ground he was of opinion that the judgment of the majority of the Court of Appeal was wrong, and that of the dissenting Judge right, and that the judgment of the County Court Judge should be restored. Dealing with the statute itself, he would remark that there was a careful avoidance of technicality. It contemplated what might excite horror in the minds of lawyers, that a man injured should be able to claim so much and go to the County Court and get the matter at once decided. If anything like a technical commencement of litigation had been intended, the Legislature might have said so; but where was there any suggestion of suit, or writ, or anything in the form of a statement of claim? There was throughout no technical phraseology to indicate parties at issue or the initiation of proceedings. Once the claim for compensation was made, the matter was, either by agreement or by operation of the statute itself, remitted to the arbitrator. He did not agree with the argument which had been suggested, that there was no mode of procedure provided for determining the question. That there was none actually pointed to by the statute he granted. But he had never heard that a defendant could not appoint an arbitrator to have a question settled. It had happened to himself when he was at the Bar, and to others who had experience of arbitrations, that when a plaintiff had shilly-shallied about the appointment of an arbitrator the other side had taken steps to get one appointed. Why was not that procedure applicable to these cases? Lord Justice A. L. Smith had referred to such and such provisions as made for the benefit of the man, and such and such others for that of the employer. But they were not dealing with a contract, but with an Act of Parliament, and he repudiated anything tending to qualify the statute itself, which provided that the claim must be made within six months, as it had in this case been made. Lord Justice A. L. Smith had referred to two decisions, one in Scotland and the other in Ireland. When examined, however, those cases disclosed that there was really no claim made at all. The judgment of the County Court Judge should be restored and the appeal allowed.

LORD MORRIS dissented, and accepted the reasoning of Lords Justices A. L. Smith and Collins in the Court of Appeal. While the Employers' Liability Act, 1880, extended the liability of employers, that liability was confined to cases of actual or constructive negligence; but the Compensation Act made the employer an insurer against accidents. The earlier Act prescribed six months as the limit of time for bringing an action. It would be strange if the later and wider statute did not also impose a limit. The workman might still proceed under either Act. Section 1, subsection 4, of the Act of 1897 said, "If within the time hereinafter in this Act limited for taking proceedings." The only limitation to answer this was the expression "the claim for compensation" in section 2, subsection 1, with its limitation of six months. That section enacted, like the Employers' Liability Act, as a condition precedent to the maintenance of proceedings a notice to be given to the employer of the accident happening, and further enacted that "the claim for compensation" must be made within six months from the occurrence of the accident. There could not be an action, as the tribunals were only a somewhat mythical body called a representative committee, or an agreed arbitrator or the County Court Judge as arbitrator. The latter was the choice in the present case, and the "request for arbitration with respect to the compensation payable" was lodged

on October 2, 1899, much beyond the period of six months from the date of the accident. In his opinion that claim for compensation took the place of an action under the Employers' Liability Act, and there must be some proceeding initiated before the expiration of the six months, the words "claim for compensation" being substituted for the "action" in the Employers' Liability Act. The words were "the claim" not "a claim" for compensation. If the words of the Act were satisfied by the mere sending of a notice to the employer without proceeding to give seisin to any tribunal of the claim, the claim might be kept hanging over the employer's head to the most remote period of time, not even limited by the Statute of Limitations. That the employer might initiate proceedings appeared to him an unmeaning and futile contention. An examination of the elaborate provisions of subsections 2, 3, 4, and 5 of section 2 led him to the conclusion that "the claim for compensation" could only mean an appeal to a tribunal.

LORD SHAND concurred with the Lord Chancellor, and observed that unlike the two decisions referred to by Lord Justice A. L. Smith the claim in this case was specific as to amount, date of accident, and other particulars. The claim, which was the first step in the proceedings, was duly made in accordance with the Act of Parliament. It was not necessary to enter into details, and he entirely agreed with what had been said by the Lord Chancellor and by Lord Justice Romer in the Court below. The matter, according to the statute, was to be settled by an arbitrator—the matter being that which was raised by the claim. It did not say that an action was necessary. He also was of opinion with the Lord Chancellor that, after a claim in valid form had been intimated by the workman to the employer, if the workman delayed, it might be for an indefinite time, to initiate arbitration proceedings, the master would be entitled to do so to the effect of demanding that the claim should be dismissed as unfounded.

LORD DAVEY said that the reasons for his opinion had been so clearly stated by Lord Justice Romer that he took the liberty of adopting that learned Judge's language as his own.

LORD BRAMPTON, in a long judgment, after stating the facts, expressed concurrence with the Lord Chancellor's motion. There was, he said, no warrant for even a suggestion that a limit was expressly put by the statute upon the time within which arbitration proceedings must be commenced, unless it were found in section 2 (1) of the Act. He assumed that the framer of that subsection intended in it to express, in the "ordinary language" which he had in the following subsection enjoined an injured workman to use in preparing his notice of injury, that which every intelligent person, reading this subsection alone for his guide, would understand from the language employed. In his opinion, only one conclusion was possible—that the workman, in giving notice of injury and making his claim for compensation within six months had fulfilled every obligation imposed upon him by the subsection. If it were intended to be interpreted in the sense attributed to it on behalf of the respondents, more misleading language could not have been employed.

LORD ROBERTSON also was of opinion that the appellant was right. The proceedings contemplated by the Act of 1897 for the settlement of claims were not primarily judicial proceedings; and the error of the respondents arose from overlooking this distinctive characteristic of the Act. Arbitration might be required to decide differences arising in the proceedings; but if this occurred it was only incidental to the proceedings, and was not contemplated as a necessary part of them.

Once this was realized it became clear that the proper initiation of the proceedings was not an appeal to arbitration, but was exactly such a claim as that which was sent to the respondents. He would only add that the most plausible argument against the appellant—viz., that on his theory there would be no check on delay—was not supported by the statute. As soon as the claim was sent to the employer he could, if he disputed it, himself take the difference to arbitration and have it settled. The framer of the rules could not possibly take away this right which arose under the statute.

The appeal was accordingly allowed.

Chan. Div. }
(Cozens-Hardy, J.) }

1900.
June 26.

IN RE HADLEIGH CASTLE GOLD MINES (LIMITED).*

Company—Winding up—Extraordinary resolution to wind up voluntarily—Requisite majority—Companies Act, 1862, sec. 51.

The declaration of the chairman at a general meeting of a company that a resolution to voluntarily wind up was passed by the requisite majority cannot be impeached as founded on a mistake.

HIS LORDSHIP delivered the following judgment, reserved from the 15th inst. in this winding-up petition.

This is a petition by fully-paid shareholders asking for a compulsory order. An extraordinary resolution to wind up voluntarily was proposed at a general meeting of the company duly convened on January 31 last. At this meeting the chairman declared "he resolution to be carried on a show of hands. I find this as a fact. No poll was demanded. The petitioners ask for a compulsory order (first) on the ground that the extraordinary resolution was not passed by the requisite majority, the chairman's declaration having been founded upon a mistake, and (secondly) on the ground that there are charges against the directors and promoters which it would be better to investigate by means of a compulsory order. The first point raises a serious question under section 51 of the Companies Act, 1862, whether after the declaration of the chairman it is competent for the Court to receive evidence to impeach that declaration. Treating the matter apart from authority, it seems to me that this question must be answered in the negative. Section 51 enacts that "unless a poll is demanded by at least five members a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the same." "Conclusive" seems to me to be a clear word. The Act contains several forms of language. By section 67, a minute signed by the chairman "shall be received as evidence" in all legal proceedings. By Table A, article 42, at any general meeting, unless a poll is demanded, a declaration by the chairman that a resolution has been carried and an entry to that effect in the book of the proceedings of the company "shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution." I cannot regard "conclusive" as equivalent to "sufficient." I think the Legislature intended, in the

case of a special or extraordinary resolution, that the chairman's declaration should be conclusive unless challenged by means of a poll demanded by five members. This view, however, is directly contrary to that expressed by Mr. Justice Kekewich in "Young v. South African Syndicate" ([1896] 2 Ch., 268). He says with reference to section 51, at page 275:—"The reasonable construction of that clause seems to me to be that you are not bound to prove either the number or proportion of the votes, but that, without more, the declaration of the chairman is to be accepted as conclusive evidence without that proof; not that it shall be accepted as conclusive if there is proof that the number or proportion of votes is against the declaration. If there is proof forthcoming that the declaration is inconsistent with the real facts, I do not think that the word 'conclusive' goes so far as to exclude that evidence; for otherwise it would open the door to gross mistake if not to fraud." I have felt considerable doubt whether I am at liberty to follow my own view, but I think for the reasons which I am about to state I can do so. Mr. Justice Kekewich was under the impression, as stated at page 274, that the point arose before him for the first time. His attention was not called to the case of the "Gold Company," which is reported in 11 Ch.D., 701, but is more fully reported in 48 L.J. Ch. N.S., 281. In that case only 17 shareholders were present. Eleven voted for the extraordinary resolution to wind up voluntarily, two against it, and four did not vote at all. No poll was demanded, and the chairman declared the resolution to be carried. It seems plain that this was a mistake, for there was not the requisite three-fourths majority. Vice-Chancellor Malins treated the voluntary winding up as valid, but nevertheless made a compulsory order. In the Court of Appeal this order was reversed. It appears from the L.J. report, page 286 that counsel for the respondents (petitioner) were about to argue that the voluntary winding up was irregular and that the wishes of the shareholders were not properly ascertained, upon which Lord Justice James remarked "As no poll was demanded, the ruling of the chairman is by the section 51 made conclusive. You cannot go into that now." This apparently was the decision of the whole Court. The Court discharged the order of Vice-Chancellor Malins and recognized that the voluntary winding up could not be impeached. This decision was not brought to the notice of Mr. Justice Kekewich and under the circumstances I think myself at liberty to disregard his decision and to follow my own view. The result is that I must treat the winding up as valid and not capable of being impeached. I may add that this result seems to me to be eminently convenient, for the present case furnishes a remarkable illustration of the extreme difficulty of ascertaining precisely what took place at a noisy meeting of shareholders; no two witnesses agree. It is perhaps right that I should observe that Mr. Justice Vaughan Williams in "Re Bidwell Brothers" ([1898] 1 Ch., 603) and Mr. Justice Chitty and the Court of Appeal in "Ernest v. Loma Gold Mines (Limited)" ([1896] 2 Ch., 572; [1897] 1 Ch., 1) considered whether a chairman had proceeded upon correct principles, but the point was not taken that a chairman's declaration is made conclusive, and the attention of the Court was not called to the authorities. I cannot regard either of those cases as decisions adverse to the view which I have expressed. On the second point I feel no difficulty in saying that the petitioners have not established any case. The decision of the Court of Appeal in the "Gold Company" case is itself a strong illustration of the doctrine that the Court will not, under ordinary circumstances, make a winding-up order after a voluntary winding-up at the instance of share-

*Reported by D. PITCAIRN, Esq., Barrister-at-Law.

holders. Such rights as they may have against directors or promoters can be enforced by means of an application under section 138. Moreover, I see no reason to doubt that the liquidator will do his duty. The result is that I must dismiss the petition and dismiss it with costs.

Mr. Younger, Q.C., and Mr. Maughan were for the petitioner; Mr. Cosens-Hardy for the company; Mr. Eve, Q.C., and Mr. George Cave, and Mr. Edward Ford for debenture-holders and shareholders respectively opposing.

[Solicitors—Gibbs, White, and Strong; Rose-Innes, Son, and Crick; Courtenay, Croome, Son, and Finch.]

Q.B. Div. }
(Bigham, J.) }

1900.
June 26.

MOLINOS DE ARROZ V. MUMFORD.*

Insurance—Policy against loss caused by war
—Construction—Rice requisitioned for food.

This was an action to recover a loss under a policy of insurance subscribed by the defendant and other underwriters at Lloyd's. The policy, which was dated December 9, 1898, and was for the space of 12 calendar months from that date, contained the following clause in writing:—"£20,000 on produce, rice, paddy, &c., the property of a company managed by Messrs. Smith, Bell, and Co. in any part of the Northern Provinces of Isla de Luzon. This policy is only against all loss or damage directly caused by war, revolution, civil commotion and (or) hostilities and fire risks excluded by fire insurance companies' policies." The question was whether a loss of rice and paddy, which had been "requisitioned" by the Filipinos in the course of hostilities with the United States, was covered by the policy.

Sir Robert Reid, Q.C., and Mr. T. E. Scrutton appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. J. A. Hamilton for the defendant.

MR. JUSTICE BIGHAM, in giving judgment, said that the facts of the case were as follows:—In 1898 the plaintiffs were the owners of two mills in the island of Luzon. Their business was to clean paddy and convert it into rice and sell the rice to customers in the Philippine Islands, and the regions thereabouts. In May, 1898, a war broke out between Spain and the United States. In August, Manila, the capital of the Philippine Islands, was captured by the United States, and by October, 1898, the war was practically at an end, the result being that the United States took possession of the Philippine Islands. During the war the American troops had been assisted by the natives of the islands led by General Aguinaldo. After the war, however, the relations between the United States and the natives were not in a very satisfactory condition, and the plaintiffs took out the policy sued upon. In February, 1899, Aguinaldo commenced hostilities against the United States forces in the immediate neighbourhood of Manila, but the Filipinos were gradually driven back in the direction of the plaintiffs' mills, which were 180 miles from Manila. In May things were in such a condition that the managers of the mills, who were Englishmen, were forced to leave the mills and to go within the American lines. They left the mills under a staff of workmen and clerks, half-castes and natives; and the mills were at the mercy of the forces of Aguinaldo. It became necessary for food to be found for Aguinaldo's troops, and he requisitioned the unprotected rice and paddy at the plaintiffs' mills. This began on June 1, and continued till November 14, with

the result that practically all the rice and paddy was taken from the plaintiffs' mills. The main question in the case was as to whether the rice and paddy so taken was lost within the meaning of the policy. His Lordship was of opinion that it was. He agreed with the argument put forward on behalf of the plaintiffs that in looking at the cause of the loss one must not confine oneself to the immediate physical consequences of some act of violence committed in the course of war. The proper way was to remember that there was a condition of things in existence which could be described as a state of war, and the object of the plaintiffs was to protect themselves, and of the defendant to insure the plaintiffs, against the consequences of that state of things; and one of the direct consequences of that state of things was that the plaintiffs' rice was taken from them against their will. It was said for the defendant that the taking of the rice was in the nature of an enforced sale or a rude form of taxation. His Lordship did not agree. The rice was taken from the plaintiffs just as much as if an army had camped near the mills and had fed on the rice. No attention need be paid to the fact that the so-called Government of the Filipinos went through the empty formality of handing to the plaintiffs pieces of paper which purported to be receipts for the rice taken. On the main question in the case, therefore, his Lordship held that the loss was directly caused by war within the meaning of the policy. There was another question. Before the rice was taken it had deteriorated by reason of its having been kept too long in the mills. The plaintiffs said that, had it not been for the warlike operations that were going on, the rice would not have been detained but would have been sold in the ordinary course of business and would have realized a sound price, and it was contended that the damage to the rice from the necessary detention was as directly caused by the war as the loss through the taking away of the rice. His Lordship had some doubt on this point, but he came to the conclusion that it could not be said that the deterioration of the rice was directly caused by the war, and therefore the plaintiffs were not entitled to recover that head of loss. His Lordship held that the amount which the plaintiffs were entitled to recover under the policy was £15,000, and gave three months' interest at 4 per cent.

Judgment for the plaintiffs with costs.

[Solicitors—Hollams, Sons, Coward, and Hawksley; Waltons, Johnson, Bubb, and Whetton.]

Judicial Committee of the Privy Council } 1900.
(Lords Davey, Robertson, Lindley, Sir } June 27.
H. de Villiers, and Sir Ford North)

FLEMING V. THE BANK OF NEW ZEALAND.*

Banker—Cheque—Consideration—Consideration moving from plaintiff's agent—Action for dishonouring cheques.

This was an appeal from a judgment of the Court of Appeal of New Zealand of February 4, 1899, reversing a judgment of Mr. Justice Pennefather.

Mr. Asquith, Q.C., and Mr. J. W. McCarthy were counsel for the appellant; Mr. Arthur Cohen, Q.C., and Mr. W. Wills for the respondents.

LORD LINDLEY, in delivering their Lordships' reserved judgment, said the action was brought in New Zealand by the plaintiff against his bankers for dishonouring certain cheques. The action was tried with a jury, and the plaintiff obtained a verdict and judgment for £2,000 damages. The defendants appealed, and the Court of Appeal not only set aside the verdict and

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.
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*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

judgment but entered judgment for the defendants with costs. From that decision the plaintiff now appealed. The plaintiff was a farmer and stock dealer in an extensive way of business. He was a large buyer of sheep, for which he was in the habit of paying cash. He was in good credit, but in August, 1897, his account with his bankers was overdrawn to the extent of £859. He had made an arrangement with them for an overdraft of £1,200. The plaintiff had in August and September, 1897, a large number of sheep in the hands of the Southland Frozen Meat and Export Company, and those sheep were at the plaintiff's disposal and were available as a security if the plaintiff desired to borrow money upon them. Mr. Chisholm was the bank manager and Mr. Thompson was the manager of the Frozen Meat Company. On August 28, 1897, the plaintiff and Chisholm had a conversation about the plaintiff's overdraft; about the sheep he had in store with the Frozen Meat Company; and about further purchases of sheep which the plaintiff might desire to make. The plaintiff and Chisholm gave different accounts of the conversation; Chisholm maintaining that those sheep were to be a security for the plaintiff's overdraft, whilst the plaintiff maintained that no pledge of these was ever made. On September 4, 1897, the plaintiff drew on the defendants four more cheques for sums amounting in the aggregate to £658 17s. 2d. in payment of sheep then bought by him. In order to provide for the payment of those cheques the plaintiff asked Thompson to see Chisholm and to pay £1,000 into the bank to the plaintiff's credit to meet these particular cheques. Thompson knew nothing of the plaintiff's overdraft. On September 6, 1897, Thompson saw Chisholm and explained his mission, but proposed that, as a matter of convenience to the Frozen Meat Company, he should deposit a store warrant for sheep instead of cash. That Chisholm assented to. A store warrant for 2,250 sheep belonging to the plaintiff and valued at £1,000 was accordingly sent to the bank on the same September 6. Thompson then supposed that the cheques to meet which he had deposited the warrant would be paid on presentment. Chisholm appeared to have understood that the store warrant was to secure the plaintiff's old overdraft. Whatever the explanation might be, the fact was that after Chisholm had received the store warrant the cheques were presented and dishonoured. The next day Chisholm sent to the holders of the cheques, and they were then again presented and paid. The real controversy at the trial was whether the store warrant was deposited by Thompson to meet the four cheques drawn on September 4 or to cover the old overdraft. Another question was whether Thompson exceeded his authority in obtaining credit from the bank on the security of the store warrant instead of placing £1,000 to the plaintiff's credit at his bankers in order to meet the cheque. The difference between the plaintiff's instructions and the mode in which Thompson carried them out was practically of so little consequence to any one that their Lordships were surprised that any real importance should have been attached to that variation from the plaintiff's instruction. It appeared to their Lordships to be plain from the evidence given at the trial that it never occurred to Thompson nor Chisholm nor to the plaintiff that anything could turn on the substitution of the store warrant for cash. They all treated the substitution as of no importance at all. Fourteen questions were submitted to the jury, and on their findings judgment was entered for the plaintiff for £2,000 damages and costs. The defendants appealed and applied for a new trial. They contended that the plaintiff had no cause of action, that evidence as to special damage had been improperly admitted, and that the damages were excessive. In the Court of Appeal all the members

agreed that evidence of special damage had been improperly admitted and that the damages were excessive. If a new trial had been ordered, unless the plaintiff had consented to reduce the damages to £500, as suggested by Mr. Justice Denniston, probably no further appeal would have been heard of. But the majority of the Court of Appeal went further, and held that the plaintiff had no cause of action and gave judgment for the defendants. That view is based entirely on Thompson's substitution of a store warrant for cash with the bank as above stated. Treating that deposit as unauthorized by the plaintiff, the Court held that there was no consideration for the promise by the bank to the plaintiff to pay the dishonoured cheques; and the Court further held that the ratification by the plaintiff of the unauthorized deposit was too late to avail the plaintiff. For the reasons already given, their Lordships would not themselves have come to the conclusion that Thompson exceeded his real authority, or that the jury really meant to find that he had. Taking the eighth and ninth findings—that the plaintiff did not authorize Mr. Thompson to deposit the warrant instead of cash or approve his having done so—in connexion with the evidence relating to them, their Lordships would not have understood the eighth finding as amounting to more than that nothing was said by the plaintiff to Thompson about depositing a store warrant. The further inference that Thompson exceeded his real authority in depositing the store warrant was, no doubt, consistent with the finding; but such inference did not appear to their Lordships to be warranted by the evidence and appeared to their Lordships to be opposed to it. They would not themselves have adopted the view taken by the Court of Appeal of the eighth finding or have regarded it as meaning more than was stated above. But, even if the Court of Appeal were right in regarding the eighth finding of the jury as a finding that Thompson really did exceed his authority, and thereby expose himself and the Frozen Meat Company to actions for damages, their Lordships were not prepared to hold that, apart from ratification, no contract was proved between the plaintiff and the defendants entitling the plaintiff to sue them for a breach of it. The other answers of the jury contained all the elements necessary to constitute a contract between the plaintiff and the bank and a breach of it for which the plaintiff could sue. The authority to Thompson to obtain for the plaintiff as his principal a promise by the bank to pay the cheques was proved. The promise by the bank to Thompson as the agent and for and on behalf of the plaintiff to pay the cheques was also proved. The deposit by Thompson of the store warrant for the sheep as the consideration for that promise was also proved. What more was wanted? Was it consideration, or was it consideration moving from the plaintiff? First, as to the consideration. In "*Currie v. Misa*" (L.R., 10 Ex., 153; App. 1 A.C., 554) the question arose whether a cheque drawn by the defendant and made payable to Lizarde and Co. was given for consideration or not, and whether the plaintiffs were holders of the cheque for value. The case was an important authority on the meaning of consideration. Mr. Justice Lush in giving the judgment of the Exchequer Chamber, said (L.R., 10 Ex., 163):—"A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." That definition had been constantly accepted as correct. Their Lordships so treated it, and, if correct, it covered this case so far as some consideration was concerned. The deposit by Thompson of the sheep warrant with the bank conferred upon the bank some right, interest, profit, or benefit which was all that was required by

the first half of the definition to constitute a consideration for the bank's promise to Thompson as agent for the plaintiff to pay the cheques which he had drawn and were outstanding. Moreover, Chisholm knew the circumstances under which the store warrant was deposited; and he was content to take it as the consideration for his promise. Next, as to the objection that the consideration did not move from the plaintiff. The doctrine that the consideration for a promise must move from the promisee was laid down in the textbooks (*e.g.*, in Leake in his *Digest of the Law of Contracts*, pp. 611 and 612), and held good in ordinary cases where a promise was made to one man for the benefit of another. But the authorities for the doctrine did not cover a case like the present, in which the consideration was supplied by an agent who obtained the promise for and on behalf of his principal. Chisholm was told that Thompson was instructed by the plaintiff to pay the bank £1,000, and if he had required it, that sum would have been paid accordingly. Chisholm chose with his eyes open to waive the payment in cash and to take the store warrant for what it was worth. Their Lordships were not aware of any authority for saying that in such circumstances the promisor could avoid performance of his promise to the third party on the ground that the consideration did not move from him; and to extend the doctrine to such a case would be wholly unreasonable. The above view of the case rendered it unnecessary to consider any question of ratification or to dwell on the decision of "*Bolton Partners v. Lambert*" (41 Ch.D., 295) and its application to the facts of this case. The decision referred to presented difficulties, and their Lordships reserved their liberty to reconsider it if on some future occasion it should become necessary to do so. But, although their Lordships were unable to hold that the plaintiff had no cause of action, they agreed with all the members of the Court of Appeal in thinking that the learned Judge who tried the case was wrong in admitting evidence of the plaintiff's loss of custom and of credit from particular individuals. The details of that misreception of evidence were given in the judgments of the Court of Appeal, and it was unnecessary to refer to them again. The damages awarded by the jury appeared to their Lordships to have been exorbitant, considering that the plaintiff's cheques were honoured by the bank the morning after the afternoon on which they were dishonoured. The plaintiff was, however, entitled to substantial damages, and their Lordships would adopt the views of Mr. Justice Denniston that £500 would be ample. Their Lordships would, therefore, humbly advise her Majesty that the appeal ought to be allowed and the judgment appealed from be reversed with costs, and that a new trial ought to be directed unless the plaintiff consented that the damages should be reduced to £500, and that in the event of his so consenting he ought to be entitled to judgment for £500 and to the costs of the action. The respondents would pay the costs of this appeal in either event.

[Solicitors—Ford, Lloyd, Bartlett, and Michelmores, for the appellant; Paines, Blyth, and Huxtable, for the respondents.]

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.J.J.) } June 27.

RICE V. NOAKES AND CO. (LIMITED).*

Mortgage—Redemption—Restrictive covenant—
Tied publichouse.

A mortgage of a leasehold publichouse prohibited the mortgagor from selling during the

leasehold term liquor not purchased from the mortgagee.

Held, that the mortgagor was entitled to redeem free from the tie.

Decision of Cozens-Hardy, J. (*ante*, p. 38), affirmed.

This was an appeal against the decision of Mr. Justice Cozens-Hardy which is reported *ante*, p. 38. The case raised an important question as to the rights of mortgagors and mortgagees of publichouses.

The plaintiff, a licensed victualler, in October, 1897, became the purchaser of property at Camberwell, including a publichouse known as the King's Arms, held upon lease for a term expiring at Christmas, 1923. Prior to his purchase the defendants, Noakes and Co. (Limited), brewers, had a mortgage on the property, the terms of which were practically identical with those of the mortgage of 1897 mentioned below. The defendants were not the vendors, but they released their security in order to enable Messrs. Nicholson, the second mortgagees, to sell to the plaintiff for £8,800. As is usual, the plaintiff only found a small portion of the cash, the defendants, the brewers, advancing £4,850 on a first mortgage. This mortgage was dated October 7, 1897. It contained a recital that the defendants had agreed to lend to the plaintiff the sum of £4,850, upon having the repayment thereof, and of such other moneys as were thereafter mentioned, secured in manner thereafter appearing; and it was witnessed that, in consideration of £4,850 then lent to the plaintiff by the defendants, and for securing the payment to the defendants of the said principal sum and all such further sums as thereafter mentioned, the plaintiff demised and conveyed to the defendants the leasehold premises, and all trade and tenant's fixtures, and the goodwill of the business of a licensed victualler or other business carried on upon the said premises, and the full benefit and advantage of all certificates and the magistrates' and Excise licences for carrying on such business or relating to the said premises, to hold to the defendants subject to a power of redemption therein contained. By this proviso it was declared that, if the plaintiff should, either on demand by the defendants left at the demised messuage, or without such demand, pay to them all such principal moneys and interest as were respectively mentioned in the covenant for payment thereafter contained, and as should then be due on that security, then the defendants would, at the request and cost of the plaintiff, surrender or reconvey the premises to the plaintiff or as he should direct, and (after attorning tenant at a peppercorn rent if demanded) the plaintiff covenanted with the defendants that he would on demand pay to them the said principal sum and interest at 5 per cent. until payment, and all such further sums as should be due from the plaintiff, as well for money advanced to or for the use of the plaintiff or paid on his behalf as therein mentioned, or on any other account or otherwise howsoever, with interest at the rate aforesaid, as also for goods sold and delivered by the defendants to the plaintiff. After other provisions the deed continued as follows:—"And for the considerations aforesaid the mortgagor, so as to charge the premises . . . hereby demised, into whosoever possession the same may come, whether by act of the party or by operation of law or by any other ways or means however, and to the further intent that the obligation of this covenant may run with the land, doth hereby covenant with the company that the mortgagor shall not, nor will at any time during the continuance of the term aforesaid, and whether any principal moneys or interest shall or

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

shall not be owing upon the security of these presents, use or sell, or permit to be used or sold, in, upon, or about the said demised premises, any malt liquors except such as shall be *bona fide* purchased by the mortgagor of the company. And, further, that, if and whenever there shall be a breach of the said covenant, he, the mortgagor, shall and will pay to the company the sum of £1,000 as and for ascertained liquidated damages for each such breach, and will sell all such malt liquors pure, unadulterated, and unmixed, and of the like strength, character, and quality in all respects as the same shall be supplied to him." The deed also declared that the words "the mortgagor" and "the company," except when otherwise controlled by the context, should, throughout the deed, include all persons deriving title under them respectively. The plaintiff was willing to pay off all money due to the defendants under the mortgage, and required them, on payment being made, to reconvey the leasehold property to him, and to release him from the covenant by which the house purported to be "tied" to the defendants during the whole currency of the lease, or to transfer the mortgage to him and assign the benefit of the covenant. The defendants were willing to reconvey or transfer, but not to release or assign the covenant, and the present action was brought to obtain a declaration that the plaintiff was entitled not only to reconveyance or transfer, but also to a release or assignment of the covenant. Mr. Justice Cozens-Hardy held that "the 'tie,' though perfectly valid during the continuance of the security, cannot be maintained when all moneys due upon the security have been paid off," and that, on payment of all moneys due, the plaintiff was entitled to have a reconveyance of the property, or to a transfer of the security, free in either case from the "tie." The defendants appealed.

Mr. Haldane, Q.C., Mr. Eve, Q.C., and Mr. Stanley Fisher were for the defendants; Mr. Astbury, Q.C., and Mr. Beaumont were for the plaintiff.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the case was one of considerable importance, and he was glad to find that the parties intended to carry it to the House of Lords. The mortgage deed, on its face, was a mortgage of a house not subject to any "tie." The effect of the covenant in question was to "tie" the house to the defendants up to the end of the term in 1923. The question was whether that covenant could stand. It seemed to his Lordship impossible to say that the old doctrine that the equity of redemption of a mortgage must not be "clogged" could now be disregarded by the Court, or that the doctrine had disappeared. This had not been argued by Mr. Haldane, but he had contended that there was no clogging of the equity of redemption in the present case. His Lordship read the rule as thus stated by the late Lord Bowen (then Lord Justice Bowen) in "Marquis of Northampton v. Pollock" (45 Ch.D., at p. 215). "Whenever a transaction is in reality one of mortgage, equity regards the mortgaged property as security only for money, and will permit of no attempt to clog, fetter, or impede the borrower's right to redeem and to rescue what was, and still remains in equity his own." His Lordship (the Master of the Rolls) could not express the rule more clearly. He understood it to mean that on redemption of the mortgage the mortgagor was entitled to have back that property which he had mortgaged, and that any stipulation which would prevent this when the mortgage obligation was fulfilled would be bad. This expression of the rule was approved by the late Lord Bramwell when the same case was before the House of Lords under the title "Salt v. the Marquis of Northampton" ([1892] A.C. 1). In that case no doubt was thrown

upon the doctrine; the question discussed was whether the doctrine applied under the peculiar circumstances of that case. In the present case, was it true that the covenant in question did not impede the mortgagor's right to redeem the property which remained in equity his own? The covenant would probably run with the land. If it were binding, its effect was that up to 1923, even if the mortgage debt was paid, the owner of the house would not be entitled to obtain his beer in the best market, but would be bound to take it from the defendants. It was impossible to say that this did not diminish the property which was to be given back to the mortgagor on redemption. It prevented his getting back that which was his own. Apart from any of the recent decisions his Lordship thought the case was reasonably clear. But it was said that the course of recent decisions, ending with "Santley v. Wilde" ([1899] 2 Ch., 474; 15 *The Times* L.R., 528) showed that the covenant must be regarded as not affecting the equity of redemption, but as a collateral stipulation. His Lordship did not think he was in any way departing from those decisions. He thought that "Mainland v. Upjohn" (41 Ch.D., 126) and "Biggs v. Hoddinott" ([1898] 2 Ch., 307) were easily distinguishable from the present case. "Santley v. Wilde" was much more difficult. It was a decision of the Court of Appeal and was binding on that Court. But his Lordship did not think it infringed on the doctrine which was recognized by the House of Lords in "Salt v. the Marquis of Northampton." In "Santley v. Wilde" the lessee of a theatre borrowed £2,000 on the security of a mortgage of the lease, and by the mortgage deed she covenanted to repay the £2,000 by 20 quarterly instalments, and also to pay to the mortgagee one-third of the net profits of the theatre during the whole of the term of the lease (which was four years longer than the time fixed for the payment of the £2,000), and the property was to be redeemable only on payment of the £2,000 and interest, and all other moneys covenanted to be paid. The Court construed that contract as charging the mortgaged property with the obligation to pay the share of the profits as well as the debt of £2,000. If so it was clear that the principle that the equity of redemption must not be clogged was not infringed. The judgments of the Court showed that this was the true view of the case. And this was the distinction which Mr. Justice Cozens-Hardy had pointed out in the present case. The Master of the Rolls did not differ from his view, though he had expressed the distinction in somewhat different words. In his opinion "Santley v. Wilde" afforded no ground for saying that such a covenant as that in the present case did not interfere with the principle which was recognized by the House of Lords in "Salt v. the Marquis of Northampton." His Lordship was clearly of opinion that the covenant infringed the doctrine referred to, and that the appeal must be dismissed.

LORD JUSTICE RIGBY agreed with the Master of the Rolls. The old maxim "once a mortgage always a mortgage" had not been in any way infringed upon. It must, of course, be applied carefully. The only question in "Salt v. the Marquis of Northampton" was whether there was "once a mortgage," and the House of Lords came to the conclusion that there was a mortgage *ab initio*. There was no question that if so the maxim applied. Another way of expressing the rule was that "you must not clog the equity of redemption." This maxim was not always easy of application. But, at any rate, there must be in substance a restitution of the property which was mortgaged. It must not be made any worse than it was. The mortgagee must not reserve to himself any hold upon the property when the time for redemption had arrived. These

maxims still remained in full force. It was idle to say that the equity of redemption was not clogged when a house which was mortgaged as a free house was to be taken back by the mortgagor as a "tied" house. The "tie" could not be supported without doing violence to the maxims referred to.

LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—Fishers; Sandilands and Co.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } June 28.

ELLIOTT V. YATES AND ANOTHER.*

Taxes Management Act, 1880—Distress for income-tax—Authority of tax collector to levy distress—43 and 44 Vict., c. 19.

This was an application by the plaintiff for judgment or a new trial in an action tried before Mr. Justice Channell and a common jury. The action was brought to recover damages for trespass for breaking and entering the plaintiff's house and levying a distress, and also to recover damages for irregularity in the distress by remaining in too long.

The question raised was an important one—namely, whether collectors of income-tax and house duty who have authority to collect income-tax and house duty for the year ending April 5 have power after the year ending April 5 to levy a distress for income-tax and inhabited house duty due and payable for the year ending on April 5. The plaintiff occupied a house at Maidenhead, the assessment of which was increased. The plaintiff, on account, it was stated, of illness, did not appeal to the assessment committee, and on demand being sent to him for income-tax, under schedules A and B of the Income-tax Act, and for inhabited house duty in respect of his occupation of the house for the year ending April 5, 1899, he refused to pay, thinking the assessment too high. On May 25, 1899, the defendants caused a distress to be levied on the premises to recover the amount due for income-tax and inhabited house duty, and left a man in possession until June 15, 1899, when the distress was withdrawn. The plaintiff subsequently paid the amount of the income-tax and inhabited house duty, and brought this action. The defendants were appointed collectors by the local commissioners on March 31, 1898, and on December 13, 1898, the commissioners signed a warrant (being in the form No. 5 in the second schedule to the Taxes Management Act, 1880) authorizing the defendants to demand and collect the income-tax and inhabited house duty for the year ending April 5, 1899. The material parts of the warrant are set out in the judgment of Lord Justice A. L. Smith. The reason why the warrant was not made out until December 13, 1898, was that the duties for the year did not become payable until January 1, 1899. Collectors were appointed each year. Mr. Justice Channell held that the defendants had authority to levy the distress, and that, therefore, the distress was not illegal. In the event, however, of his decision being wrong upon this point he asked the jury to assess the damages upon this head of claim. The jury assessed the damages at 5s. upon the claim for damages for irregularity in the distress—that is, for keeping the distress in for too long a time. The jury gave a verdict for the plaintiff for £10. The plaintiff applied for judgment or a new trial upon the first head of claim.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Mr. J. G. Witt, Q.C., and Mr. Poley appeared for the plaintiff; Mr. Bowen Rowlands, Q.C., and Mr. E. Layman appeared for the defendants.

The COURT, having taken time to consider, delivered judgment dismissing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—The plaintiff in this action seeks to recover from the defendants damages for having trespassed upon his dwelling-house at Maidenhead on May 25, 1899. The defendants are collectors of income-tax under Schedules (A) and (B) of the Income-tax Acts, and also of inhabited house duties, and were appointed by the Commissioners of Taxes to collect the same pursuant to the Taxes Management Act, 1880 (43 and 44 Vict., c. 19), for the year ending April 5, 1899. The defendants justify the alleged trespass under a warrant dated December 13, 1898, duly granted to them under the Taxes Management Act, 1880. It is not in dispute (1) that the taxes for which the defendants distrained had been duly demanded of the plaintiff upon January 1, 1899; (2) that such taxes then became due and payable by the plaintiff, and continued so down to the distress (which is the alleged trespass) upon May 25, 1899; and (3) that the plaintiff throughout persisted in refusing to pay what was due from him, and that he had no valid excuse for such refusal. The first point taken on behalf of the plaintiff is that under the warrant the defendants' authority to distrain came to an end upon April 5, 1899, and consequently they were *functi officio* upon May 25, 1899, and could not justify under it. In my judgment this is not so, and the authority under the warrant has no such limitation, and this will be seen upon reading it. The warrant, after reciting the appointment of the defendants to be collectors of the duties arising from property, professions, trades, and offices, and of the duties on inhabited houses for the year ending April 5, 1899, enjoins and requires the collectors to make demand of the several sums upon the parties charged therewith, and upon payment thereof to give acquittances, and "if any person should refuse to pay the sum or sums charged upon him upon demand duly made, for non-payment thereof to distrain for the same by virtue of this our warrant without further authority." I do not find in this warrant that the power to distrain is limited to a distress made on or before April 5, 1899, but, on the contrary, the power given is to distrain without limit as to time "for duties payable for the year ending April 5, 1899." I would point out that the collectors appointed in the succeeding year for the year ending April 5, 1900, could not distrain for the taxes and duties due for the preceding year ending April 5, 1899. So much for the warrant itself under which the defendants justify. But it is further argued for the plaintiff that by the Taxes Management Act, 1880, the collectors became *functi officio* on April 5, 1899. I will first deal with the only section that has any possible bearing upon this point prior to section 100, for in that and the following sections the statute deals with a new state of circumstances which does not exist in the present case. Section 73, subsection 1, which is the only section referred to in this part (Part V.) of the Act, deals with the nomination of collectors in the month of April in each year. There is nothing in this section which enacts that after the month of April, 1899, the nominated collectors may not get in unpaid arrears which they were appointed to collect and which they could not collect owing to the persistent refusal of the taxpayer to pay, and, indeed, subsection 9 of the section points to this, that it is not until the collectors' accounts for the year have been closed that the collectors' office is at an end. I can find down to section 100 nothing which enacts that a collector's power to

distrain under section 86 of the Act ceases upon April 5 in any year under a warrant similar to that in the present case. The collector appointed is not for one year only, and no more, his appointment is to collect the taxes for the year ending April 5. Although there is a fresh appointment every year, the collectors appointed are not in place of those appointed in the preceding year, but to collect another year's taxes. No doubt, as a rule, the duties of the collectors for a particular year would be practically ended with the year, but they are not appointed only for the period of a year, nor do their duties of necessity end with the year. As a short method of description, they might be referred to as collectors appointed for a year, and I think that the expression in section 117, subsection 1, "for the remainder of the year," is explicable in the view that the Act intended to show clearly that the appointment of one collector in lieu of another was not intended to invalidate the latter's acts for the period during which he had acted. At section 100 there comes a new part of the Act—viz., Part VII., headed "Receipt and Account." This gives rise to other considerations. By section 100 the Board may appoint in each year a day to receive the moneys received by the collectors, on which day the collectors shall account for all moneys given them in charge to collect. By section 103 on the appointed day the collectors are to pay over to the collector of Inland Revenue the moneys received by them, and by subsection (b) to deliver a schedule of arrears. Until this is done, in my judgment, the collectors' authority to collect has not terminated. By section 105 and the following sections, under the heading of "Schedules of Arrears," different processes are prescribed by which a defaulting taxpayer may be brought to book by the Commissioners and others. In the present case no day prior to the day of distress had been appointed for receipt of the moneys collected by them under section 100, and consequently no schedule of arrears was in existence, and it will be seen that in this state of circumstances none of the sections after and including section 100 have any application to this case, and I have not to consider what effect they would have if they did apply. I cannot find in the Act prior to section 100, which is the part of the Act which applies to this case, any more than in the warrant itself, that the authority of the collector to collect arrears due before April 5, 1899, terminates upon that day; and as no day for receipt has been appointed under section 100 the sections subsequent thereto do not apply. The argument that the proceedings to make the plaintiff pay after April 5, 1899, must be by way of making him a Crown debtor is not well founded in this case, and, in my opinion, in the present case there is nothing to justify such an argument. The above are the only points now remaining in the case. I agree with my brother Channell that the defendants can justify, as they have done, under their warrant of distress of December 13, 1898. The appeal must therefore be dismissed with costs.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

LORD JUSTICE ROMER concurred.

[Solicitors—Samuel Price and Sons, for the plaintiff; F. FitzPaine, for C. R. Thomas, Maidenhead.]

Chan. Div. } 1900.
(Kekewich, J.) } June 28.

IN RE ARCHIBALD D. DAWNAY (LIMITED).
Company—Shares—Liability for—Fully-paid

*Reported by G. I. FOSTER COOKE, Esq., Barrister-at-Law.

shares issued to vendor—Signatory to memorandum of association—Companies Act, 1867, sec. 25—Companies Act, 1898, sec. 1.

"*In re F. W. Jarvis and Co.*" ([1899] 1 Ch., 193) approved and followed.

This case is one of very much importance to intending vendors to public companies, where the purchase-money is to consist, either in whole or in part, of paid-up shares, for it illustrates the necessity of seeing that all the statutory formalities required in such a case are complied with, so as to ensure the vendor against possible liability in the future of being after all called upon to pay for those shares in cash.

The case now before the Court was as follows:—The above company was incorporated under the Companies Acts, 1862 to 1896, on August 7, 1897, with a nominal capital of £75,000 in 7,500 shares of £10 each. The object of the company was the acquisition of the business of a civil and consulting engineer and surveyor and constructional engineer established by a Mr. Archibald D. Dawnay, with the stock, plant, machinery, and business premises. The basis on which the company was formed was the purchase from Mr. Dawnay of the business for £40,690, by the allotment to him or his nominees of 4,069 fully-paid shares, and a draft agreement to that effect was prepared before the incorporation of the company ready to be adopted by it and executed on its incorporation. Mr. Dawnay, who himself drew up the memorandum of association, signed it for "4,069" shares of £10 each which, though not indicated by any numbers, he understood and were intended, as he deposed, to be the paid-up shares which were the consideration to be given him for his business. He also signed the memorandum for 200 further shares, which he paid for in cash. He stated that he never agreed to take any other shares than those mentioned, and that when he signed the memorandum he was not aware that his doing so implied any contract or obligation to pay cash for the 4,069 shares, and that his signing for them in those circumstances was an inadvertence. There were other subscribers to the memorandum for shares amounting in all to 231 shares and one other share had since been issued, the total issue thus being 4,501 shares; the remaining 2,999 shares were never issued. The agreement for the sale and purchase of the business (the draft of which had already been prepared, as above mentioned) was duly executed on August 11, 1897, after the incorporation of the company, and on the 13th was filed with the Registrar of Joint Stock Companies. After reciting the objects and formation of the company, it was agreed that the vendor, Mr. Dawnay, should sell and the company should purchase the business in question, and that part of the consideration should be "£40,690 to be satisfied by the allotment to the vendor or his nominees of 4,069 fully paid-up shares in the capital of the company to be numbered 1 to 4,069 both inclusive," and that, as the residue of the consideration, the company should undertake to discharge all the debts and liabilities of the business. Shortly after the filing of the agreement the 4,069 shares, numbered as stated in the agreement, were duly allotted to the vendor and registered in his name, and certificates for them were duly issued to him. No further capital beyond the 75,000 shares was ever created. No notice of any call in respect of any of the 4,069 shares had ever been given. The serious question then arose whether Mr. Dawnay, the vendor, was not liable to pay in cash for the 4,069 for which he subscribed the memorandum, there being nothing to show that those shares were identified with the 4,069 numbered shares specified in

the agreement. Section 25 of the Companies Act, 1867, requires that every share in a company "shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." By section 1 of the Companies Act, 1898, the Court is empowered to grant relief for an omission to file a sufficient contract under section 25 of the previous Act, where the omission has been "accidental or due to inadvertence"; and accordingly the vendor applied by motion under section 1 of the Act of 1898 that the company should, within 14 days after the order now asked for, file with the Registrar of Joint Stock Companies a memorandum in writing in the form scheduled to the notice of motion, and that an order might be made to the effect that—the Court being of opinion that the 4,069 fully paid-up shares mentioned in the agreement were the 4,069 shares for which the vendor had signed the memorandum of association—on the filing of the said memorandum in the form scheduled within the time aforesaid, such memorandum should, in relation to the 4,069 shares, operate as if it were a sufficient contract in writing within section 25 of the Act of 1867, and had been duly filed at or before the issue of such shares. The scheduled form of memorandum purported to state that the 4,069 shares numbered in the agreement were the 4,069 shares for which the vendor had signed the memorandum of association, and had been issued in satisfaction of the £40,690, part of the consideration agreed to be paid to the vendor. An affidavit by a director of the company agreed with the vendor in saying that the company never contemplated an allotment of any further shares to him, and never made any call in respect of the 4,069 shares for which he signed the memorandum of association, "considering them to be the very shares agreed to be allotted as fully paid up under the terms of the filed agreement, and that the omission to file a sufficient agreement with the memorandum arose from inadvertence." It appeared that the company was in a prosperous condition and paying large dividends.

Mr. BUNTING, for the vendor, relied upon "*In re Whitehead and Brothers (Limited)*" ([1900] 1 Ch., 804), submitting that the present case was distinguishable from "*Dalton Time Lock Company v. Dalton*" (66 L.T., 704) and "*In re F. W. Jarvis and Co. (Limited)*" ([1899] 1 Ch., 193).

Mr. Warrington, Q.C., and Mr. W. Brinton appeared for the company.

At the conclusion of the argument on the 21st inst. his Lordship reserved judgment.

MR. JUSTICE KEKEWICH said,—Judgment was reserved because I was unwilling to depart from the decision of Mr. Justice Romer in "*In re F. W. Jarvis and Co. (Limited)*" ([1899] 1 Ch., 193) or to adopt that of Mr. Justice Cozens-Hardy in "*In re Whitehead and Brothers (Limited)*" ([1900] 1 Ch., 804) without further consideration. Unless the distinctions which satisfied Mr. Justice Cozens-Hardy in the latter case, and which were also urged here, are sufficient, this case must be governed by the decision of Mr. Justice Romer, which is directly in point. The case before him was like this one. It was one in which a vendor had signed the memorandum of association for a number of shares in precisely the same way as in the present case, in consideration of the issue of which as fully paid up he contracted after the incorporation of the company to sell his property; and there, as here, the vendor's shares were protected by a registered agreement, and the question arose respecting the same number of shares for which the memorandum of association was signed. The report states ([1899] 1 Ch., 194) that

there was evidence that the shares for which the vendor signed the memorandum of association were the same as those issuable to him under the agreement; but the learned Judge did not consider the evidence as sufficient, and indeed says, on page 189, that the two lots of shares could not be identified. He held that the case was not one contemplated by the Act of 1898; but, more than that, he considered it on its merits, and though deeming it a case of great hardship and expressing his regret that he could not help the applicant, he determined, for the reasons set out in his judgment, that the application ought not to be granted. Mr. Justice Cozens-Hardy came to a different conclusion in "*In re Whitehead and Brothers (Limited)*." He held that case to be distinguishable from that decided by Mr. Justice Romer. The only distinction noticed in his judgment is that there was no difficulty in identifying the shares registered in the name of the vendor as being the same shares as those subscribed for by him on the memorandum. I cannot myself see from the report that he had any better evidence of identity than was before Mr. Justice Romer; but perhaps there was some which has escaped my notice or is not expressly mentioned in the report. The other distinction urged in argument, but not referred to by the learned Judge, was that, in the case before Mr. Justice Romer, there were shares not taken up more than sufficient to provide for the double allotment, whereas in "*In re Whitehead and Brothers (Limited)*" all the shares had been issued. I do not say that this is not a fact worth consideration, and it is undoubtedly present here; but I do not think it sufficient, standing alone, to induce me to distinguish a case similar in other respects from "*In re F. W. Jarvis and Co. (Limited)*." As regards the other distinction which I have commented upon in connexion with the case before Mr. Justice Cozens-Hardy, I need only say that I have no more convincing evidence than was before Mr. Justice Romer, and that it seems to me—as it seemed to him—insufficient. Besides these distinctions there is a fact peculiar to this case which deserves separate notice, because much was made of it in argument. The applicant subscribed the memorandum of association not only for the same number of shares as that for which he agreed to accept in payment of purchase-money, but also, and separately, for 200 shares for which he admits he is liable to pay. The argument I understand to be this—that this is evidence of two classes of shares subscribed for, and that one of them is identical with the other, being undoubtedly distinct from the vendor's shares. To my mind the observations of Mr. Justice Romer are equally applicable to both, and the fact, peculiar though it be, does not assist the applicant. Under these circumstances I must follow Mr. Justice Romer's decision and refuse the application. It is as well to add that I do this not so much because I am bound by the case of "*In re F. W. Jarvis and Co. (Limited)*," as because it approves itself to my judgment and I ought not readily to adopt distinctions from it. As stated by that learned Judge at the conclusion of his judgment, my order will not prejudice any question that may hereafter arise between the applicant and the Court as to whether, under the circumstances, he is or is not bound to take other shares under the memorandum of association; but, seeing the importance of the case, the considerable amount involved, and the public inconvenience of a difference of opinion between Judges on such a question, I venture to hope that my conclusion will be submitted to review in the Court of Appeal.

HIS LORDSHIP accordingly refused the application, but made no order as to costs.

[Solicitors—Bartlett and Co.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } June 30.

CROSSFIELD AND SONS V. TANIAN.*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897, Sched. I., para. 12—Award—Application to review.

An award cannot, by an application to review under para. 12 of Sched. I., be impeached on the ground that facts were taken as admitted at the hearing which ought to have been contested.

This was an appeal from the refusal of the Judge of the Warrington County Court to review an award made in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation, Patrick Tanian, was a labourer in the employment of Messrs. Crossfield and Sons, and in the course of his employment he met with an accident which resulted in the loss of his right eye. The applicant duly filed a request for arbitration, and in the particulars annexed to the request he stated that his weekly wages before the accident were 30s., and that at the time of filing the request he was earning wages at the rate of 17s. 1d. a week. The employers filed an answer, in which they stated that the applicant's weekly wages before the accident were not 30s., but 19s. 10½d. This answer, however, was only filed two days before the hearing of the arbitration, whereas Rule 17 of the Workmen's Compensation Rules, 1898, requires that the respondent's answer shall be filed "five clear days at least before the day fixed for proceeding with the arbitration." At the hearing the County Court Judge, finding that the employers' answer was out of time, considered himself bound to accept the applicant's statement contained in the particulars, and he made an award in the applicant's favour for a weekly payment of 12s. 6d. The award was made in August, 1899. In March, 1900, the employers applied to the County Court Judge, under paragraph 12 of Schedule I. to the Workmen's Compensation Act, asking that the weekly payment might be reviewed. The County Court Judge declined to accede to the application. The employers appealed. It was not suggested on their behalf that any change had taken place in the circumstances of the case between the making of the award and the application for a review, but it was contended that, on the true construction of paragraph 12 of Schedule I., it was open to either party at any time to apply for a review of the weekly payment. Paragraph 12 is as follows:—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the *maximum* above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

Mr. Arthur Powell appeared for the employers, Mr. W. D. Benson for the workman.

The COURT, without calling upon counsel for the workman, dismissed the appeal, Lord Justice Vaughan Williams doubting.

LORD JUSTICE A. L. SMITH said that what they had to consider was the true meaning of paragraph 12 of the first Schedule to the Workmen's Compensation Act. The question was whether employers could apply under that paragraph for a review of a weekly payment where the circumstances, which existed at the time of the making of the award, had not in any way altered at the time of making the application for a review. An award had been made in this case by the County Court Judge,

who had before him the statement of the workman that his weekly wages before the accident were 30s. The employers desired to show that the workman's wages had been 19s. 10½d. But the County Court Judge held that, as the employers had not filed their answer five days before the hearing, in accordance with the rules, they were out of order, and it was not open to them to take this point, and he therefore made an award on the basis of the workman's statement. The award was made in August, 1899. It was clear that the County Court Judge had not made any mistake in dealing with the case as he had done, neither was any appeal brought against the award. But in March, 1900, the employers applied under paragraph 12 of Schedule I. for a review of the weekly payment which the County Court Judge had awarded. The question arose, What change had taken place in the circumstances of the case since the making of the award. The answer was that no change whatever had taken place. The point which the employers really wished to raise was that the award was wrong, because the County Court Judge ought to have found that the workman's wages before the accident were 19s. 10½d. But could the employers in an application under paragraph 12 show that the award was wrong? In his opinion they could not. Paragraph 12 was passed *ad hoc* altogether. It contemplated that an injured workman might get well, or, at any rate, he might get better, or he might get worse. And accordingly it enacted that any weekly payment—not any award—might be reviewed at the request either of the employer or of the workman, and on such review might be ended—that was to say, if the workman got well—or diminished if he got better, or increased if he got worse. He thought that the decision of the County Court Judge refusing to review the weekly payment was right, and that the appeal ought to be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS said he agreed that it would be manifestly unfortunate if paragraph 12 of Schedule I. of the Workmen's Compensation Act could be used for the purpose of appealing against any award which one party or the other did not like. He felt sure that the Legislature did not intend this enactment to be used for such purpose. But though he felt this, on the other hand he knew no duty of the Court which it was more difficult to exercise, or which, in his opinion, ought to be more sparingly exercised, than what he might call the power of interlinear legislation, that was to say, of introducing into an Act of Parliament words which were not there. What were the words of this enactment? "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the *maximum* above provided." It was suggested that in the exercise of the powers which the Court had of interlinear legislation they should read in the words "if the circumstances are changed." He could not feel that there was any necessity for introducing those words into the enactment. But whether that were so or not, it seemed to him that the employers now proposed to show the existence of circumstances which were different from the circumstances which were before the County Court Judge on the original hearing. It was said that they could not do that, because they were estopped by the previous award. He was not sure that that was so. In the first place, an award was not a judgment so as to operate technically as an estoppel. And, in the second place, if abstract justice required them to say whether there ought not to be an estoppel, he could not help seeing that this was a case in which the question of amount had never been determined on the merits at all. It might be that the result was that there was an estoppel, but he could not feel sure. At any rate, he

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

hesitated to read into the Act words which were not there.

LORD JUSTICE ROMER said that this was an attempt to re-open an arbitration and impeach an original award on the ground that facts were admitted at the hearing which should have been contested. This was done under cover of an application made under paragraph 12 of Schedule I. to the Workmen's Compensation Act. In his opinion that paragraph was directed to another purpose, and was not intended to enable an award to be impeached on any such ground. He thought that it applied to cases in which some change in the circumstances had taken place since the date of the award. Here there had been no such change, no new fact had intervened. It seemed to him that, if the appeal were allowed, it would lead to great abuse. Whenever a party was dissatisfied with an award, he could keep on having fresh arbitrations until he obtained an award in his favour.

[Solicitors—W. Hurd and Son, for the employers; Cunliffes and Davenport, agents for Davies and Forshaw, Warrington.]

Q.B. Div. (Crown Cases Reserved) (Lord)
Russell of Killowen, C.J., Mathew,
Grantham, Wright, Bruce, Ridley, } 1900.
Darling, and Channell, JJ. } July 2.

THE QUEEN V. OLLIS.*

Criminal Law—Evidence—Admissibility—False pretences.

On a trial for obtaining money by false pretences evidence as to other similar transactions on the part of the prisoner tending to show a course of conduct is not rendered inadmissible by reason of the fact that he has been tried and acquitted in respect of such other transactions.

This case was argued before five Judges on March 17 last, and subsequently before the Court as at present constituted on May 5, when judgment was reserved. A report of the arguments will be found in *The Times* of March 17 and May 7.

The case was one stated by the Recorder of Bath for the opinion of the Court of Crown Cases Reserved, and raised an important question as to the admissibility of certain evidence. The defendant, Thomas Edwin Ollis, was tried at the quarter sessions for the city and borough of Bath held on October 13, 1899, on an indictment charging him with obtaining from Mr. H. F. Ramsey a cheque for £3 by falsely pretending that a cheque for £5 drawn by himself on the Birkbeck Bank in favour of Mr. Ramsey was a good and genuine order for the payment of £5. Mr. Ramsey gave evidence on behalf of the prosecution to the effect that the defendant on July 1, 1899, borrowed £2 from the witness: that on the following Wednesday (July 5) he gave the witness the cheque for £5, and the witness, believing the cheque to be a good one, gave in exchange his own cheque on the London City and Midland Bank for £3; that on presentation the defendant's cheque was returned marked N-S; and that when the witness took it to the defendant the latter expressed surprise, saying something about expecting money to have been paid in by some solicitors, and wrote out another cheque, which was returned similarly marked. Other evidence was given, which was to the effect that the defendant had an account at the Birkbeck Bank, but that the balance to his credit on July 5 was only 3s. 10d., and that no

money had been paid into the account since March, 1896; that he was an undischarged bankrupt; and that £183 would be due to the defendant as commission upon the sale of an hotel, but that the hotel had not been sold. The defendant was acquitted on this indictment. He was tried on the following day on another indictment charging him with three similar offences—namely, that on July 6, 1899, he obtained 10s. from Mrs. B. L. Rawlings by falsely pretending that a cheque for £3 15s. 6d. drawn by him on the Birkbeck Bank was good, and that on June 24, 1899, and on June 26, 1899, he obtained the sums of £1 10s. and £2 respectively by falsely pretending that cheques for £1 10s. and £2 respectively were good. The evidence given by Mr. Ramsey in the trial of the former indictment was tendered by the prosecution, but was rejected by the Recorder on the ground that it would be unfair to the defendant to admit it. The jury, being unable to agree, were discharged, and the defendant was tried again on the same indictment at the following quarter sessions, held on January 8 of this year. The evidence of Mr. Ramsey was again tendered and pressed upon the Court, and was this time admitted and the defendant was convicted. But the Recorder reserved the question whether the evidence of Mr. Ramsey was properly admitted for the consideration of this Court.

Mr. J. Harris Stone and Mr. W. T. Lawrance appeared for the defendant; and Sir Sherston Baker for the prosecution.

The LORD CHIEF JUSTICE, in delivering judgment, said that the question here arose upon a case stated by the learned Recorder of Bath, before whom the accused was indicted for obtaining sums of money by false representations, by means of worthless cheques. The trial of the first of these charges took place on October 13, 1899. It appeared that on July 1, 1899, Ramsey lent the accused £2 and on the 5th asked him to return it. The accused then wrote out a cheque for £5 and asked Ramsey to cash it, and Ramsey, believing it to be all right, gave him his cheque for £3. The cheque for £5 was dishonoured. In May, 1899, the accused had been adjudicated bankrupt. He had kept an account at the Birkbeck Bank, but that account had been dead, although not closed, since March 31, 1896, nothing having been paid in or drawn out, and on July 5, 1899, his balance there was 3s. 10d. At the trial the accused said that he expected money to be paid into his banking account by a firm of solicitors. A member of the firm stated that the accused would have been entitled to some £183 commission on the sale of some property, but that the sale had not taken place. The accused was acquitted upon this particular charge. His acquittal may have proceeded upon the ground that the representation was not fraudulently made; or, if fraudulently made, that the prosecutor had not been induced by that fraud to part with his money. On the following day, October 14, the accused was again put upon his trial upon an indictment containing three distinct charges in three several counts, all for obtaining money by means of worthless cheques on the Birkbeck Bank—that is to say, on July 6 he obtained £3 15s. 6d. from Bertha Lucy Rawlings, on June 24 £1 10s. from W. H. Morris, and on June 26 a further sum of £2 from Morris. The jury were unable to agree upon their verdict, and the accused was again put upon his trial upon this indictment containing the three charges at the quarter sessions held in January, 1900. At this trial counsel for the prosecution pressed the Recorder to admit evidence of the fraud practised on Ramsey as relevant to the charges then before him and as negating any reasonable belief on the part of the accused that there was money at the bank to meet these other cheques or any of them. The evidence was, after discussion, admitted; and Ramsey

*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

made precisely the same statement he had made before upon the trial of the first indictment when the accused was acquitted. The only point for their present determination was whether that evidence was inadmissible by reason of the fact that it was given on a former trial on a charge of which he was acquitted. We all agree the evidence was not inadmissible on the grounds suggested in the case. It was clear that there was no estoppel; and the negating by the jury of the charge of fraud on the first occasion did not create an estoppel; nor was there any question arising upon the maxim *Nemo debet bis puniri pro uno delicto*. The evidence was not less admissible because it tended to show the accused was, in fact, guilty of the former charge. The point was, was it relevant in support of the three subsequent charges? In the opinion of the majority of the Court, and in his Lordship's own opinion, it was relevant as showing a course of conduct on the part of the accused and a belief on his part that the cheques would not be met. The accused gave cheques on June 24 and 26 which were dishonoured, and, finally, a further dishonoured cheque on July 6, all three cheques having been drawn on the same bank as the first dishonoured cheque was drawn upon. It was impossible to say that all these facts were not relevant as showing an intention to defraud. The fact of the dishonour of the first cheque might, and perhaps ought to, have been capable of explanation, but it was impossible to say that it was not relevant. He (the Lord Chief Justice) had had the benefit of reading his brother Bruce's judgment, and had done so with great respect, as it differed in some respects from his own, and it appeared to him to go rather to the weight than to the admissibility of the evidence. In his opinion the conviction must be affirmed and the matter remitted to the learned Recorder to be dealt with by him in his discretion. His Lordship added that Mr. Justice Mathew concurred in the above judgment.

MR. JUSTICE GRANTHAM said he would confine his remarks to what seemed to him to be the only legal question for their determination, and the only one argued before them. Whether or not evidence given against a prisoner on one charge on which he had been acquitted can be afterwards used against him on another charge, not for the purpose of again attempting to get him convicted of the offence of which he has been acquitted, but merely to prove guilt in his conduct on the second charge by reason of his conduct in the first case. In other words, to negative the suggestion of the innocence of his conduct in the matter which was the subject of the second charge by giving evidence of facts previously given on the first charge which disprove his suggestion of an innocent mind, and an innocent action, in the second case. Having compared the present case to that of a man uttering base coin, his Lordship said that the objection to the admissibility of the evidence had arisen, he thought, from an entire misapprehension of the principle *Nemo debet bis puniri pro uno delicto*. That fundamental maxim of our criminal law meant that a man should not twice be put in peril for the same offence after a verdict had been returned by the jury, where the verdict had been given, it must be remembered, on a good indictment on which the prisoner could be legally convicted. How could it be said that this was the same offence as that on which he was acquitted? His Lordship referred to the cases of "*Reg. v. Westwood*" (4 C. and P., 547) and "*Rex. v. Birchenough*" (1 Moody's Crown Cases, 477), as supporting his view, and said the real test was, was the first charge the same as that on which the prisoner was being charged again, or was the evidence necessary to support the second indictment sufficient to prove a

legal conviction on the first. If not, the evidence on the first charge could be used again because it was being used in a different case and on a different charge. For these reasons, in his judgment, their answer must be yes, the evidence was admissible.

The LORD CHIEF JUSTICE then read the judgment of Mr. Justice Wright who, after stating the facts, said the first question argued was whether on the trial of the indictment for obtaining money by a false pretence from Rawlings and Morris on June 24 and 26, and July 6, evidence was relevant which was admitted to show that on July 5 and 6, the prisoner was endeavouring by an exactly similar pretence to obtain money from Ramsey. He thought the question must be answered affirmatively. The evidence tended to show that the conduct of the prisoner in tendering drafts on a bank at which he had no living account was not inadvertent or accidental, but was part of a systematic fraud extending over a period immediately preceding and following the date of the offence charged, and the case in that respect seemed to him to be governed by "*Reg. v. Francis*" (L.R., 2 C.C., 128) and "*Reg. v. Rhodes*" ([1899] 1 Q.B., 77). The real question was whether this relevant evidence of the false pretence on July 5 and 6 ought to have been excluded on the ground that it was part of the evidence given for the prosecution at the former trial at which the prisoner was acquitted. He thought the objection as to the admissibility of the evidence was rightly overruled, because it was not shown that the jury at the first trial negated the making or the fraudulent character of the pretence charge at that trial. The offence charged was not alone the making of that false pretence, but was the making of it and the obtaining of the then prosecutor's money by means of it. The only possible ground of objection to the reception of the evidence, assuming it to be relevant, seemed to be that there was an estoppel of record or quasi of record. An objection in the nature of *autrefois acquit* could not, of course, be maintained, because on either indictment the prisoner could not have been convicted of the offences or any of them which were alleged in the other indictment. Nor could there be an estoppel of record or quasi of record unless it appeared by record of itself, or as explained by proper evidence, that the same point was determined in the first trial which was in issue in the second trial. But in this case the record of the first trial would show no more than a general verdict of not guilty. It would not show, nor would evidence be admissible to show, whether the jury acquitted on the ground that in their opinion the pretence was not false, or on the ground that though false it was not fraudulently made, or on the ground that the money was not thereby obtained from the prosecutor. The use at the subsequent trial of Ramsey's evidence was not an attempt to re-open the question of the prisoner's innocence of the charge on which he had been acquitted, or to defeat the immediate and direct object of the former acquittal of that charge. He therefore agreed with the majority of the Court that the conviction should be affirmed.

MR. JUSTICE BRUCE, in delivering judgment dissenting from the majority of the Court, said that the real question for the jury on each of the counts which alleged a separate offence was whether the prisoner, at the time he passed the cheques in the counts mentioned, believed that the facts were such that the cheques would be met. They were not told in the case what was the nature of the evidence in support of any of the charges in the indictment, save that they were told that a witness, Harold F. Ramsey, gave the same evidence he had given on the trial of the prisoner on a former indictment. The question was whether such evidence was admissible, and it became a little difficult to decide

that question without knowing what was the direct evidence offered in support of the charges upon which the prisoner was convicted and what was the nature of the defence raised. But it appeared to him that enough was stated to show that the evidence of Harold F. Ramsey was not admissible on the trial of the prisoner on the indictment on which he was convicted. They might assume that the three cheques mentioned in the second indictment were all passed on the dates mentioned in the indictment and were all dishonoured, and, further, that the defence on the second indictment was the same as on the first—namely, that the prisoner at the time when each cheque was passed believed that the cheque would be met. That would depend on the knowledge or belief of the prisoner as to the state of his banking account on the days in question. The question they were asked to consider was whether the statements of Ramsey, with reference to the issuing by the prisoner to him of a cheque on July 5, were relevant to the question affecting the prisoner's knowledge of the state of his banking account on June 24 and 26 and July 5. He did not think that the transactions of July 5 could reasonably be considered to have any bearing upon the prisoner's knowledge or belief as to the state of his banking account on June 24 and 26. They certainly had no direct bearing on these questions, and if they were admissible, they were so admissible on the ground that they fell within the rule which allowed in some cases evidence to be given of facts distinct from, but similar to, the facts on which a charge was based. It was important to bear in mind that this rule did not render it competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment on which he stood charged for the purpose of leading to the conclusion that the accused was a person likely from his criminal conduct or character to have committed the offence for which he was being charged. His Lordship referred to the cases of "Reg. v. Oddy" (2 Den. C.C., 265) and "Reg. v. Holt" (Bell's C.C., 280) as illustrating this principle. He did not see how this latter case could be distinguished from the present. A line of cases had established the rule that when it becomes material to establish that an act charged in the indictment, and proved to have been done, was intentional and not accidental, evidence was admissible of similar acts done by the same person, having no direct bearing upon, or connexion with, the acts charged in the indictment save that the acts were similar and done by the same person. This rule was sometimes stated, he thought inaccurately, to be a rule which admitted indirect evidence of this class to prove guilty knowledge. He believed the evidence was admissible under this rule only on the ground that it tended to negative mistake or accident. His Lordship proceeded to give illustrations of this rule and referred to the language of Chief Justice Lord Coleridge in "Regina v. Francis" (L.R., 2 C.C., p. 181), cited with approval by Chief Justice Lord Russell in "Reg. v. Rhodes" ([1899] 1 Q.B., 77). In the present case there was no question of accident or mistake, the question was knowledge or no knowledge of the state of the banker's account, or of circumstances raising a belief in the mind of the prisoner respecting the state of his banker's account. Although there was a superficial resemblance between the act of pretending that a false coin was a genuine one and the act of pretending that a cheque was a valid cheque when it was not, there is a distinction between the two cases. The character of a coin is inherent in it and does not depend upon external circumstances, but in the case of a cheque, which was a genuine cheque (that is, signed by the person by whom it purported to be signed), the

validity of the cheque depended upon the state of the banker's account, and upon arrangements made between the customer and the banker, which might vary from day to day and were in no way inherent in the cheque. The act of pretending that a genuine cheque is a valid one is in substance a pretence that circumstances exist at the time of the passing of the cheque which justify a belief that the cheque will be met. Such circumstances might exist on one day and not on another, and the fact that such circumstances exist or do not exist on one day have no necessary connexion with the question whether such circumstances exist or do not exist on another day. In other words, the successive acts of passing at different dates genuine cheques falsely pretending that they are valid are not necessarily successive acts of the same character, because the quality of each successive act depended upon the knowledge of the person passing the cheque of circumstances existing at the time external to the instrument itself and varying in character from day to day. Therefore he thought that indirect evidence, based upon transactions other than those charged in the indictment, were not admissible within the rule which permitted such evidence to be given to negative mistake or accident. He was also of opinion that the evidence of the transaction on July 5 was not admissible as evidence of a system of fraud. He thought, therefore, that the evidence of the transactions on July 5 was not admissible on any of the counts of the second indictment, and that the conviction should be quashed, and that even if the evidence of that transaction should be held to be admissible as bearing on the first count, yet, as it was admitted generally and the jury were not directed to consider that evidence in connexion with that count alone, he should still be of opinion that the conviction should be quashed. On the question whether, if Ramsey's evidence were admissible on other grounds, it ceased to be admissible on the ground that the defendant had been acquitted of the charge contained in the first indictment, though he entertained during the argument considerable doubt upon the subject, he was now of opinion that that objection could not be maintained. He had had the advantage of reading the judgments of Mr. Justice Wright and Mr. Justice Channell, and on this point he agreed with the opinions expressed by them.

MR. JUSTICE RIDLEY said he had had an opportunity of reading Mr. Justice Bruce's judgment, with which he agreed, and he did not think he could usefully add any judgment of his own.

MR. JUSTICE DARLING said that it appeared to him that this evidence of Ramsey's would certainly have been admissible in the first instance on the trial of the indictment on which the defendant was convicted, although in itself capable of sustaining another charge against him of a criminal offence—that is, had there not been a former trial in the course of which this evidence has already been given. He thought it was material, for it went some way to show that the defendant knew that he had no assets at the bank on which he gave the cheque, as this had already been brought to his notice in regard to another cheque given by him but a very short time before. This evidence had, however, been given at the first trial, and it was said that therefore it was not again admissible, on the grounds stated in the "case reserved." This was in effect to state that this case came within the rule *Nemo debet bis puniri pro uno delicto* a rule which applied equally in civil actions under the form *Nemo bis vexari debet pro eadem causa*. This rule was the foundation of the pleas in bar known as *autrefois acquit* and *autrefois convict*. To the indictment

on which the defendant was convicted it would not have availed him to plead either of those pleas and to have supported them by evidence in the trial in Ramsey's case. Had only the evidence given on the trial in Ramsey's case been given on the trial of this indictment there would have been no evidence to go to the jury, for there would have been none of the giving of the cheque, or making the false pretences, charged as a crime by this indictment. It seemed to him, therefore, that by the admission of this evidence the defendant was not *in reprobis*, for he felt sure that those words were not to be understood as meaning that a man is not to be more than once annoyed by the same evidence. He thought they meant that he was not to be by legal process twice exposed to the risk of being found guilty of the same crime or the same tort, or liable twice to pay the same debt be it to the State or his fellow citizens. To hold otherwise seemed to him to rule that evidence which had been given once should never be produced again against the same defendant; yet it was plain that up "to a certain point" the evidence must often be the same, although the defendant was accused of wrongs done to two distinct persons and that in different suits or forensic proceedings. It seemed to him impossible to say that the evidence was irrelevant to the issue, and, as a matter of law, he was of opinion that the evidence of Ramsey was admissible.

MR. JUSTICE CHANNELL said it was an elementary principle of criminal law that a prisoner could only be convicted on a criminal charge by evidence bearing directly on that charge, and that it was inadmissible to endeavour to support the charge by showing that the prisoner had committed other similar offences, and was therefore likely to have committed the one with which he was charged. He knew of no exceptions to that rule; but nevertheless there were cases where evidence of transactions other than those the subject of the indictment could be given, because those transactions had a direct bearing upon one of the questions at issue on the trial of the particular indictment. Where the proof of an offence involved the proof of such matters as intent to defraud, or guilty knowledge, or the like, the evidence of other transactions was often the only evidence by which that essential part of the offence could be proved. In such cases evidence of other transactions was admitted, not for the purpose of showing that the prisoner committed the other offences, but for the purpose of showing that the transaction the subject of the indictment was done with the intent to defraud, or with guilty knowledge, as the case might be. It seemed to him to be a mistake to say that if the other transactions have been the subject of an indictment the prisoner is being twice vexed for the same matter by the proof of them on a subsequent indictment being allowed. His Lordship, having cited the case of a man passing counterfeit coins as an illustration in point, said the objection in the present case was to the evidence of Ramsey. The mere fact that he had given evidence in the case in which the prisoner had been acquitted of course did not make his evidence inadmissible. No one suggested that the evidence of the banker's clerk, the solicitor, and the trustee in bankruptcy, given also in the former case, was inadmissible. If the evidence of Ramsey was wanted to show that the prisoner had committed a fraud on Ramsey, that act being the fraud for which he was indicted, it would be inadmissible; but it was not wanted for that purpose but to show if possible that frauds were committed on Rawlings and Morris. Its admissibility, in his opinion, depended solely on whether it was relevant for that purpose, and upon the question of relevancy he concurred in the judgment of the majority of the Court.

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.JJ.) } July 2.

ISAACS V. EVANS.*

Practice—Non-suit—Non-suit on counsel's opening.

A plaintiff should not be non-suited on his counsel's opening except by the consent of his counsel.

This was an appeal from a decision of Mr. Justice Farwell's, reported *ante*, p. 113. The appeal raised an important question of procedure—viz., as to the circumstances which will justify a Judge at the trial of an action in deciding the case upon a preliminary question of law without hearing the evidence.

The action related to an alleged partnership in a gold mine in Wales. One of the plaintiffs, Thomas Evans, alleged that he and the defendant, Meredith Evans, had had several transactions together as partners in joint adventures in relation to gold-mining properties in Wales, and that in the month of April, 1898, they determined to acquire a certain property at Garthgell, in Merioneth, with a view to mining for gold. The owner of the property was one John Vaughan, and the plaintiff Evans alleged that he and the defendant arranged with him for the grant of a lease to the defendant on behalf of himself and the plaintiff Evans, and such lease was accordingly granted, and further, that a Crown licence was granted to the defendant on behalf of himself and the plaintiff Evans. The defendant had worked the mine since the date of the lease and the licence. In November, 1898, the plaintiff Evans assigned to the other plaintiff, Godfrey P. Isaacs, his moiety of the term, with rights and powers under the said lease and licence. The plaintiffs alleged that the defendant had refused to recognise their title or interest, and that he wrongfully claimed to be himself fully entitled to all the benefit arising under the said lease and licence. They accordingly claimed 1 a declaration that the defendant is a trustee of one moiety of the property at Garthgell for the plaintiffs or one of them; 2) an account; (3) an injunction. The defendant denied the existence of a partnership, and pleaded the Statute of Frauds. In reply, the plaintiffs set up acts which they alleged to be part performance of the partnership agreement. When the case was opened on behalf of the plaintiffs, Mr. Justice Farwell intimated that he would first deal with the question arising under the statute. The plaintiffs' counsel desired to go into the evidence before the question of law was determined, but the learned Judge declined to adopt that course; and at the conclusion of the opening he decided against the plaintiffs without hearing counsel for the defendant. Upon the Statute of Frauds the main contention of the plaintiffs was that the alleged contract was a partnership contract which might be proved by parol evidence, notwithstanding that the subject-matter of the contract was land and that the statute required that any contract for the sale of lands, or any interest therein, should be evidenced in writing; and reliance was placed upon "*Forster v. Hale*" (5 Ves., 308) and "*Dale v. Hamilton*" 5 Hal., 369. The learned Judge, however, held that the statute applied. In his opinion it was clear upon the cases that before evidence could be admitted as to the contract it must be shown that there was an actually subsisting partnership. Otherwise it would always be possible to evade the statute by pleading a partnership. He thought that the case of "*Carriek v. Sandmore*" 2 De G. and J., 161 was directly in point. He, therefore, dismissed the action with costs. The plaintiffs appealed.

Mr. Rufus Isaacs, Q.C., Mr. Badcock, Q.C., and Mr.

*Reported by H. B. HEWING, Esq., Barrister-at-Law.

E. Ford were for the plaintiffs; and Mr. Hughes, Q.C., and Mr. Ingle Joyce for the defendant.

The MASTER of the ROLLS said that the learned Judge had decided this case upon a preliminary discussion arising out of the opening of the learned counsel for the plaintiffs. Inasmuch as he (the Master of the Rolls) thought that there were not sufficient materials before the Court to enable it to determine the case and that there must be a further inquiry, he would, in accordance with the usual practice, abstain from saying anything upon the questions which had been raised since it might embarrass the parties upon the further inquiry. He would only say this, that, there being here three questions to be determined—viz., as to what the agreement was, whether there had been part performance of it, and what were the rights of the rights of the plaintiffs and the defendant—he did not think that the Court could deal with those questions without hearing the evidence. He would have had more hesitation in adopting this course but for the decision of the Court of Appeal in “Fletcher v. London and North-Western Railway Company” ([1892] 1 Q.B., 122); and his hesitation arose from the fact that in his own personal experience he had known many cases in which the plaintiff had been non-suited. But he thought that it would not conduce to expedition if a preliminary judgment was to be given upon an assumed state of facts in a case where there was any dispute as to the real facts, and in all cases there ought to be the consent of the plaintiffs’ counsel to that procedure. It was not possible to say in this case that there had been any such consent, and it was for that reason that he was pressed with the decision of the Court of Appeal in “Fletcher v. London and North-Western Railway Company.” In that case the Court laid it down broadly that, except by the consent of the plaintiff’s counsel, a plaintiff ought not to be non-suited without the evidence being heard. Where that consent was given it might fairly be assumed that the plaintiff was satisfied with the facts as stated in the opening. This case must therefore be remitted for trial.

LORD JUSTICE RIGBY agreed. He was not sorry to be bound by the rule laid down in “Fletcher v. London and North-Western Railway Company.” In his opinion, as a general rule, the time that was wasted in discussions whether the witnesses should be called and the almost inevitable disputes that arose when the evidence had not been given, more than counterbalanced any advantage to be gained by deciding a case at the trial upon a preliminary point of law.

LORD JUSTICE COLLINS said that “Fletcher v. London and North-Western Railway Company” came as somewhat of a surprise to the profession, but it was a decision of the Court of Appeal and their Lordships were bound by it. Speaking for himself, where a case was tried before a Judge without a jury and the counsel for the plaintiff had, as he might be trusted to do, stated his case up to the very high-water mark of what he was able to prove and the Judge was against him, he thought it would be a waste of public time to hear the evidence. It was, however, improbable that counsel would often insist upon the evidence being heard when the result must be the same as upon his opening statement. He regretted the delay which would result in this case.

[Solicitors—T. D. Jones, for D. Oswald Davies, Delgelly.]

Q.B. Div. } 1900.
(Bigham, J.) } July 2.
PRICE AND PIERCE V. MARITIME INSURANCE COMPANY
(LIMITED).*

Insurance—Marine—Subject-matter of insurance
—“Advances”—Construction of policy.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The facts of this case are fully stated in the judgment. Mr. Carver, Q.C., and Mr. T. E. Scrutton appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. J. A. Hamilton for the defendants.

MR. JUSTICE BIGHAM read the following judgment:—This action is brought to recover a total loss on a policy of insurance effected by the plaintiffs with the defendants. The question is whether there has been a total loss within the meaning of the policy. The facts were as follows:—In December, 1898, the Italian ship Cinque was loading at Pensacola for a voyage thence to Southampton. The master required money for his disbursements, and he borrowed the amount from the plaintiffs, who took from the master a document which for the purposes of this case may be called a promissory note. The note is in the following terms:—“£760 12s. 9d. stg. Pensacola, Fla., Dec. 30, 1898. Ten days after arrival at port of destination of the steel bk. called Cinque, of which I am the master, now lying at Pensacola, Fla., loaded with P.P. sawn timber and lumber, and ready to sail for Southampton, I promise to pay to the order of myself the sum of £760 12s. 9d. British sterling in approved bankers’ demand bills in London value received for necessary disbursements of my vessel at this port, for the payment of which I hereby pledge my vessel and freight, and my consignees at the port of destination are hereby directed to pay the amount of this obligation from the first amount of freight received for account of my said vessel, any other draft or obligation by me drawn at this port on said freight to be secondary to this. Signed in duplicate, one being accomplished, the others to stand void. COMMOSA RITTORI, Master of the Steel Bk. Cinque.” The effect of this transaction was to vest in the plaintiffs an insurable interest in the vessel and her freight, and the plaintiffs thereupon effected the policy sued on. It is a policy at and from Pensacola to Southampton, the subject-matter of the insurances being “advances valued £775,” the risks are described in the customary way, and the insurance is against total loss only. The vessel proceeded on her voyage, but she never reached her destination. In February, 1899, she ran ashore at the Azores and became a total wreck. The cargo was discharged, and the holder of the bill of lading obtained possession of it upon payment of £790, being freight *pro rata itineris*. By Italian law, subject to which the contract of affreightment had been made, such freight was in the circumstances payable. The question is whether, having regard to this payment, there can be said to have been a total loss within the meaning of the policy. The question, in my opinion, subdivides itself into two,—First, what was the real subject-matter of the insurance? Secondly, was that subject-matter totally lost? Each is question of fact rather than of law. Now, in my opinion the only interest which the plaintiffs had consisted of a charge on the vessel and her freight to secure the payment of their advances. When the ship went to sea that security, and nothing else, was in peril, and that security alone could form the subject of an insurance. The words “advances valued £775” in the policy mean, therefore, the interest in ship and freight which the plaintiffs held as security for the loan they had made. It is said on behalf of the plaintiffs that that is not the subject-matter of the insurance, and that what the defendants underwrote was the risk of the ship’s never arriving at Southampton, and in support of this contention it is pointed out that, by the terms of the promissory note, the loan is only repayable after the arrival of the ship at Southampton; and it is suggested that the non-arrival of the ship involves a total loss of the plaintiffs’ money. But the answer to this contention is plain. First, no such risk as that suggested can be found described in the policy; the word “advances”

is quite inapplicable to it. Again, I doubt whether a man can create in himself an insurable interest by merely agreeing with his debtor that the debt due to him shall only be payable on the arrival of a ship. He must have some interest in the ship, her freight, or her cargo—some interest in the property in peril. A man may be largely interested in the arrival of a ship and yet have no insurable interest in her—as where the ship is bringing goods to a market where the man deals, which, when they arrive, he can buy and so fulfil his contracts and thereby save himself from loss. Further, I do not see what the underwriters have to do with the terms of the promissory note; they were no parties to it and knew nothing of it. And, lastly, I doubt whether the non-arrival of the ship would afford any answer to a claim against the shipowners for repayment of the loan. It is the master who protects himself by the words “ten days after arrival,” not the shipowners. The latter are by the note directed to pay the amount of the loan “from the first amount of freight received.” I think the defendants’ definition of the subject-matter of the insurance is the right one, and not the plaintiffs’. Then the question remains—Was that subject-matter (the charge on the ship and freight) wholly lost? I think not. The plaintiffs say it was, because the ship was lost and because the only freight pledged to them was, as they say, the freight payable at Southampton, which was also lost. No doubt the ship was lost; but was the freight? I think not. The plaintiffs did not merely get a charge on the freight payable at Southampton; they got a charge on all the freight the ship might earn on the insured voyage. The terms of the promissory note show that to be so; and, inasmuch as the ship earned £790, which was paid to her owners at the Azores, there has been no total loss of the subject-matter of the insurance.

Judgment for the defendants, with costs.

[Solicitors—Thomas Cooper and Co.; Waltons, Johnson, Bubbs, and Whatton.]

Judicial Committee of the Privy Council }
(Lords Davey, Robertson, Lindley, } 1900.
Sir H. de Villiers, and Sir F. North) } July 3.

GALLIERS AND OTHERS V. BYCROFT AND ANOTHER.*

Privy Council Appeals—Natal—Will—Construction—Substitution—Direct substitution—*Fideicommissum*.

This was an appeal from an order of the Supreme Court of the Colony of Natal of December 1, 1898.

The Hon. J. W. Leonard, Q.C. (of the Cape Bar), appeared for the appellants; Mr. Israel Davis for the respondents.

SIR HENRY DE VILLIERS, in giving their Lordships’ judgment, said the will which their Lordships were called upon to construe was executed in Natal, but the testator, William Galliers, sen., was an Englishman who had married in England before he settled in Natal. The will was in English in the following terms:—“I give and bequeath all and singular my real and personal estate . . . unto my dear wife Matilda Galliers (born Sabin) for the use and benefit of herself and my children during her lifetime, and after her decease I direct that the same may be equally divided among my children or such of them as may be then alive.” The testator died in 1864, leaving him surviving his wife, one son, and three daughters. The son, William Galliers, jun., died in 1875, after executing a will by which he bequeathed all his property to his wife Fanny Galliers. He left him surviving his wife and one son, William

Elton Galliers. The wife of the testator (William Galliers, sen.) died in 1897 leaving her surviving her three daughters already mentioned and her grandson, William Elton Galliers. The executors of William Galliers, sen., thereafter awarded the whole of the estate to the three daughters. Objections were filed against the distribution on behalf of the widow and the son of William Galliers, jun., they claiming to be entitled to share in the distribution of the estate. The Supreme Court, by its order, the Chief Justice dissenting, directed the executor “to frame and file an amended account so as to include in it William Elton Galliers, jun., as taking his father’s share in the capital of the estate of William Galliers, sen., and also his father’s share of the income of that estate from the date of the death of the widow of William Galliers, sen.” Against that judgment the three daughters had appealed. The widow of William Galliers, jun., had joined her son in supporting the judgment, but she claimed that, if her son should be held not to be entitled to his father’s share, she, as the sole heiress under her husband’s will, was entitled to it. The ground upon which a majority of the Natal Supreme Court supported the claim of the testator’s grandson was “that the law of Natal (differing in this respect from English law, but following Roman law) applies to cases of the present kind a rule of construction that where a parent has appointed children (or remoter descendants) as heirs and directed that upon their death their share should go over either to a stranger or to another child, then the going over or substitution is subject to the tacit condition implied by law that the deceased child left no issue.” That statement of the rule, if confined to the case of *fideicommissary* substitutions, appeared to their Lordships to be a fair deduction from the Roman and Dutch authorities on the subject. The rule had its origin in a response given by Papinian and quoted in the “Digest” (35, 1, 102) as follows:—“A grandfather having instituted as his heirs a son and a grandson born of another son requested the grandson, if he should die within his 30th year, to restore the inheritance to his uncle. The grandson died within the age mentioned leaving children. From a conjecture of dutiful conduct I answered that the condition of *fideicommissum* had failed because it would be found that less had been written than spoken.” It was obvious that in that brief opinion Papinian was not referring to the case of a direct or ordinary substitution—that was to say, the substitution of the son on failure of the grandson to take under the will—but to the case of a *fideicommissary* substitution, that was to say, the substitution of the son for the grandson by virtue of a trust imposed on the latter to restore the inheritance on the happening of a certain event after he had entered on it. The term *fideicommissum*, used by Papinian, would not be applicable to a direct substitution, nor would the grandson be requested or able to restore (*restituere*) an inheritance which he had never entered upon. The law relating to *fideicommissa* had been fully developed in his time, and it was a very common practice for Roman testators in creating such trusts to make them conditional upon the fiduciary heir dying without children. Papinian held in effect that that condition *si sine liberis decesserit* should be read into every will whereby the burden of *fideicommissum* was imposed on a grandchild of the testator. The authority of Papinian stood so high that the response was accepted as law, and it was confirmed by two Imperial rescripts quoted in the code (6, 25, 6, and 6, 42, 30), which extended the application of the rule to the case in which descendants of whatever degree were burdened with *fideicommissum* and even to the case of natural children who were so burdened. The

*Reported by W. J. MONTAGUE, Esq., Barrister-at-Law.

terms of both rescripts clearly showed that the condition *si sine liberis* was intended to be read only into wills by which *fideicommissa* were created. None of the Dutch Commentators on the Digest or the Code who were cited in the judgment of the Court below had extended the rule any further. Voet (36, 1, 17, *et seq.*), Peresius, Wissenbach, and Strykius treated the matter as part of the law relating to *fideicommissary* dispositions, and all the illustrations given by them were cases of *fideicommissary* substitution. Bruneman, in his Commentary on the cited passage of the Digest, confined the rule to *fideicommissary* substitutions and, in his Commentary on the Code (6, 42, 30), he expressly stated on the authority of Peregrinus (*de fideicommissis*) and other writers that the condition was not implied in the case of ordinary substitution unless the instituted heir was also burdened with a *fideicommissum* in favour of the substituted heir. Burge, in his Commentaries (vol. 2, p. 109) said:—"The condition *si sine liberis* is in certain cases implied when it has not been expressed. If a father or grandfather institute his son or grandson, who at the time has no children, with a *fideicommissum* to restore the inheritance to a third person, this condition *si sine liberis* is implied." He then proceeded, following Voet, to specify the limitations upon the rule of construction thus broadly stated, and he treated the matter as falling entirely under the law relating to *fideicommissary* substitutions. No decision of any Court administering the Roman-Dutch law had been cited to show that the condition had ever been implied in the case of a will under which the heir or legatee, if he took his inheritance or bequest at all, would take it free from any trust or burden. The case of Mylne (1 Natal Law Reports, p. 88), which was mainly relied upon by the Court below, was treated by the Court, which decided it as one of *fideicommissary* substitution. The testator in that case bequeathed the annual proceeds of his estate to the children of his daughter Jessie, who had been first married to one Robertson and then to one Tollner. The will then proceeded thus:—"In the event of any one of these my heirs dying, whether of the Robertson or Tollner families, the dividend or share of the deceased shall revert to and be paid to the survivors of that family to which the deceased belonged." After the death of the testator the children of Jessie received the annual proceeds and two of them claimed payment of the *corpus* of the estate free from any limitation over, but Chief Justice Connor decided that they were not entitled to succeed on the distinct ground that the substitution was intended to apply after as well as before they had entered on their inheritance. So far as the substitution was intended to take effect after the testator's death, it was clearly *fideicommissary*, for the children of Jessie were mentioned as "heirs" whose shares on their death should "revert" to the survivors of their respective families. That being so the condition *si sine liberis* was read into the will, but, as it could not be known until the applicants' death whether they would die without issue, the Court refused to order the payment to them of the *corpus* of their shares as their absolute property. The case, therefore, was no authority for the proposition that the condition *si sine liberis* could legally be read into a will which merely substituted one heir or legatee for another in the event of the instituted heir or legatee not entering on the inheritance or legacy. By the will now in question the testator, after giving a life interest in his estate to his wife for the benefit of herself and his children, directed that after her decease the estate should be equally divided among his children or such of them as might then be alive. The effect of that direction was virtually to institute the children as heirs on the death of their mother and to substitute the

survivors for such of the children as might die before their mother. It was a case, therefore, of direct and not of *fideicommissary* substitution. The children were not requested to part with their inheritance after they had once entered on it, and consequently those who survived their mother took their inheritance free from any burden. Those who died before their mother entered upon no inheritance and possessed nothing to restore. Their Lordships' attention had, however, been called to the English case of "*Sturges v. Pearson*" (4 Mad., 411), in which it was held that a bequest to several or to a class, "or" to such of them as shall be living at a given period, should be construed as a vested gift to all subject to be divested in favour of those living at that period, and that, consequently, if none were then living all were held to take. Their Lordships were not aware that that doctrine of vesting and divesting had ever been adopted in the Roman or the Dutch law, but, assuming that it had been so adopted, such a vesting and divesting would be a very different matter from the *aditio* and *restitutio* by an heir or legatee under a *fideicommissary* substitution. If William Galliers, jun., had survived his mother his inheritance would, under the will, have belonged to him absolutely. Having died before her he acquired nothing in respect of which a *fideicommissum* could be imposed on him. The will itself was free from ambiguity and contained no indication of any desire on the testator's part to benefit his grandchildren in preference to his surviving children, and the question to be determined was whether this was a case in which a Court administering the Dutch law could legally supply the omission of a supposed natural duty. To read into a will words which the testator had not used, to presume an intention which the testator had not expressed, could only be justified by a positive rule of construction having the force of law. Such a rule could not now be extended beyond the special circumstances to which the law originally confined it, even although the reason which led to the introduction of the rule might be applicable to other circumstances also. It was said that the principle underlying the rule of construction now under consideration was that the testator must be presumed to have overlooked the contingency of his instituted children or other descendants having issue. That principle would, no doubt, also be applicable to the case of direct substitution, but it would be equally applicable to many other cases than that of substitution, whether direct or indirect. The text of the Roman law had applied the rule of construction only to *fideicommissa*, no text writer or decided case under the Dutch law had extended it any further, and those commentators who discussed the question whether the rule should be extended to wills which contained no *fideicommissary* substitution answered the question in the negative. Their Lordships were therefore unable to agree with the majority in the Court below that the rule should be applied to the construction of the will now in question. It was not implied in that decision that the application of the *conditio si sine liberis* to direct legacies to children with a substitution had been an illegitimate extension of the principle by those Courts of law (as in Scotland) which had derived it from the Roman law, and their Lordships recognized the strength of the reasoning by which that extension was justified. It was enough for the decision of the present case to say that the Roman-Dutch law had not so proceeded, and it was for their Lordships to apply the law as it stood. But another rule of construction, bearing a close resemblance to the one just considered, had been called in aid by the respondents and it was this, that where a testator conferred benefits by will on his "children" he must be presumed to have intended to include under that term all other descendants. The reason for

that supposed rule was variously stated, and one of the grounds on which it was supported was the extreme improbability that the testator would have omitted to mention other descendants if he had thought of them. It was clear, however, from the reasoning of Voet (36, 1, 22) that in his time, at all events, no such hard and fast rule of construction was recognized. The conclusion at which he arrived was that the word "kinderen," which was the Dutch equivalent for "liberi" and for "children," must *prima facie* be taken to refer to descendants of the first degree, but that, if it could be gathered from the context of the will or from other circumstances that the testator had regard to descendants of a remoter degree, the word should be construed as having such wider signification. He added that the question in each case was not one of law but rather of intention. It appeared from later authorities that in the case of a bequest to the testator's own "children" the Courts of Holland required much slighter evidence of a desire to benefit further descendants than in the case of a bequest to the children of another person. It was difficult to find in the terms of the short will now under consideration such an indication of a desire to benefit the children of the testator's children as to justify their Lordships in giving to the term "children" the wider signification contended for. The Judges in the Court below held the same view, and moreover relied upon the case of "Martin v. Lee" (14 Moore P.C.C., 142), which was decided by their Lordships' Board on appeal from Lower Canada. There the testatrix, a married woman, domiciled in Lower Canada, had made a will in the English language. By the will she devised her estate to her husband for his life and after his decease to her children living at the time of her decease. One of her children predeceased her, leaving a child who was held by the Court of Lower Canada to be entitled to take under the will on the ground that the term "children" included grandchildren. Their Lordships, however, held that, upon the true construction of the will, the intention of the testatrix was to restrict the gift to her children, which intention countervailed the general force given by the law of Lower Canada to the word "enfants." Their Lordships added that it might well be that the will "having been written in the English language the proper mode of dealing with the case may have been for the Courts in Canada to ascertain what, according to the English law, was the meaning of the word 'children' as used in the will." The point was not decided, nor was it necessary for their Lordships now to decide it, seeing that, in their opinion, the children of the testator's children would not have been included in the word "kinderen" even if the will had been in the Dutch language and that word had been employed. In regard to the respondent Mrs. Rycroft, she claimed to be entitled, as sole testamentary heiress of William Galliers, jun., to his share of the estate in case his son should fail in his claim. Their Lordships, however, fully agreed with the Judges of the Natal Court that the words in the will "or such of them as may then be alive" prevented such a vesting of the inheritance in any child dying before his or her mother as would make the inheritance transmissible to his or her heirs. It was only in the event of William Galliers, jun., dying after his mother that Mrs. Rycroft would have been entitled to his share of the inheritance—as he died before his mother, his sisters, being the persons substituted for him under their father's will, were entitled to the share which he would otherwise have taken. The result was that in their Lordships' opinion the judgment proposed by the learned Chief Justice was right, and they would humbly advise her Majesty to allow the appeal, to disallow the objections to the distribution, and to order that the cost of all

parties in the Court below be paid out of the estate of William Galliers, senr. The cost of all parties on appeal would also be paid out of the estate.

[Solicitors—Budd, Johnson, and Jecks, for the appellants; Atkinson and Dresser, for the respondents.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } July 3.

IBEDALE AND PORTER V. THE CHINA TRADERS INSURANCE COMPANY (LIMITED).*

Insurance—Marine—General average—Loss of freight.

Held, that freight had not been lost in such circumstances as to make the loss the subject of general average contribution.

Decision of Bigham, J. (15 *The Times* L.R., 460) affirmed.

This was an appeal from the judgment of Mr. Justice Bigham at the trial of the action, without a jury, reported in 15 *The Times* L. R., 460; 4 Com. Cas., 256; [1899] 2 Q.B., 356. The action was brought to recover for a total loss under a policy of insurance on freight by the ship *Lodore*.

The parties agreed to the following statement of facts:—1. The plaintiffs own the iron ship *Lodore*, and by charter, dated February 10, 1897, chartered her to load coals at Cardiff for Esquimalt at 19s. 9d. per ton delivered. By a policy, dated March 3, 1897, they insured the chartered freight thereunder, valued at £1,650, with the defendants, against, *inter alia*, loss by fire and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid freight. 2. The *Lodore* proceeded to Cardiff, and there loaded a full cargo of coals and sailed on March 29, 1897, on the insured voyage. On May 26, 1897, the coals began to heat, and the master decided, for the safety of the ship, freight, and cargo, to jettison cargo, and to bear up for the River Plate. About 40 tons were jettisoned and the *Lodore* subsequently anchored in Buenos Ayres Roads on May 29, 1897. Between that date and June 25, 1897, cargo was from time to time discharged, and various surveys were held upon the coals, and it was found that the coals continued hot and would heat still further if the voyage was proceeded with. Accordingly, on June 25, 1897, the coals were condemned, and were ultimately sold. The vessel abandoned her voyage to Esquimalt and returned to the United Kingdom with another cargo, and the chartered freight was totally lost. 3. It was necessary for the safety of the whole adventure for the vessel to put into Buenos Ayres as aforesaid, and it was reasonably certain that, if she had continued on her direct voyage, the temperature of the coal would have continued to rise until spontaneous combustion ensued, and that, had she so continued her voyage, the ship and cargo would have been destroyed by fire before reaching Esquimalt. When and while she was at Buenos Ayres, the ship and her cargo, both the portion landed and the portion remaining on board, were in safety, but after she reached Buenos Ayres no part of the cargo could have been reloaded and (or) carried with safety to Esquimalt in the same or another bottom, and it was all necessarily and properly sold at Buenos Ayres. 4. The policy and charterparty, the protest, dated August 11, 1897, and the average statement, dated March 15, 1898, with the survey reports as therein set out, may be referred to as parts of this special case. 5. This action, in the defence to which all underwriters interested similarly to the defendants

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

concur, is defended to test the question whether by way of set-off and deduction from the total loss on the policy, which is admitted, the defendants are entitled to have the said loss of freight made good in general average to any and what extent, and to deduct the contribution to the same falling on the plaintiffs as ship-owners from the amount due on the policy. 6. It is not intended to allege or rely on improper condition of cargo as a defence to any claim there may be. 7. The Court is to have power to draw all necessary inferences of fact, and the parties agree to leave the adjustment of figures, on such principle as may be laid down, to Mr. F. C. Danson, of Liverpool, average adjuster. The learned Judge held that at the time the master abandoned the voyage the freight was hopelessly lost and could not, therefore, be said to be sacrificed at all. The plaintiffs were, therefore, not liable to make good any part of the loss in general average contribution. The defendants appealed.

Mr. Carver, Q.C., and Mr. T. E. Scrutton appeared for the defendants; Mr. Joseph Walton, Q.C., and Mr. J. A. Hamilton appeared for the plaintiffs.

The COURT, having taken time to consider, delivered judgment dismissing the appeal.

LORD JUSTICE A. L. SMITH read the judgment of the Court as follows:—This is an action by shipowners upon a policy of marine insurance by which the defendants underwrote for the plaintiffs the chartered freight of coals, valued at £1,650, upon a voyage from Cardiff to Esquimalt in the plaintiffs' ship *Lodore*, and the perils insured against were "loss by fire and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid freight." It is not disputed by the defendants that the chartered freight was lost by reason of the perils insured against within the meaning of the policy ("The Knight of St. Michael" [1893], p. 30), and that for this loss the defendants are liable to the plaintiffs. But the defendants contend that upon the facts of this case there has been a general average loss which is the subject of a general average contribution payable by the plaintiffs, and that for the amount of this contribution the defendants are entitled to have credit given to them when they pay to the plaintiffs the amount recoverable under the policy. The question argued before us is whether as regards the coal, upon the delivery of which at Esquimalt the freight would have become payable, there has been a general average sacrifice which would form the subject of a general average contribution, and, as this was the only point taken or argued, I pass on without observing upon the form in which the question is raised. My brother Bigham has held that the defendants' contention is ill-founded, and they appeal. It has long since been established that to constitute a general average loss so as to be the subject of a general average contribution two things at least must co-exist—(a) there must be an intentional sacrifice of part of the ship or cargo, or a voluntary expenditure for the benefit of the ship and cargo; (b) that such sacrifice or expenditure must be made at the time when a common danger to ship and cargo existed, for when the common danger has ceased there can be no sacrifice or expenditure that can be the subject of a general average contribution. Lord Justice Bowen in "*Svensden v. Wallace*" (13 Q.B.D., 69, at p. 84) thus expresses himself as to what constitutes a general average sacrifice. He says:—"It is essential at the outset to bear in mind two things—the nature of every general average sacrifice, and the object of every general average contribution. A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo. . . . The sacrifice" must be "made for the common safety in a time of danger." What the

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learned Lord Justice here says about a general average sacrifice is only what will be found laid down in many cases and stated in the text-books of authority, though clothed in different language. We have nothing in this case to do with any expenditure, for it is not suggested that there has been any. What we have to consider is whether there has been a general average sacrifice of cargo, so as to be the subject of a general average contribution by the owner of ship and freight. It is said by the defendants that there was a general average sacrifice of the coal when the ship turned off her course and bore up to the River Plate, followed, as it was, by an abandonment of the voyage after the ship arrived at Buenos Ayres. To appreciate this argument it seems to me important to consider—first, the position of matters and what took place when the captain of the ship determined to bear up for the River Plate; and, secondly, what took place after the ship's arrival there. The admitted facts are that upon May 26, 1897, when the ship was on her voyage from Cardiff to Esquimalt, the coals began to heat and the master decided "for the safety of the ship, freight, and cargo to bear up for the River Plate." I leave out of consideration the 40 tons of cargo which were jettisoned, for no question now arises thereon. I do not doubt that the bearing up under the circumstances above mentioned for the River Plate was a general average act, which would have given rise to a general average contribution if, in consequence of such act, any expenses or loss to the cargo were thereby occasioned. But no question of expenses arises, for none were incurred, and there was no loss to the cargo thereby occasioned. In these circumstances how can it be said that the bearing up for the River Plate was a general average sacrifice as regards the cargo, so as to be the subject of a general average contribution? No part of the cargo was in fact sacrificed, and *a fortiori* there was no general average sacrifice so as to be the subject of a general average contribution. Mr. Carver argued that the voyage was abandoned when the captain decided to bear up for the River Plate, but in my judgment it clearly was not. The master bore up for the River Plate and went into Buenos Ayres for the purpose, if possible, of continuing the voyage after he had got the cargo in order. He did not bear up for the River Plate for the purpose of abandoning the voyage. That was wholly foreign to his purpose. The bearing up for the River Plate was no abandonment of the voyage at all, and it is wholly erroneous to say that it was. Now the ship with the coals on board—other than those jettisoned—arrived at Buenos Ayres on May 29, 1897, and remained there till June 25, 1897, on which day the coals were condemned and ultimately sold. The admission is that "when and while the ship was at Buenos Ayres the ship and her cargo were in safety." The sale of the cargo, which in my opinion constituted the abandonment of the voyage, was not a general average sacrifice which forms the subject of a general average contribution, for the common danger had ceased, and the ship and cargo had then been in safety for about a month. The suggestion that the sale of the coal at Buenos Ayres was made for the common safety of ship and cargo to enable the vessel to bring her voyage and the common adventure to a successful issue will not assist the defendants, for, as was pointed out by Lord Justice Bowen in "*Svensden v. Wallace*" (at p. 85), a sacrifice for the safety of the common adventure does not constitute a general average sacrifice according to the law of England; nor, indeed, did Mr. Carver argue that it did. What he argued was that there had been a general average sacrifice of cargo when the ship bore up for Buenos Ayres, and at that time there was a common danger. I agree that then there was a common danger, but then there was no sacrifice of cargo. I am of

opinion that there has been no general average sacrifice in this case, and consequently the right to a general average contribution never arose, and that this appeal must be dismissed with costs. I agree with Mr. Justice Bigham's inference of fact that at Buenos Ayres the coal was hopelessly lost.

[Solicitors—Rowcliffes, Rawle, and Co., for Hill, Dickinson, Dickinson, and Hill, Liverpool, for the plaintiffs; Field, Roscoe, and Co., for Batesons, Warr, and Wimshurst, Liverpool, for the defendants.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.J.J.) } July 2.

THE KENT COAL EXPLORATION COMPANY (LIMITED) V.
MARTIN AND OTHERS.*

Practice—Pleading—Statement of claim—Causes
of action—Joinder.

This was an appeal from an order of Mr. Justice Bucknill's reversing an order of a Master striking out the plaintiff's statement of claim unless amended within seven days. The defendants were James Browne Martin, Gilbert Pitcairn Simpson, George Wreford, Edward C. Robson Rose, William James Cousins, Arthur Burr, Henry Thomas Potter, and Harcourt Willoughby Marley. The defendants Cousins, Burr, Potter, and Marley were the promoters of the plaintiff company. The defendants Martin, Simpson, Wreford, and Rose were directors of the plaintiff company. The statement of claim alleged that all the defendants had been guilty of a conspiracy to defraud, in pursuance of which they had carried out certain purchases, loans, and other transactions. The statement of claim further alleged, alternatively, that the defendants who were directors, in carrying out the said purchases, loans, and other transactions, had acted negligently and recklessly, and in breach of their duty as directors. The defendants took out a summons at Chambers asking that the statement of claim might be struck out, on the ground that a tort alleged against all the defendants could not properly be joined in the same statement of claim with a separate tort alleged against some of them. The Master, thinking that the case was governed by "*Gower v. Couldridge*" ([1898] 1 Q.B., 348), made an order that the statement of claim should be struck out unless amended within seven days. Mr. Justice Bucknill, thinking that the case was governed by "*Frankenburg v. Great Horseless Carriage Co.*" ([1900] 1 Q.B., 504), reversed the order of the Master. The defendants Martin and Simpson appealed.

Mr. Stewart-Smith (Mr. Robson, Q.C., with him) appeared for the appellants; Mr. R. A. McCall, Q.C., and Mr. J. Austen-Cartmell, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the decision of the learned Judge was right. The action was brought by a company against two sets of individuals—viz., the promoters of the company and the directors. The statement of claim alleged, as to both the promoters and the directors, that was to say, as to all the defendants, that they had been guilty of a fraudulent conspiracy, in pursuance of which they had carried out certain purchases, loans, and other transactions, whereby the plaintiffs had been damaged. It then went on to allege that the directors in carrying out the said purchases, loans, and other transactions had acted negligently, recklessly, and in breach of their duty as directors. It was argued that, according to the case of

"*Gower v. Couldridge*," the two allegations ought not to be allowed to stand in the same statement of claim. But in his opinion the present case was not governed by "*Gower v. Couldridge*." In that case there were three defendants, as to two of whom three separate causes of action were alleged, while as to the third only two causes of action were alleged. It was held that the two causes of action against the third defendant could not be joined in the same statement of claim with the three causes of action against the two defendants. In the present case the allegation was that there was a cause of action for conspiracy against all the defendants, and then as regards the same cause of action it was alleged that the defendants who were directors were guilty of breach of duty as directors. In his opinion the statement of claim ought not to be struck out, but ought to be allowed to stand. Neither did he see any reason why the Court in the exercise of its discretion should order the charge of conspiracy to be tried separately from the other part of the action.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER delivered judgment to the same effect.

Court of Appeal (A. L. Smith, } 1900.
Vaughan Williams, and Romer, } July 3.
L.J.J.)

SHOOLBRED V. ROBERTS.*

Bankruptcy—Property of bankrupt—Money deposited with stakeholder to abide the event of a billiard match.

Decision of Phillimore, J. (15 *The Times* L.R., 523), affirmed in part.

This was an appeal from the judgment of Mr. Justice Phillimore on an interpleader issue, reported in 15 *The Times* L.R., 523; [1899] 2 Q.B., 560. The issue raised the question whether the plaintiff, who was the trustee in bankruptcy of the defendant, John Roberts, the well-known billiard player, or the defendant was entitled to the sum of £200, which had been paid into Court by Messrs. Ashley and Smith (Limited), the proprietors and publishers of the *Sportsman* newspaper, in these circumstances:—On November 28, 1898, John Roberts, the defendant, and Charles Dawson entered into an agreement to play a match at billiards for the sum of £100 a-side, and under the terms of the agreement the editor of the *Sportsman* was appointed stakeholder. The sum of £200 was duly received by Ashley and Smith (Limited) to abide the event of the match and to be paid to the winner, each of the parties depositing £100. The match was duly played, and resulted in favour of the defendant on April 3, 1899. On March 29, 1899, Ashley and Smith (Limited) received a notice from the plaintiff claiming the £200 in their hands on behalf of the creditors of the defendant. On April 4, 1899, the defendant applied to Ashley and Smith (Limited) for payment of the £200 to him. Thereupon they paid the money into Court, and the issue above stated was directed. It appeared that the defendant was adjudicated bankrupt in March, 1898, and was at the trial of the issue undischarged. Mr. Justice Phillimore held that the trustee was entitled to the £100 deposited by the defendant, as the defendant could have recovered it back from the stakeholders and the trustee stood in the same position as the defendant. As regards the £100 deposited by Dawson, the learned Judge held that the trustee was not entitled to that sum. He accordingly gave judgment for the plaintiff for £100. The defendant appealed, and the plaintiff gave cross-notice of appeal.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

*Reported by W. F. BAILEY, Esq., Barrister-at-Law.

Mr. Bonsey appeared for the defendant; Mr. Herbert Reed, Q.C., and Mr. E. T. Holloway appeared for the plaintiff.

"*In re Roberts*" ([1900] 1 Q.B., 122, and *ante*, p. 29); "*Burge v. Ashley and Smith*" ([1900] 1 Q.B., 744); and section 18 of the Gaming Act, 1845 (8 and 9 Vict., c. 109), were referred to.

The COURT dismissed the appeal and allowed the cross appeal.

LORD JUSTICE A. L. SMITH said that, with regard to the £100 deposited by the defendant with the stakeholders, it must be taken that either the defendant or his trustee in bankruptcy claimed the return of the deposit from the stakeholders who had not paid it over. It could not now be contended, since the decision in "*In re Roberts*," that this £100 belonged to the defendant as his personal earnings. The first question was whether the defendant could have recovered this sum from the stakeholders. It had been held over and over again that a deposit in a case like this could be recovered by the depositor from the stakeholder before it had been paid over to the winner. It seemed to him that the defendant could have recovered the £100 back. That being so, it seemed clear that the trustee in bankruptcy was entitled to this £100. With regard to the other £100, which had been deposited by Dawson, different considerations arose. Whether an order for interpleader ought ever to have been made he (the Lord Justice) did not stop to inquire. An interpleader order had been made and the stakeholders had paid the £200 into Court. What ought to become of the £100 which had been deposited by Dawson? Did it belong to Dawson? Clearly not, because Dawson had plenty of opportunity of intervening and claiming it, and he had not done so. The trustee in bankruptcy claimed it as being entitled to it through the defendant, and the proper order to make in the special circumstances of this case was that this sum should be handed over to the defendant's trustee in bankruptcy. With regard, therefore, to the first £100 the appeal would be dismissed, and as regards the other £100 the cross appeal would be allowed. There would be no costs of the appeal or cross appeal.

LORD JUSTICE VAUGHAN WILLIAMS agreed in the peculiar circumstances of the case with the judgment delivered by Lord Justice A. L. Smith. But he did not wish it to be supposed that, when a bankrupt had made a wagering contract, his trustee in bankruptcy could come forward and recover the amount won by the bankrupt on the wagering contract as winnings. Nor did he wish it to be understood that the parties to these wagering transactions could evade the law by agreeing to pay the money into Court, and then, by having a consent order made for an interpleader issue, try the question as to who was entitled to the winnings. He had very great doubt whether in this case an interpleader order ought to have been made at all. By Order 57, r. 1 (a), the person seeking relief by way of interpleader must be under liability for a debt, money, goods, or chattels, for or in respect of which he was, or expected to be, sued by two or more parties making adverse claims thereto. He did not see how those conditions precedent were fulfilled in the present case. How could it be said that the stakeholders expected to be sued by two or more persons making adverse claims to this fund? Therefore he did not think that an interpleader issue ought to have been ordered in this case. It had, however, been ordered and tried. The trustee in bankruptcy had taken action with regard to £100, part of the stakes, which was inconsistent with its remaining in the stakeholders' hands. He claimed the £100, not as winnings, but as a deposit made by the defendant with the stakeholders. When he had done that, whether or not in words revoked the authority of the stakeholders,

in substance and effect he did so. Therefore the money no longer remained in the stakeholders' hands to be disposed of as winnings, but had to be dealt with as a deposit. Dawson did not claim the other £100 back, but he was willing to have the money handed over to the defendant or his trustee in bankruptcy as being money which he, Dawson, had voluntarily placed in the stakeholders' hands. In these special circumstances they might give judgment for the plaintiff.

LORD JUSTICE ROMER agreed. As to the defendant's appeal, he had nothing to add to the judgments already delivered. The cross appeal gave rise to a question of some difficulty. The interpleader issue was not between the parties to the wagering contract, but between one party to the wagering contract and a person claiming through him. Rightly understood the case was one where the bankrupt, who was entitled to a sum of money, raised as against his trustee in bankruptcy the point that he, the bankrupt, was entitled to the money under a void gaming contract. It was, therefore, a case where the bankrupt raised, as against his trustee in bankruptcy, section 18 of the Gaming Act, 1845. He (the Lord Justice) did not think that the bankrupt could raise such a point as against his trustee in bankruptcy. The circumstances here were peculiar, and throughout the interpleader proceedings the stakeholders treated the money in their hands as belonging to the defendant, and the only question was whether the defendant or the trustee claiming through him was entitled to the money. He (the Lord Justice) agreed with what had been said as to the care which ought to be taken in directing an interpleader issue where the stakeholder applying for the interpleader issue held in his hands money the subject of a wagering contract. He did not think that he was going too far in saying that an interpleader order ought not to be made where the parties to a wagering contract were applying to the Court for it.

[Solicitors—Roscoe and Hincks, for the plaintiff; Letts Brothers, for the defendant.]

Chan. Div.	}	1900.
(Buckley, J.)	}	July 3.

BUCKLAND V. BUCKLAND.*

Husband and Wife—Married women's property—Settlement by infant—Subsequent repudiation..

This was an action by Felix Buckland and Jeanette Edith Buckland, his wife, against E. J. S. and L. J. Buckland (infants) and H. F. Cockle and J. E. Blackett, asking for a declaration that a certain settlement was not binding on the plaintiffs and that Cockle and Blackett, the trustees thereof, might be directed to transfer the settled property to the plaintiff, J. E. Buckland, on her separate receipt.

Under the will of James Cockle, who died in July, 1875, the female plaintiff was entitled to a legacy of money and shares, and Cockle and Blackett (with another person since deceased) were the executors. On December 12, 1891, the female plaintiff being then an infant, aged 18, was married to the plaintiff F. Buckland, and before the marriage a settlement dated December 8, 1891, and made between the female plaintiff (then J. E. Cockle) of the first part, F. Buckland of the second part, and the defendants Cockle and Blackett (the trustees) of the third part, was executed. By this settlement, after reciting that upon the treaty for the marriage it was agreed that the legacy and the investments thereof should be settled upon the trusts and subject to the powers and provisions thereafter declared,

*Reported by F. EVANS, Esq., Barrister-at-Law.

it was witnessed that, in pursuance of the agreement and in consideration of the marriage, the female plaintiff, with the privity and approbation of F. Buckland, declared that the trustees of the settlement should stand possessed of the legacy and investments, upon trust after the marriage to pay the income to the female plaintiff during her life for her separate use, without power of anticipation, and after her death in trust for such of her children as she should appoint by deed or will, and in default of appointment for the children of the marriage equally, and if there should be no child attaining 21, if a son, or being married, if a daughter, then upon trust that the trustees should hold the property in trust for such persons as the female plaintiff should appoint, and in default of appointment if the female plaintiff should survive her husband in trust for her, her executors, administrators, and assigns, and so that during the intended coverture she should not have power to anticipate the same, but if F. Buckland should survive the female plaintiff, then in trust for the persons who would have been entitled under the Statute of Distributions if the female plaintiff had died intestate and without having been married. The female plaintiff alleged that on attaining 21 she had repudiated the settlement, but that the trustees declined to hand over the trust funds to her. The defendants, other than the trustees, were the children of the marriage. The defendant trustees relied on section 19 of the Married Women's Property Act, 1882, which, so far as it is material, is as follows:—"Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman." The case was tried before his Lordship on June 28 and 29, and at the conclusion of the arguments his Lordship reserved judgment.

Mr. T. H. Attwater was for the plaintiffs; and Mr. A. St. John Clerke for the defendants.

MR. JUSTICE BUCKLEY delivered judgment as follows:—"In *'In re Queade's Trusts'* (33 W.R., 816) the settlement was a post-nuptial settlement made in the year 1847 between the wife, who was an infant, the husband, and the trustees. It contained an agreement and declaration by the parties, and a covenant by the husband, that all future property by the wife should be settled. In 1883—that is to say, after the passing of the Married Women's Property Act, 1882—the wife became entitled as one of next of kin to a share of undisposed of residuary estate. There, as here, the wife was at the date of the deed an infant, and there was, therefore, no settlement by her. Mr. Justice Chitty held that section 5 of the Act of 1882 was operative in those circumstances, and that the wife was entitled. In *'Hancock v. Hancock'* (38 Ch.D., 78) that case was disapproved. The Court of Appeal held that according to its true construction the 19th section of the Act of 1882 prevents section 5 from interfering with any settlement which would have bound the property if the Act had not been passed. The argument that "settlement" in section 19 must mean a settlement which is binding upon the wife was advanced and failed. The settlement in that case did not contain any covenant by the wife or any joint declaration or agreement. Subsequently in *'Stevens v. Trevor-Garrick'* ([1893] 3 Ch., 307) Mr. Justice Chitty held that in a case where not section 5 of the Act but section 2 was the relevant section, the principle of the decision of the Court of Appeal was equally applicable. In this state of things it appears to me that the decision in *'In re Queade's Trusts'* is gone altogether, and that it cannot be maintained, as was argued before me, that the effect of section 19 is merely to provide that the construction of the settlement is not to be affected

and that the Act does not apply except where the wife is bound by or has assented to the settlement. I conceive that I must deal with the present case upon the footing that section 2 is not to interfere with the settlement, if it be a settlement which would have bound the property if the Act of 1882 had not been passed. What then would have been the effect of the settlement of December 8, 1891, if the Married Women's Property Act, 1882, had not been passed? At the date of the marriage in December, 1891, the lady was entitled to a legacy of £1,000 under the will of her father, who had died in 1875. It was not given for her separate use. It was therefore a sum to which the husband would after the marriage have been entitled by virtue of his marital right upon reducing it into possession. In that state of things a deed was executed to which the lady (then an infant), the intended husband, and certain trustees were parties. It recites the will by which the legacy is given, and the death of the testator, and recites that the lady is an infant of the age of 18 years or thereabouts, and then recites that upon the treaty for the marriage it was agreed that the legacy should be settled upon the trusts after declared. The *testatum* is that in pursuance of the said agreement and in consideration of the said intended marriage, the lady, with the privity and approbation of the intended husband, declares that the trustees of the will shall stand possessed of the legacy upon certain trusts. Now, seeing that the lady was at this date an infant, the recited agreement cannot have been with her. It must have been an agreement between the intended husband and the trustees for the beneficiaries, including the children of the marriage if there should be such. In pursuance therefore of this agreement between the intended husband and the trustees, the intended wife with the privity of the intended husband declares that the legacy shall be held upon certain trusts. As a declaration by the infant this of course had no effect at all, so that, unless the recital of the agreement is to be operative as between the parties who are recited to have agreed, the instrument will have been wholly inoperative as to the property purporting to be settled. The case therefore seems to me parallel with that of *'Holles v. Carr'* (2 Freeman, 3; 3 Swan, 638), referred to by Lord Romilly in *'Young v. Smith'* (L.R., 1 Eq., 180). There is a plain recital of an agreement that the legacy shall be settled upon trusts which are in the instrument after declared, and no subsequent operative part to give effect to that agreement, unless it be found in implying a covenant on the part of the husband to do such things as are necessary to give effect to the settlement which the infant purports to make with his privity and approbation. Under these circumstances it appears to me that there is in this instrument an agreement by the husband which binds the marital right which is his upon the footing that the Married Women's Property Act, 1882, has not been passed. In other words, I think that, as in *'Hancock v. Hancock'*, the agreement by the husband to settle, although unaccompanied by any obligation binding the infant wife, is an agreement which would have bound the property if the Act of 1882 had not been passed, and that upon the true construction of that Act section 19 prevents section 2 from interfering with it. I may add that, as a matter of fact, it is plain from the evidence which was given before me that the guardian of the lady, who was one of the trustees, stipulated for the execution of the settlement as a condition of approving the marriage, and that there was in fact an agreement as between the husband and Mr. Henry Frederick Cockle, the trustee, that the property should be settled as appears by the instrument of December 8, 1891. Under these circumstances the action fails, and must be dismissed.

[Solicitors—C. H. Dodd, Lewisham, for all parties.]

Q.B. Div. } 1900.
(Bruce, J.) } July 3.

COHEN V. KUSCHKE AND CO. AND KOENIG.*

Principal and Agent—Secret commissions—
Action by principal to recover.

In this case, which was reported in *The Times* of June 27, the plaintiff sought to recover the amount of secret commission alleged to have been paid by Kuschke and Co. to Koenig when the latter was the manager of the plaintiff's tobacco business. The jury found a verdict for the plaintiff for £38, and judgment was given accordingly against Koenig. It was contended, however, on behalf of Kuschke and Co. that judgment could not be given against them unless it was proved that the plaintiff had suffered damage by Kuschke and Co.'s prices being raised so as to cover the amount of the commission. The case came up for further consideration of this point on June 30, and judgment was given to-day.

Mr. Witt, Q.C., and Mr. Norman C. Craig were for the plaintiff; Mr. J. Eldon Bankes was for Kuschke and Co.

Mr. WITT argued that the case was covered by the authority of "*Lister and Co. v. Stubbs*" (45 Ch.D., 1). As soon as the seller knew that the person with whom he was dealing was the buyer's agent there was fraud. When an article was being sold, the value of which was a matter of opinion, it was impossible to prove the true value. He referred to "*Grant v. The Gold Exploration and Development Syndicate (Limited)*" ([1900] 1 Q.B., 233).

Mr. BANKES contended that the plaintiff was not entitled to judgment, because he had no finding by the jury that the price was increased by the amount of the bribe. It was Mr. Witt's deliberate act that that question was not gone into, for he had objected to evidence on the point. Counsel cited "*Mayer of Salford v. Lever*" ([1891] 1 Q.B., 168). In the second case cited by his learned friend it was clear that the bribe was added to the purchase-money. It was tried by a Judge alone, and he drew that as an inference of fact. It was not a matter of law that in every case where secret commission was paid the purchase price was loaded with the commission. It was an inference of fact in every case.

Mr. WITT, in reply, submitted that in contemplation of law the defendants had fixed the real price at the price actually charged less the amount of the commission.

MR. JUSTICE BRUCE read the following written judgment:—This is a claim by the plaintiff to recover £38, a sum paid by the defendants Kuschke and Co. to the defendant Koenig, being a sum paid by way of secret commission to Koenig, who was engaged as the plaintiff's buyer. It was not disputed at the trial that the sum of £38 was paid by Kuschke to Koenig, but the question in dispute was whether it was a sum of money paid in pursuance of a bargain made by Koenig for the purchase from Kuschke and Co. of a parcel of 32 bales of Sumatra tobacco, or was a mere gratuity paid to Koenig as a Christmas-box or as a present. The defendants contended that it was a mere gratuity and that it had no relation to the contract by Koenig for the purchase of the 32 bales. Thereupon I left to the jury the following question, whether a term of the bargain was a promise to pay Koenig 3d. in the pound by way of secret commission and whether payment was made in pursuance of such promise. They answered that in the affirmative. I thereupon entered judgment for the plaintiff against the defendant Koenig. The

question now arises as to whether the plaintiff is entitled to judgment against the defendants Kuschke and Co. It was contended by Mr. Bankes on behalf of the defendants Kuschke and Co. that as there was no evidence that the price of the 32 bales had been enhanced by the amount of the commission, Kuschke and Co. are not liable. But I cannot agree with that contention. It is clear that Kuschke and Co. knew perfectly well that Koenig was the plaintiff's agent and was buying the 32 bales for him, and it is quite clear from the evidence of the defendants that the money paid to Koenig was paid to him with the intention that he should have the benefit of it. Indeed, as I have said, the case of Kuschke and Co. is that the £38 was a present to Koenig. If the money paid was not a mere gratuity, the defendants Kuschke and Co. must have paid it as a secret commission. By the finding of the jury Kuschke and Co. did pay this money to Koenig as a secret commission and in those circumstances I think it matters not whether a different price would have obtained had there been no bargain for a commission. In this sale it was a term, it entered into the bargain, that a sum of money, which was part of the apparent or pretended price of the goods, was to be paid over to Koenig for his own use. That money was in law not Koenig's money, but it was the money of the plaintiff. And if the defendants Kuschke and Co. paid over to Koenig with knowledge of the circumstances money which was the plaintiff's money, intending that Koenig should keep it for his own use and that the plaintiff should be kept in ignorance of the payment, I think they are liable to the plaintiff for the amount. The plaintiff cannot, of course, recover the money twice over, but he is entitled to recover it against either or both of the defendants, and he is entitled to judgment against Kuschke and Co. for £38 and costs.

[Solicitors—Windsor and Co., for the plaintiff; Courtenay, Croome, Son, and Finch, for the defendants, Kuschke and Co.]

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.J.J.) } July 5.

ROGERS V. ROSEGOOD.*

Vendor and Purchaser—Contract—Covenants—
Restrictive covenants—User—Covenant running with the land—Rights of assignees.

Decision of Farwell, J. (*ante*, p. 20), affirmed as regards some of the plaintiffs. Cross appeal of plaintiff Rogers allowed.

This was an appeal against the decision of Mr. Justice Farwell, which was reported in *The Times* of November 8 last, and *ante*, p. 20. The action was brought by the trustees of the will of the late Sir John Millais, as owners of property in Palace-gate, and by W. R. Rogers, the owner of adjoining property, for the purpose of enforcing restrictive covenants against the defendant, who is now the owner of the property known as Thorney-house, at the corner of Palace-gate and Kensington-gore, and proposes to build a large block of residential flats upon it. On May 31, 1869, the then Duke of Bedford purchased a plot of land, which formed part of the property to which the action related, from Messrs. Cubitt and Co., and covenanted to erect thereon not more than one messuage, or dwelling-house, which was to be used for a private residence only, and no trade or business was to be carried on there. Subsequently, on July 31 in the same year, he purchased an adjoining plot upon similar conditions, except that there was no

*Reported by J. F. WALKER, Esq., Barrister-at-Law.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

express restriction as to the number of houses to be built upon it. These covenants were expressed to be intended "to enure for the benefit of" Messrs. Cubitt and Co., "their heirs and assigns, or others claiming under them to all or any of their lands adjoining or near to" the property purchased by the Duke. The Duke subsequently purchased another adjoining plot, with respect to which no restrictive covenants were entered into. Sir John Millais bought his property in Palace-gate from Messrs. Cubitt in 1873 and built a house upon it. The conveyance to him contained no express assignment of the benefit of the covenant entered into by the Duke of Bedford. The conveyance contained a recital of one of the conveyances to the Duke, but did not in any way refer to the restrictive covenant therein. In 1872 the Duke of Bedford died, and his successor no longer wished to live at Thorney-house. In order to enable him to dispose of the property more freely, Messrs. Cubitt in 1876 executed a deed releasing him, so far as they could, from the covenant relating to the number of houses to be built on the property. The plaintiff Rogers, who was one of the firm of Cubitt and Co., and consequently one of the original covenantees, purchased other property in Palace-gate from the firm after the date of this release. The defendant purchased from the Duke's devisees. Mr. Justice Farwell held that the trustees of Sir John Millais were entitled to the benefit of the restrictive covenant, and could enforce it against the defendant, and that the erection of a block of flats would be a breach of the covenant not to erect more than one house on the land. His Lordship accordingly granted an injunction in favour of the trustees as against the defendant. But his Lordship held that the plaintiff Rogers, having joined in releasing the covenant, could not now enforce it. The action was dismissed as regarded Rogers. The defendant appealed; and Rogers gave a cross notice of appeal.

Mr. Warrington, Q.C., Mr. Hughes, Q.C., and Mr. A. J. Allen were for the defendant; Mr. Haldane, Q.C., and Mr. Christopher James were for the plaintiffs. On June 21 last the judgment of the Court was reserved.

LORD JUSTICE COLLINS read the judgment of the Court dismissing the appeal and allowing the cross appeal. His Lordship said:—This case raises questions of some difficulty, but we are of opinion that the decision of Mr. Justice Farwell is right, and ought to be affirmed. No difficulty arises as to the burden of the covenants in this case. The defendant is the assignee of the covenantor in respect of the two plots of land comprised in the conveyances of May 31 and July 31, 1869, and he took with notice of the covenants now sought to be enforced. Nor have we any hesitation in accepting Mr. Justice Farwell's conclusion, that the buildings which the defendant proposes to erect will involve a breach of these covenants. The real and only difficulty arises on the question—whether the benefit of these covenants has passed to the assigns of Sir John Millais as owners of the plot purchased by him on March 25, 1872, there being no evidence that he knew of these covenants when he bought. Here again the difficulty is narrowed, because by express declaration on the face of the conveyances of 1869 the benefit of the two covenants in question was intended for all or any of the vendor's lands near to or adjoining the plot sold, and therefore for (among others) the plot of land acquired by Sir John Millais, and that they "touched and concerned" that land within the meaning of those words so as to run with the land at law we do not doubt. Therefore, but for a technical difficulty which was not raised before Mr. Justice Farwell, we should agree with him that the benefit of the covenants in question was annexed to and passed to Sir John Millais by the conveyance of the land which he

bought in 1872. A difficulty, however, in giving effect to this view arises from the fact that the covenants in question in the deeds of May and July, 1869, were made with the mortgagors only, and therefore in contemplation of law were made with a stranger to the land, "*Webb v. Russell*" (3 Term Rep. 393), to which, therefore, the benefit did not become annexed. That a Court of Equity, however, would not regard such an objection as defeating the intention of the parties to the covenant is clear; and, therefore, when the covenant was clearly made for the benefit of certain land with a person who in the contemplation of such a Court was the true owner of it, it would be regarded as annexed to and running with that land, just as it would have been at law but for the technical difficulty. I think this is the plain result of the observations of Vice-Chancellor Hall in the well-known passage in "*Renals v. Cowlishaw*" (9 Ch.D., 125), of Sir George Jessel, M.R., in "*London and South-Western Railway v. Gomm*" (20 Ch.D., 583), and of Vice-Chancellor Wood in "*Child v. Douglas*" (Kay, 560), which, we agree with Mr. Justice Farwell, are untouched on this point by anything decided in the subsequent proceedings in that case. Referring to "*Tulk v. Moxhay*," Sir George Jessel, M.R., in "*London and South-Western Railway v. Gomm*" said:—"The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of '*Spencer's Case*' to another line of cases, or else an extension in equity of the doctrine of negative easements, such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. . . . Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land" (by which he clearly means the burden), "and it does not matter whether it proceeds on analogy to a covenant running with the land or an analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that, if he acquired the legal estate for value without notice, he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." In an earlier passage (at p. 580), dealing with the covenant in question in that case—viz., a covenant by a purchaser and his assigns to resell, if called upon by the vendor (a railway company), and with the objection that it contravened the rule against perpetuities, he said:—"Whether the rule applied or not depends upon this, as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell, who did. If it is a mere personal contract it cannot be enforced against the assignee; therefore the company must admit that it somehow binds the land, but if it binds the land it creates an equitable interest in the land." These observations, which are just as applicable to the benefit reserved as to the burden imposed, show that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable

of passing by mere assignment of the land. The benefit may be annexed to one plot and the burden to another, and when this has been once clearly done the benefit and the burden pass to the respective assignees, subject, in the case of the burden, to proof that the legal estate, if acquired, has been acquired with notice of the covenant. The passage enclosed in a parenthesis in the report of the judgment of Vice-Chancellor Hall in "*Renals v. Cowlishaw*" supports the same view, nor are the general observations or the decision of the case itself inconsistent with it. There in the original conveyance which imposed the restrictive covenant there was no expression, as there is in the present case, that the restriction was intended for the benefit of any part of the estate retained, and it is in reference to such a case that he said "the plaintiffs rest their case upon there being assigns of the Mill Hill Estate, and they say that, as the vendors to Shaw were the owners of that estate when they sold to Shaw a parcel of land adjoining it, the restrictive covenant entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the Mill Hill Estate, which they retained; and, therefore, that the benefit of that restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendor was made to such assigns, and without any contract by the vendor that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length—viz., that in such a case a purchaser becomes entitled to (the benefit of) the covenant, even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of all the property retained by the vendor upon the occasion of the conveyance containing the covenant. It appears to me that the three cases to which I have referred show that this is not the law of this Court; and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not showing that the benefit of the covenant was intended to enure for the time being for the benefit of each portion of the estate so retained, or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this at least must appear, that the assign acquired his property with the benefit of the covenant—that is, it must appear that the benefit of the covenant was part of the subject matter of the purchase." So in "*Child v. Douglas*" (Kay, at p. 571) Vice-Chancellor Wood said:—"Where part of the remaining property of the original vendor has been sold to another person, who must be considered to have bought the benefit of the former purchaser's covenant, and more especially when the subsequent purchaser has entered into a similar covenant on his own part, he must be considered to have done this in consideration of those benefits, and even whether he actually knew or was ignorant that this covenant was, in fact, inserted in other purchase deeds, because he must be taken to have bought all the rights connected with his portion of the land." These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, as well in contemplation of equity as of law without proof of special bargain or representation on the assignment of it. In such a case it runs not because the conscience of either party is affected, but because the purchaser has bought something that inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the pur-

chaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral, while it is affected by notice of those that touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion. When, as in "*Renals v. Cowlishaw*," there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land, and this can hardly be the case where the purchaser did not know of the existence of the restrictive covenant. But when, as here, it has been once annexed to the land reserved, then it is not necessary to spell an intention out of surrounding facts, such as the existence of a building scheme, statements at auctions, and such like circumstances, and the presumption must be that it passes on a sale of that land, unless there is something to rebut it, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption. We find nothing in the conveyance to Sir John Millais in any degree inconsistent with the intention to pass to him the benefit already annexed to the land sold to him. The covenant by the vendor to build a wall, if required by Sir John Millais to do so, in order to prevent Sir John Millais's windows overlooking the adjoining plot does not seem to us to have any bearing on the point, and we are of opinion, therefore, that Sir John Millais's assigns are entitled to enforce the restrictive covenant against the defendant, and that his appeal must be dismissed. It is, however, still necessary to consider the question raised by the cross-notice of Mr. Rogers. Mr. Rogers is one of the covenantees with whom the Duke of Bedford covenanted in a deed of October 30, 1876, "that every messuage to be erected on the two plots, or either of them, should at all times thereafter be adapted for and used as and for a private residence only." Mr. Rogers was a party to a deed of even date, whereby he and his partners released the Duke from the covenants restricting the number of houses to be built on the plots contained in the conveyances of May, 1869, and July, 1869. He afterwards took an assignment from his partners of two other plots of the firm's building land, near to the Bedford and Millais plots. Mr. Justice Farwell dismissed the action, so far as it set up any claim by Rogers, on the ground that the latter could not after the release above mentioned complain of the erection of several dwelling-houses; and the learned Judge did not consider that the proposed building would be a violation of the covenant with Mr. Rogers, that every house to be erected on the two plots, or either of them, or any part thereof, should at all times thereafter be adapted for and used as and for a private residence only. We are of opinion, however, that such a block of flats as it is proposed to erect would involve a breach of this covenant. Though we agree, as we have said, that such a building does involve a breach of the covenant that no more than one messuage or dwelling-house should be erected or standing on such plot, and that such messuage should be adapted for and used as and for a private residence, we think it is also a breach of the covenant in question. Though it is certainly not one messuage or dwelling-house only adapted for and used as a private residence, neither does it seem to us to constitute several separate dwelling-houses adapted for and used as private residences only, within the

meaning of the covenant. We think residential flats, involving the use of a public entrance and staircase, do not answer the description of private residences contemplated by the words quoted. The covenant must, we think, be construed in an ordinary or popular, and not in a legal and technical, sense; and we do not think that residential flats, though for many purposes separate dwelling-houses, come within the popular description of the class of buildings which it was intended to permit. The cross-appeal, therefore, of Mr. Rogers must be allowed.

[Solicitors—Parker and Thomas; Stibbard, Gibson, and Co.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.J.J.) 1900.
July 5.

THE MAYOR, &C., OF THE BOROUGH OF HYDE V. THE OLDHAM, ASHTON, AND HYDE ELECTRIC TRAMWAY (LIMITED) AND OTHERS.*

Tramway Company—Laying down tramway—Power to break up footway—Tramway Act, 1870, secs. 3 and 26.

Decision of Grantham, J. (15 *The Times* L.R., 456), affirmed.

This was an appeal by the defendants from the judgment of Mr. Justice Grantham, at the trial of an action without a jury, reported in 15 *The Times* L.R., at p. 456. The action was brought by the corporation of Hyde against the Oldham, Ashton, and Hyde Electric Tramway (Limited), the British Electric Traction (Pioneer) Company (Limited), the British Thomson-Houston Company (Limited), and the British Insulated Wire Company (Limited), for an injunction restraining the defendants from breaking open certain footways in the borough of Hyde, and laying down electric cables thereunder for the purpose of using them for working tramways which the defendants had constructed, and for damages.

The Tramways Act, 1870, section 26, provides that the persons authorized by any special Act to construct a tramway (called the promoters) "may from time to time for the purpose of making, forming, laying down, maintaining and renewing any tramway duly authorized, or any part or parts thereof respectively, open and break up any road" subject to certain regulations. The regulations provide that the promoters shall give notice to the road authority of their intention to open and break up any road, and that they shall not open or break up or alter the level of any road except under the superintendence of the road authority. By section 3 the term "road" is defined to mean "any carriageway being a public highway, and the carriageway of any bridge forming part of or leading to the same." By the Tramways Orders Confirmation (No. 2) Act, 1896, the British Electric Traction (Pioneer) Company (Limited), thereafter called the promoters, their successors and assigns, were authorized to construct tramways in the district of Oldham, Ashton-under-Lyne, and Hyde. The Oldham, Ashton, and Hyde Electric Tramway (Limited) were the successors of the British Electric Traction (Pioneer) Company (Limited). The other defendants were the contractors employed by them to do the work. Section 6 of the last-mentioned Act provides that the promoters may, and so far as regards so much of the tramways as is to be laid within the borough of Hyde shall, within two years from the date of the provisional order, construct and maintain the tramways therein described. Section 13, subsection 10, provides for the use to be

made of any paving, metalling, or material excavated by the promoters in the construction of the tramways from any road under the jurisdiction of the plaintiffs. Subsection 19 provides that the promoters shall not, without the consent of the plaintiffs, work the tramways by steam or any mechanical power other than electricity and that such consent may be given subject to such terms and conditions as the plaintiffs think fit. Subsection 21 provides that the promoters shall enter into a bond to forfeit £500 to the plaintiffs in case the tramways are not completed within two years. Section 16 provides that the promoters shall, besides giving notice of their intention to open or break up any road, lay before the Board of Trade and the road authority a plan showing the proposed mode of constructing, laying down, maintaining, and renewing the tramways. Section 24 provides that the carriages used on the tramways may, with the consent of the Board of Trade, be moved by means of electricity or other mechanical power applied according to a system approved by the Board of Trade. Section 25 provides that the promoters may place and maintain on any street or road in which any of the tramways may be laid such posts and overhead electric wires as may be necessary and proper for working the tramway by electric power. A plan for the construction of the tramway was authorized by the Board of Trade under section 24 of the Act of 1896. It involved the laying down of cables or feeders under the footways of the streets traversed. Disconnecting stations were authorized to be erected on the pavement at intervals of a quarter of a mile, by means of which the electric current might be disconnected from any section of the overhead wire. On July 5, 1898, the defendants gave to the plaintiffs notice of their intention to open the ground of the streets under the plaintiffs' control, along which it was intended that the tramway should pass, for the purpose of laying the electric supply mains. Prior to this they had undertaken to pay £500 towards the cost of widening the streets. The plaintiffs, however, refused to consent to the feeders being laid under the footways, unless the defendants undertook to pay a further sum of £500 towards widening the streets. This the defendants declined to do, and, claiming to be entitled to lay the feeders under the footways without the consent of the plaintiffs, they effected the work in September and October, 1898. This action was commenced on December 2, 1898. At the trial Mr. Justice Grantham gave judgment for the plaintiffs, granting a mandatory injunction and also awarding them £100 damages. The defendants appealed.

Mr. Cripps, Q.C., and Mr. Bartley Dennis appeared for the defendants; Mr. Macmorran, Q.C., and Mr. E. Sutton for the plaintiffs.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the action was brought by the corporation of Hyde, in their capacity as surveyors of the highways within their borough, and they complained that the defendants had, without their consent and against their wish, laid down certain electric cables or feeders under the footways in certain streets within the borough. The defendants claimed that they had a right so to lay down feeders under the footways, and they claimed that they had a right to continue to do so, and they justified under the Tramways Act, 1870, and under a provisional order confirmed by a Confirmation Act passed in 1896. The question was, could the defendants justify under the Tramways Act for the provisional order? Mr. Justice Grantham had decided that they could not, and in his opinion that decision was right. It was clear, from sections 3 and 26 of the Tramways Act, that that Act did not authorize the opening or breaking up of footways, but only of carriage-ways. The defendants now said that those sections only

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

applied to the laying down of tramways and not to the laying down of electric feeders. If that were so, at any rate the Act did not help the defendants in their justification. They then justified under their provisional order. Now did the provisional order give them the power to lay down electric feeders under the footways? Section 25 was the section on which the defendants chiefly relied. That section provided that the promoters might place and maintain on any street or road—he was not prepared to say that “street” did not mean the whole width of the street from wall to wall including the footways—such posts and overhead electric wires as might be necessary and proper for working the tramways by electric power. Did that confer authority on the promoters to lay down cables or feeders underneath the soil, or only to do something overhead and above the soil? In his opinion it only applied to something to be done above the soil and not underneath it. But it was argued on behalf of the defendants that it was necessary to lay down feeders underneath the soil in order to enable them to carry out their statutory powers of making the tramways. The argument came to this, that the word “overhead” in section 25 of the provisional order ought to be construed as meaning underground. He could not read the section as justifying the defendants in what they had done. At the trial the plaintiffs gave evidence of the damage which they had sustained, and the learned Judge awarded them £100 damages. The plaintiffs, however, wanted more than this; they said that the defendants claimed to have a right to lay the feeders under the footways, and intended to go on laying them, and they asked that the defendants might be restrained from doing so. The learned Judge accordingly granted an injunction. The defendants now said that the plaintiffs were not entitled to an injunction because they had been too late in asking for it. It appeared that the work was finished on October 3, and that the writ was issued on December 2. But the corporation had not lain by and permitted the defendants to do the work. On the contrary, the work had been done in spite of the strongest objections on the part of the corporation. He did not think there was any ground for saying that the plaintiffs were too late. It was then suggested that the injunction would do more harm than good, and that, if the plaintiffs took a proper view of their duty, they would not ask for it. But the plaintiffs did ask for it, and in his judgment that suggestion was untenable. As to whether there ought to be a mandatory injunction, he thought that the injunction should be varied, and that it should be in the form which would be stated by Lord Justice Romer. The appeal failed, and must be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS delivered a judgment in which he said that he entirely agreed.

LORD JUSTICE ROMER said he also agreed. The form of the judgment would be altered, and would be as follows:—“Declare that the defendants are not empowered to lay or keep wires under the footways. Restrain the defendants from opening or breaking up such footways without the consent of the plaintiffs; but this injunction is not to restrain them from removing wires, provided they make good all damage.”

[Solicitors—Rooke and Sons, agents for Thomas Brownson, Hyde, for the plaintiffs; H. C. Godfray, for the defendants.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } July 6.

MATTHEWS AND ANOTHER V. USHER AND OTHERS.*

Landlord and Tenant—Lease—Forfeiture—Mortgage of equity of redemption.

In the case of a lease made before the Conveyancing Act, 1881, the equitable owner of the reversion cannot bring an action to recover possession of the premises.

This was an appeal by the defendants from the judgment of Mr. Justice Ridley at the trial of the action without a jury. The action was brought to recover possession of certain houses upon the ground of forfeiture for breach of a covenant to repair in a lease.

The question was whether in the case of a lease made before the Conveyancing Act, 1881, the equitable owner of the reversion could bring an action to recover possession of the premises. The facts, so far as material to this report, were as follows:—On March 10, 1819, one Severn granted a lease of certain houses to one Everard for the term of 81 years at the annual rent of £36. The lease contained a covenant by the lessee, his executors, administrators, and assigns to repair and keep in repair the houses, and a proviso that the lessor, his heirs, and assigns might re-enter on breach of any of the covenants in the lease. In 1878, the legal owner of the reversion expectant on the lease executed a legal mortgage of it, and in July, 1887, he mortgaged the equity of redemption to the plaintiffs. The plaintiffs were in receipt of the rents and profits. In July, 1898, the plaintiffs served notice under section 14 of the Conveyancing Act, 1881, stating as ground of forfeiture a breach of the covenant to repair, and brought this action to recover possession of the houses. The defendants contended that only the legal owner of the reversion, in this case the first mortgagee, could elect to take advantage of the forfeiture clause in the lease and bring an action to recover possession of the houses. At the trial the mortgagee was added as plaintiff in the action. Mr. Justice Ridley held that, by virtue of section 25, subsection 5, of the Judicature Act, 1873, the plaintiffs could bring the action and he gave judgment for them. The defendants appealed. By section 25, subsection 5, “A mortgagor, entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.”

Mr. R. M. BRAY, Q.C., and Mr. BROOKE LITTLE, for the defendants, said that before the Judicature Act, 1873, the mortgagor in possession could not have brought ejectment. Section 25, subsection 5, of that Act had not given him that right. The lease only gave the legal owner of the reversion the right to forfeit the lease. It was the right of the legal mortgagee to say whether he would elect to forfeit the lease or not. The lease was part of his security. Section 10 of the Conveyancing Act, 1881, no doubt gave the mortgagor in possession the right to sue in such a case, but that section was limited to leases executed after the passing of the Act. That section would be unnecessary if the plaintiffs' contention were correct. The plaintiffs, therefore, were not entitled to sue. They referred to “Municipal Permanent Investment Building Society v. Smith” (22 Q.B.D., 70); “Fairclough v. Marshall” (4 Ex. D., 37); “Gentle v. Faulkner” (*ante*, p. 397, and [1900] 2 Q.B., 267).

Mr. DICKENS, Q.C., and Mr. H. TINDAL ATKINSON (Mr. Spence with them), for the plaintiffs, contended that in equity the mortgagor in possession was looked

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

upon as the real owner of the property, and section 25, subsection 5, of the Judicature Act, 1873, said in effect that the equity view of the position of the mortgagor in possession should prevail in all Courts, and he could now sue to recover possession. The section put the mortgagor in the position of the mortgagee as long as the mortgagee allowed the mortgagor to remain in possession. They referred to "Trent v. Hunt" (9 Ex., 14), and "Heath v. Pugh" (6 Q.B.D., 345).

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the short question was whether the plaintiffs, who were only the owners of the equity of redemption, could bring this action to recover possession. The lease reserved to the lessor, his heirs, and assigns the right of re-entry on breach of any of the covenants in the lease. Clearly the plaintiffs, being the mortgagors, were not "assigns" within the meaning of the proviso. That word, as was held in "Gentle v. Faulkner," meant a legal assign. It was said that section 25, subsection 5, of the Judicature Act, 1873, gave the plaintiffs the right to bring ejectment for forfeiture on breach of covenant. There was a great deal to be said on both sides, but in his opinion that subsection did not cover the present case. It was conceded that a mortgagor could not have brought this action before the Judicature Act. Did section 25, subsection 5, enable the plaintiffs to do so? He (the Lord Justice) thought that that enactment meant that a mortgagor entitled for the time being to the possession of land might sue for such possession, and a mortgagor entitled for the time being to the receipt of the rents and profits of land might sue for such rent or profits. Here the plaintiffs were not entitled to possession of the land because the lease had not been forfeited. It was said that they stood in the shoes of the mortgagee. That contention would not avail them, because at the time of the action the mortgagee had not given notice under the Conveyancing Act, 1881, and therefore had not put himself in a position to sue for possession. It was then said that the mortgagee was joined as a plaintiff in the action, but that again would not avail the plaintiffs, because, as already stated, notice under the Conveyancing Act, 1881, had not been given by the mortgagee or by any one on his behalf. Judgment must therefore be entered for the defendants.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—G. F. Hudson, Matthews, and Co., for the plaintiffs; Peacock and Goddard, for the defendants.]

Chan Div. }
(Cozens-Hardy, J.) }

1900.
July 6.

SACCHARIN CORPORATION (LIMITED) v. REITMEYER.*
Patent—Infringement—Common form of patent
—"Make, use, exercise, and vend," meaning of.

This was a patent action which raised a novel point of construction on the very old use of the word exercise in the common phrase "make, use, exercise, and vend," which occurs in all patents granted from the time of Queen Elizabeth to the present day.

The plaintiffs are the owners of several English patents for processes for making a substance called

ortho-toluin-sulphuric acid, which is used in making saccharin. The defendant is a commission merchant. The plaintiffs sued him in respect of alleged infringements of one of their patents called Monnet's patent, by the sale of parcels of saccharin. In the case of one of the sales his Lordship held that the plaintiffs failed to prove that the saccharin was made from an article manufactured by the patented process. In another case the defendant had contracted to deliver, and procured to be delivered, at a German port saccharin to the Chemical and Drugs Company, an English company which imported the article to England and sold it in England. Against this company the plaintiffs have succeeded in getting judgment. In respect of this part of the case the defendant's counsel contended that, assuming that the article used in making the saccharin was made by the patented process, the delivery by him to an English person in Germany, whether with or without knowledge that it was to be sent to England, was no infringement of English law. They argued also that in vending saccharin they were not bound to inquire whether one article used in the making substance dealt in was or not made by the patented process.

Mr. Moulton, Q.C., Mr. Cripps, Q.C., and Mr. J. Graham were for the plaintiffs; Lord Robert Cecil, Q.C., and Mr. A. J. Walter for the defendant.

HIS LORDSHIP delivered judgment, reserved from the 27th ult., as follows:—This is an action in which the plaintiffs claim damages for the infringement of Monnet's patent of 1894. The plaintiffs in their particulars rely upon the importation of a parcel of saccharin purchased by the defendant from M. Cerck in June, 1897, and imported into this country and sold by the defendant. The defendant admits this importation and sale. As to this part of the case, it is sufficient for me to say that it is not proved that the saccharin in question was made according to the Monnet patent; and that, on the contrary, it has been proved to my satisfaction that it was made by a different process. So far, therefore, as relates to this part the plaintiffs' action wholly fails, and, whatever may be the ultimate result of the action, regard must be had to this in dealing with costs. The plaintiffs also rely in their particulars upon the defendant's transactions with reference to certain parcels of saccharin which were ordered by the defendant as commission agent or merchant in 1897 from certain persons on the Continent, and were delivered by the vendors at foreign ports direct to the order of the Chemical and Drugs Company (Limited), of Manchester, the purchasers. The orders were given by the Chemical and Drugs Company to the defendant in England. The goods were contracted to be delivered, and were in fact delivered to the company at Continental ports. The defendant got his profit as commission agent or merchant in respect of the transactions. As to these parcels, the question is entirely different. The defendant in the first place asserts that the plaintiffs have not proved that the stuff was manufactured according to Monnet's patent. I have had the evidence of a German chemist from whose works one of the cases was procured, and although his evidence was not altogether satisfactory, by reason of his refusal to state the details of the manufacturing process adopted by his firm, I think I must hold, in the absence of any evidence to the contrary, that the plaintiffs have established that this one case of saccharin was manufactured according to Monnet's patent as interpreted by Mr. Justice Buckley in the recent case of "Saccharin Corporation (Limited) v. Anglo-Continental Chemical Works (Limited)." The evidence does not satisfy me except as to this one case. The defendant next contends

*Reported by D. PITCAIRN, Esq., Barrister-at-Law.

that even if Monnet's process was adopted, yet there is no infringement, because Monnet's patent is not one for the manufacture of saccharin, but only for the manufacture of tolwin-sulpho chlorides, a chemical substance used in the manufacture of saccharin, but also used for other purposes and not contained as such in saccharin. The defendant contends, with great plausibility, that a new terror will be added to life if every person is held to infringe Monnet's patent who uses an article imported from abroad in the course of the production of which saccharin derived from a chemical substance produced according to Monnet's process may have been employed. It seems to me, however, that this point has really been decided against the defendant and in favour of the plaintiffs by Mr. Justice Buckley in the case to which I have referred, and I therefore propose to adopt his view without expressing any opinion of my own. Assuming, then, that the importation into this country of the saccharin infringed Monnet's patent, the further question arises whether the defendant has infringed. Now it is plain that a patent is of local force. It cannot and does not profess to interfere with or control acts done abroad, and it is for the plaintiffs to prove that what the defendant has done brings him within the reach of the law. The patent is in the common form scheduled to the Act of 1883. It confers upon the patentee the sole privilege and authority to "make, use, exercise, and vend" the invention within the United Kingdom and the Isle of Man. Of these four words, "make, use, exercise, and vend," it is admitted that the defendant has not "made" or "used," and I think it is clear that he has not "vended." (See "*Badische Anilin Company v. Basle Chemical Works*" [1898] A.C., 200.) It is said, however, that he has "exercised" the invention within the jurisdiction. It is remarkable that this word, which has been found in letters patent, at least since 1621, so far as I am aware, has never been construed. I think, however, that it can only mean "put in practice." I do not think it can be taken to cover a transaction such as I have to deal with. The defendant as a commission agent contracted for delivery to the purchasers at a German port. He had no interest whatever in the case when delivered at the foreign port to the purchasers. He had no right to control its destination. I assume that he knew or suspected that the greater part of the stuff would find its way into this country, but I cannot regard that as material. The acts done by the defendant on the Continent were lawful there, and—being done on the Continent—were not unlawful here. The plaintiffs have sought to extend the principle laid down in "*Elmalie v. Bousier*" (9 Eq., 217) and "*Von Heydn v. Newstadt*" (14 Ch.D., 230), that the importation into and sale in England of an article manufactured abroad according to a process protected by an English patent is an infringement of the English patent to a case where the defendant has neither imported into nor sold in England. The plaintiffs have attempted to create a prejudice in their favour by asserting that the purchasers to whom the stuff was delivered were, and were known by the defendant to be, a company possessing no capital. But this seems to me wholly irrelevant to any question I have to decide. This is not an action based upon a charge of fraud or conspiracy. It is an action based solely upon infringement of a patent, as to which *scienter* is immaterial. The plaintiffs have sued and obtained judgment against the Chemical and Drugs Company. They have sued, or they may sue, the persons who bought from that company in England. They now attempt to sue the defendant. I am not disposed for the first time thus to extend the rights of a patentee. In my judgment, the plaintiffs' action wholly fails, and I must dismiss it with costs.

[Solicitors—J. H. and J. Y. Johnson; Deacon, Gibson, and Medcalfe.]

Judicial Committee of the Privy Council
(Lord Halsbury, L.C., Lords Macnaghten, Davey, Robertson, and Lindley) 1900.
July 7.

THE TORVA EXPLORING SYNDICATE (LIMITED)
V. KELLY.*

Contract—Agreement—Construction—Promise to pay on "flotation" of company—Flotation, 'what is.

This was an appeal from a judgment of the Supreme Court of the Cape of Good Hope of May 20, 1898, affirming a decision of the High Court of Matabeleland.

Mr. Swinfen Eady, Q.C., and Mr. A. M. Bremner were counsel for the appellants; Mr. H. Terrell, Q.C., and Mr. R. J. Parker for the respondent.

LORD MACNAGHTEN, in delivering their Lordships' judgment, said the question in the case was, What is the meaning of the word "flotation" as used in an agreement between a mining prospector and his employers, who were a syndicate or joint-stock company, limited by shares, and formed apparently for the purpose of acquiring and dealing in mining claims and other property within the territories of the British South Africa Company? The agreement was dated July 17, 1894, and made between the Torva Exploring Syndicate (Limited) and the respondent. The syndicate thereby hired the prospector for two months certain, and one month more if required. He was to devote all his time and attention to the interests of his employers and use his best endeavours to peg off payable mining properties in Matabeleland or Mashonaland for their benefit. He was to be paid a monthly salary of £15, and to be furnished with all necessary prospecting gear and provisions. The development or abandonment of all properties pegged off was to be at the discretion of the syndicate's representative, and all claims pegged off were to be transferred to the syndicate. Then followed the clause on which the question turned:—"7. The prospector shall receive from the syndicate the sum of £250 (two hundred and fifty pounds) on flotation by the syndicate of every block of 10 claims pegged by the prospector." In the course of his service under this agreement the plaintiff pegged off 330 claims or 33 blocks of ten claims each. They were pegged off under licences procured by the syndicate. No transfer was therefore necessary. They were all registered in the name of the syndicate or its nominees. By an agreement dated March 13, 1895, the syndicate agreed to sell the whole of these 330 claims, together with certain other property, to the Charterland Goldfields (Limited) for the sum of £50,000, payable in fully-paid shares of the purchasing company, who were besides to undertake the contracts and obligations of the syndicate, including their obligations to their prospectors. The sale was afterwards carried into effect. The purchase money was paid, and the transfer was duly entered on the register of the British South Africa Company. The objects for which the Charterland Goldfields (Limited) was established were among others "(a) to purchase . . . mines and mineral properties. . . to carry into effect . . . an agreement with the Torva Syndicate" (being the agreement above stated), "(b) to prospect for, open, work, develop, and explore . . . gold . . . and other mines . . . and to carry on and conduct the business of raising, crushing, washing, smelting, reducing, and amalgamating ores, metals, and minerals, and to render the same merchantable and fit for use." The capital of the company was £500,000 in £1 shares. It was stated at the trial by the manager of the Charterland Goldfields that his company did not apply to the public for capital, but it

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

was admitted that there were then about 2,000 shareholders and that the shares had been at a premium. Stopping at that point and putting aside for the moment the mining regulations of the British South Africa Company the result seemed to be that the Torra Syndicate did in fact dispose of those mining claims at a good profit to a substantial company having for its main purpose, or at any rate for one of its principal objects, the developing and working of gold mines. Was not that a "flotation" of those gold mining claims? The appellants said not. They said that it was not "flotation" at all, at any rate not the flotation contemplated by the agreement. "Flotation," they said, for the purposes of the agreement, meant the disposing of mining claims to a joint stock company with the consent of the British South Africa Company after doing the necessary work and obtaining a certificate called the inspection certificate prescribed by the mining regulations of the British South Africa Company. In order to show the meaning of the term "flotation" reference was made to the mining regulations of the British South Africa Company and the oral evidence given at the trial. Turning first to the regulations of the British South Africa Company, the word "flotation" was found occurring in the regulations of 1890 in a notice of May 17, 1892, amending one of those regulations and in the Mines and Minerals Ordinance of 1895. No definition of the word was given. The interpretation clause of the Ordinance of 1895 declared that in the interpretation of that Ordinance all words should be understood in the sense which they bore in ordinary use, and then it proceeded to define a great many expressions which were referred to as "special terms," amongst which the word "flotation" was not to be found. It was, however, clear from section 28 of the Mining Regulations of 1890 that "the flotation of a block" might be "into either a joint stock company or into a syndicate to further test the mine," that was as was conceded in the argument either into a mining company or into a developing company, and it was equally clear that the consideration for a flotation might be scrip or shares of the company or syndicate into which the mining claims were floated. The oral evidence as to the meaning of the term "flotation" did not help one much. No two of the witnesses agreed in their definitions. The plaintiff explained his view of the meaning of the word. He said that he discussed its meaning with Mr. Cresswell. He alleged that Mr. Cresswell, who acted for the syndicate, told him that there would be no difficulty in disposing of claims as soon as a sufficient number were obtained, and assured him that he would receive his share when the syndicate disposed of the claims whether they were transferred to a company or to an individual. That was all that "flotation" meant according to his view. Mr. Cresswell was not called by the defendants to contradict the plaintiff or to explain the part he took in the transaction. There was this to be said for the plaintiff's view that no doubt the primary object of making the prospector's remuneration dependent on flotation was that the syndicate might not have to put their hands in their own pockets. It was difficult to suppose that the parties to the agreement concerned themselves about the protection of the British South Africa Company, who were quite able to take care of their own interests. Besides calling a Mr. Heyman, who was managing director of "Willoughby's Consolidated," and formerly Civil Commissioner at Bulawayo, the defendants called Mr. Holland, the manager of the Charterland Goldfields, and Mr. Sauer, who was manager of the Rhodesian Exploration Companies, chairman of the Chamber of Mines, and manager of other companies. Mr. Holland's view was that "flotation," according to the Stock Exchange use of the term, meant

"inviting subscriptions from the public for the purpose of launching a company." "Flotation," he said, "is complete when the public have responded and the capital is provided." "There is no flotation of a company," he added, "if the shares are not publicly offered." Mr. Heyman said that "flotation" meant "the grouping of a certain number of claims to be formed in a gold-mining company to be worked at a profit." But he rather disappointed expectations by saying he was not in a position to give an opinion as to Mr. Holland's definition. He was not an expert on mining; he was manager of his company purely for financial purposes. Mr. Sauer thought that "flotation of claims" was "the flotation of claims to work at a profit into a company ordinarily called a gold-mining company." There were different kinds of flotation of claims, he said, "either into a developing company, a mining company, or other companies." In practice he would call the Charterland Goldfields a development company. But on being referred by the Court to the memorandum of the Charterlands Goldfields he added, "I would say Charterland Goldfields is a gold-mining company." In further answer to the Court he said that in applying the term "flotation of claims" a gold-mining company actually working claims at a profit was meant. That, he said, was the intention, though it was very often badly expressed in the agreement. Discarding some of the suggested conditions of "flotation" on which the learned counsel for the appellants no longer insisted, such as Mr. Holland's view that there could be no flotation unless the shares were publicly offered and Mr. Sauer's notion that the company must be actually working at a profit the fair result of the oral evidence seemed to be that the disposition made by the syndicate of those mining claims was "flotation" according to the ordinary acceptance of that term. The learned Chief Justice who presided in the Court of Appeal corroborated that view by saying, "Quite independently of the evidence given in this case I am of opinion that there has been a flotation of claims in the sense universally understood in South Africa." Having expressed that opinion, the learned Chief Justice proceeded to consider whether the mining laws in force in the territories of the British South Africa Company at the date of the contract required a different construction. The Court of Appeal, concurring with Mr. Justice Vincent, who tried the case, determine the question in the negative. Their Lordships agreed in that conclusion, but as that was the principal point in the argument before the board it would be proper to add a few words on the subject. It might be observed in passing that apparently the point was not made by any witness at the trial or relied on in the argument before the Judge of First Instance. Its importance seemed only to have been discovered in the argument before the Court of Appeal. It was probably owing to that circumstance that there was so little evidence about the practices of the British South Africa Company in regard to mining claims, while so much stress was now laid on regulations which appeared to have been habitually disregarded. The Mining Regulations No. 1, 1890, were nominally in force when the agreement of July, 1894, was made. Section I. declared that the right of mining for and disposing of all minerals belonged to the British South Africa Company. Any person might take out a licence to prospect, paying stamp duty and signing a declaration of obedience to the company. Every holder of a licence had the right to peg off ten quartz reefs claims in block. Then his title to those claims was to be inscribed in the Mining Commissioner's Register, and he was to receive a certificate, and thereupon his licence as a prospector ceased. Every quartz reef claim registered by any prospector was held on joint account

in equal shares with the company, and every transfer of the claim-holder's interest in such claim was subject to the right of the company. Every claim-holder desirous of transferring his interest might effect such transfer at the office of the registrar of claims. The transfer was to be duly entered in a book to be kept for that purpose and a certificate of transfer was to be granted. No transfer was to be made until the same had been duly registered, and no registration was to be made until all dues were paid. Every digger had to do a certain amount of work upon his block within a certain limited time under penalty of forfeiture, but the Mining Commissioner might extend the time at his discretion. When the required amount of work was done the claim-holder was bound to apply for an inspection certificate, and on giving evidence of having opened up a payable reef and having done the required amount of work he was to receive an inspection certificate certifying that the required work had been done. Then came section 28, on which the main argument of the appellants was founded. It provided that "when the claim-holder shall have received his inspection certificate he shall request the company to make a proposal for the flotation of his block into either a joint-stock company or into a syndicate to further test the mine. The company shall within a reasonable time either make a proposal or decline to do so." The section then proceeded to deal with each alternative. On any flotation the vendor's scrip was to be divided between the company and the claim-holder. It was not very easy to see how that clause was to be worked. One of the defendants' witnesses called it "pure nonsense." In May, 1892, the British South Africa Company issued a notice stating that the company waived its present option of flotation of mineral companies as laid down in its mining regulations, but retained the right of veto on any particular flotation and required application for formal consent before any mineral companies could be floated. That notice did not seem to make the matter very much clearer. On being referred to sections 27 and 28 Mr. Sauer, the chairman of the Chamber of Mines, said that the Chartered Company had not enforced their rights under that old law—"that is to say," he added, "they have never demanded their rights from claim-holders." Now the argument on the part of the appellants was this:—They said that the parties to the agreement—the prospector and the syndicate—must have been familiar with the mining laws in force in the territories of the British South Africa Company; they must therefore have contracted on the basis of those regulations, and consequently "flotation" in the agreement must be confined to the particular kind of flotation referred to in section 28, that is, flotation by the British South Africa Company or by the claim holder with their consent and in either case after the grant of an inspection certificate. But that consequence did not necessarily follow. The word flotation in the agreement seemed to be used generally. There was no limitation attached to it nor any qualification of any sort. Why should it be confined to the particular flotation referred to in clause 28, which did not seem to have been a workable clause nor one insisted upon in practice? The British South Africa Company were not prejudiced by a transfer of mining claims in accordance with their own regulations. All dues up to the time of transfer must be paid. They knew what the consideration was. That must be set forth in the declaration made for the purpose of transfer duty. They might, if they pleased, demand one-half of the shares payable on the transfer. If they preferred to wait or thought it better not to insist on their rights, why should the prospector lie out of the remuneration which he has earned and which his employers, without taxing themselves, were in a position to pay? In the result, their

Lordships were of opinion that the fulfilment of the requirements of sections 26, 27, and 28 did not enter into the definition of flotation and was not a condition precedent to the flotation contemplated by the agreement of July, 1894. Their Lordships were pressed by the learned counsel for the appellants to follow the decision of the Court of Appeal in England in the case of "Gifford v. Willoughby's Mashonaland Exhibition Company" (reported *ante*, p. 24). The Court there rejected a similar claim by a prospector founded on an agreement expressed in the same terms as the agreement of July 17, 1894. Unfortunately the circumstances of that case were not such as to make it of much assistance. The case came from the Commercial Court. There was no evidence given there. The place of evidence was supplied by statements of counsel. It did not appear, however, what those statements were. Some evidence seemed to have been given before the Court of Appeal, but that evidence—whatever it was—was left in equal obscurity. Nor had the decision itself the weight of a united judgment. Each of the learned Judges seemed to have taken a separate line, not always considering in the views of his colleagues, nor always pointing in the same direction. Their Lordships would humbly advise her Majesty that the appeal must be dismissed. The appellants would pay the costs of the appeal.

[Solicitors—Ingle, Holmes, and Son, for the appellants; Hutchins and Son, for the respondent.]

Q.B. Div. }
(Bigham, J.) }

1900.
July 9.

MACBETH V. WILD AND CO.*

Ship—Charter-party—Demurrage—When lay days commence—Construction of charter-party.

In this case the plaintiff sued on behalf of himself and all others the owners of the steamship Louisiana. The claim was for demurrage at the port of discharge. By a charter-party dated December 30, 1899, it was agreed between the owners of the Louisiana and the defendants, as freighters, that the steamship should "proceed to a customary safe loading berth in the River Nervion . . . as ordered (in writing) immediately on arrival (or lay days to count), and there load . . . a full and complete cargo of iron ore . . . and being so loaded shall . . . proceed to a safe berth at Middlesbrough-on-Tees as directed by consignees or their agents, to whom notice is to be given, within office hours, in writing, of the steamer being ready to discharge, and there deliver the cargo on being paid freight." "Lay days shall commence when the steamer is reported at the Custom-house, and in free pratique at the respective ports of loading and discharging, unless the loading or delivery has sooner commenced, but not to be reported between the hours of 4 p.m. and 10 a.m." The vessel loaded a cargo and proceeded to Middlesbrough. Notice was given to the plaintiff's agents that the vessel should discharge at Gjerns Wharf, Middlesbrough. On February 7, 1900, the vessel arrived and anchored at the Bell buoy within the Port of Middlesbrough, but owing to neap tides and the draught of the Louisiana there was not water enough for her to proceed to the named wharf. At noon on February 7 the vessel had been reported at the Custom-house and was lying at the Bell buoy in free pratique, and thereupon the captain gave to the charterers' agents written notice of such facts and of his contention that the lay days began at noon on that day. The charterers contended that until the ship had proceeded to the wharf as directed the lay days did

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

not commence. The vessel remained at the Bell buoy waiting for sufficient draught of water until February 12, when, the tides having sufficiently made again, she proceeded towards the wharf and was moored alongside at 4 30 a.m. on February 14. The plaintiff claimed demurrage for the period from noon on February 7 to 4 30 a.m. on February 14.

Mr. J. A. Hamilton appeared for the plaintiff; Mr. Carver, Q.C., and Mr. J. Eldon Bankes for the defendants.

MR. JUSTICE BIGHAM read the following judgment:—As a rule lay days begin to count as soon as the ship is ready to deliver her cargo at the agreed discharging berth, but the parties may stipulate differently if they choose, and here they have so chosen. In express terms the charter-party provides that the lay days are to commence when the steamer is reported at the Custom-house and is in free pratique at the Port of Middlesbrough. At noon on February 7 the steamer was reported and in free pratique. The lay days, therefore, began to run from that time. The defendants say that the plain provision of the charter-party is to be disregarded or to be read differently from its ordinary sense—first, because the notice of readiness to discharge could not be given while the steamer was at the Bell buoy; and, secondly, because the provision as to the loading necessitates a different reading of the lay-day clause from that which its wording seems to require. As to the first of these contentions, I think there is nothing in it. When the vessel gets to the designated discharging berth the notice must be given, and if it is not given, and time is thereby lost, the shipowner will be liable in damages; but the omission to give the notice will not prevent the running of the lay days which has already commenced. As to the second contention, it is to be noticed that it is based only on the loading clause, which, except for the purpose of throwing light on the meaning of the lay-day clause, is immaterial to the question in hand. The lay days at the loading port are to begin to run when the ship is reported at the Custom-house and in free pratique, and apparently they may begin sooner if the loading berth is not named immediately on the vessel's arrival. For aught I know, the vessel may not be able to report herself at the Customs in Spain until she is in a position to name her loading berth, and if so that would account for the provision as to the charterer giving immediate notice of the berth. But whether this be so or not, the difficulty in reading the lay-day clause with the stipulation in the loading clause ought not to prevent me from giving to the former its plain effect in connexion with the provision as to the discharge.

Judgment for the plaintiff, with costs.

[Solicitors—Holman, Birdwood, and Co.; H. H. Sherriff.]

Q.B. Div. } 1900.
(Bigham, J.) } July 9.

SCOTT AND HORTON V. ERNEST.*

Stock Exchange—Rules—Failure of broker—
Liability of broker's client to jobber.

Rule 71 of the Stock Exchange Rules applies to selling-out or buying-in only as between members of the Stock Exchange.

The plaintiffs in this case were jobbers on the London Stock Exchange, and the action was brought to recover £348 damages from the defendant for his failure to take delivery of 1,000 Bayley's United and 500 Hannan's North shares bought on his behalf from the plaintiffs by a Mr. C. Hemmerde, a broker on the

Stock Exchange. The shares had, on the defendant's instructions, been carried over from time to time, and at the mid-December account they were again carried over to the end of December account. On December 14 Mr. Hemmerde was declared a defaulter; and at the end of December account the plaintiffs, having ascertained that the defendant was the client for whom the shares had been bought, applied to him for a "name" for the shares. The defendant did not furnish a name, and declined to recognize the plaintiffs in the transaction. The plaintiffs thereupon sold the shares in the market, and, the price having fallen, claimed the difference from the defendant. The contracts entered into with the plaintiffs related solely to the defendant's shares, and the question as to privity of contract in these circumstances between the jobber and the client of a broker in default has recently been decided adversely to the present defendant's contention by Mr. Justice Mathew in "*Anderson v. Beard*" (5 Com. Cas., 261) and "*Levite and Thornton v. Hamblet*" (*ante*, p. 436), following the *dictum* of Mr. Justice Kennedy in "*Beckhussen and Gibbs v. Hamblet*" (5 Com. Cas., 217). This point, therefore, although pleaded in the present case, was not argued; neither was there any argument on the question as to the measure of damages, that point having also been dealt with in the previous cases. A point was however taken on behalf of the defendant which had not been raised in any of the other cases. It turned on the provisions of rule 71 of the rules and regulations of the Stock Exchange, which is as follows:—"Buying-in or selling-out must be effected publicly by the secretary to the committee for general purposes, or by the clerks of the house in their respective markets, who shall trace the transaction to the responsible party, and claim the difference thereon." It was contended for the defendant that the sale of the shares having been made by the plaintiffs in the market, and not as provided by the rule, the plaintiffs could not recover in this action. The defendant also said that on December 15 he had given notice to Mr. Hemmerde to close the transaction.

Mr. Rufus Isaacs, Q.C., and Mr. G. A. H. Branson appeared for the plaintiffs; Mr. Herbert Reed, Q.C., and Mr. F. G. Thomas for the defendant.

MR. JUSTICE BIGHAM, in delivering judgment, said that on the question of fact as to the notice to sell alleged to have been given by the defendant to the broker, he was not satisfied that the broker ever received the instructions, and his lordship thought that the defendant must have known that the broker had not received those instructions, because he (the defendant) never received a contract note from the broker or from the official assignee. The facts, therefore, were as follows:—The defendant instructed a broker on the Stock Exchange to buy certain shares for him. The shares were bought from the plaintiffs, who were jobbers, and were carried over from time to time. The last carrying over was at the mid-December account for the end of December account. The effect of the carrying-over transaction was that the broker, as the agent of the defendant, made a contract for him with the plaintiffs, by which contract the plaintiffs became bound to deliver the shares at the end of December account to the defendant or to his broker, if the broker remained, in accordance with the rules of the Stock Exchange, in a position to receive the shares and pay for them. If he did not do so, then the person to whom the shares were to be delivered in the ordinary course was the defendant. Privity of contract existed between the plaintiffs and the defendant, and if the broker failed to be able to carry out the transaction in the ordinary way, then it had to be carried out by the plaintiffs with the defendant. On December 14 the broker was declared

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

a defaulter, and he thereupon ceased to be able to carry out any more of his transactions, and under the rules all the transactions which he then had open with members of the Stock Exchange were closed by the official assignee. That closing did not, however, affect the defendant's rights and obligations. The defendant remained liable to the plaintiffs on the contracts, the subject of this action, and the plaintiffs equally remained liable to the defendant, just as if the closing of the broker's transactions by the official assignee had not taken place. That closing was merely part of the machinery of the Stock Exchange, for the purpose of speedily and finally regulating accounts between members, and it affected no one else. Therefore, at the end of December account the contracts in this action were still subsisting, the parties being the plaintiffs and the defendant. The obligation of the defendant was to take up the shares which he had bought when the end of December account arrived. He could perform that duty by passing his own name, and by informing the plaintiffs that it was his own name into which the shares were to be transferred, and that when the transfer had been duly prepared and certified in the company's office, then he would pay for the shares. The defendant did not do that. He did not intimate that he would take the shares himself, and he did not furnish any other name. In these circumstances the remedy of the plaintiffs was to sell out the shares in the ordinary way. They did so. They sold them in the ordinary way on the Stock Exchange for the best possible price. The result was a loss which they now sought to recover. It was said that the plaintiffs were not entitled to recover this loss, because they had not proceeded in the way directed by rule 71 of the rules and regulations of the Stock Exchange, subject to which the transactions had been entered into. In his Lordship's opinion, rule 71 probably related only to selling-out or buying-in as between members and not as between members and outsiders. Many of those rules were made for the purpose of regulating business between members, and did not refer to cases where a member of the outside public was brought into direct relation with a jobber by reason of the failure of the broker employed. Further, even if the rule did apply to transactions such as the present, it was directory only, and the non-observance of it did not deprive the plaintiffs of their right to recover this loss. There would therefore be judgment for the plaintiffs for the amount claimed with costs.

A stay of execution was refused.

[Solicitors—Spyer and Sons; Ashley, Lumley, and Michael.]

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.JJ.) } July 10.

BEARD V. LONDON GENERAL OMNIBUS COMPANY.*

Master and Servant—Master's liability to third persons—Negligence—Personal injuries—Scope of servant's authority—Omnibus driven by conductor—Non-suit.

This was an application for a new trial of an action tried before Mr. Justice Lawrance and a jury. The action was brought to recover damages for personal injuries caused by the negligence of the defendants' servants. The plaintiff's case was that on December 31, 1899, at 2 o'clock in the afternoon, he was riding a bicycle in the neighbourhood of Battersea-rose, when he was run down and severely damaged by one of the defendants' omnibuses. It appeared that the omnibus was just about to start on a fresh journey and was

making a slight détour in coming from the stables to its starting-place in front of the Norfolk Arms. One of the plaintiff's witnesses, a police constable, said that the man who was driving the omnibus was not a licensed driver, but the conductor. At the close of the plaintiff's case the defendants' counsel submitted that there was no case to go to the jury, and the learned Judge withdrew the case from the jury and directed that judgment should be entered for the defendants. The plaintiff now applied for a new trial. It was contended on his behalf that the learned Judge was wrong in non-suiting the plaintiff on the ground that there was no evidence that the man who was driving the omnibus was acting within the scope of his authority. The question whether a servant or agent was acting within the scope of his authority was always a question of fact, and was for the jury. It was well known to be an every-day occurrence for the conductor of an omnibus to drive for short distances during the temporary absence of the driver, especially in bringing the omnibus to its starting-point for a fresh journey.

Mr. Moyses and Mr. A. J. Wallach appeared for the plaintiff; Mr. Jelf, Q.C., and Mr. Clavell Salter for the defendants.

The COURT dismissed the application.

LORD JUSTICE A. L. SMITH said this was an appeal from a nonsuit by Mr. Justice Lawrance. The plaintiff, while riding a bicycle, had been run over by an omnibus belonging to the defendants, and had been thereby damaged, and he brought this action in which he complained that his injuries were caused by the negligence of the driver of the omnibus. If the plaintiff had simply proved that the defendants' omnibus was being driven negligently, as it in fact was, then in his opinion there would have been *prima facie* evidence that it was being driven by the person whom the defendants had authorized as their agent to drive. There would have been a presumption in the plaintiff's favour that the person actually driving was the authorized driver. But here the plaintiff's case was opened on the footing that the omnibus was not being driven by the driver, but by the conductor. The duties of a driver and a conductor were quite independent duties, and *prima facie* it was not the duty of a conductor to drive. It seemed to him that the plaintiff had negatived the presumption which otherwise would have existed in his favour. He thought that Mr. Justice Lawrance had been right in coming to the conclusion that there was no evidence that the accident happened through the default of an agent authorized by the defendants to drive.

LORD JUSTICE VAUGHAN WILLIAMS said he thought that this case was on the border-line. If on the evidence it was clear that the conductor was doing something outside his functions, then, in his opinion, the nonsuit was correct. But he did not think it would be right, without evidence as to what were the functions of the driver and the conductor, to assume that it was necessarily beyond the functions of the conductor to take charge of the omnibus during the temporary absence of the driver. Proprietors of omnibuses sent out their omnibuses under the charge of a driver and a conductor, and although it was true that the driver and the conductor had different functions to perform, it was quite consistent with that that it might be within the scope of the authority of the one to perform the functions of the other during the temporary absence of the other. If it appeared that at a time when one journey was at an end and another journey was about to commence the conductor turned the omnibus round, and in so doing negligently injured the plaintiff, he thought that the case ought to be left to the jury, and that it would be for the defendants to show that it was outside the functions of the conductor to take charge of the omnibus during

*Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

the temporary absence of the driver. But in this case the evidence spoke of the omnibus coming down the hill at the rate of eight miles an hour, and that evidence seemed to him to show that the conductor was not merely performing the driver's duty temporarily, but to be consistent with this, namely, that the driver had done what he undoubtedly had no right to do—that was to say, that he had delegated his authority generally to the conductor. He thought, however, that it would be unfortunate if it should go forth that whenever the conductor of an omnibus was found exercising the functions of the driver, then no case could possibly be made out against the proprietors of the omnibus in an action for negligence, unless the plaintiff called evidence to account for the temporary absence of the driver, and that in default of such evidence there was no case to go to the jury. It seemed to him that the sounder and simpler view was that, where omnibuses were sent out in charge of a driver and a conductor, it ought to be left to the jury to say whether the particular act done by the conductor was within the scope of his authority as conductor. He could not say of his own knowledge whether during the interval between two journeys the conductor had any duties to perform with reference to the horses, and he was not prepared to say that the mere fact that the act complained of was an act of driving on the part of the conductor was sufficient reason for not leaving the case to the jury. But in this case that consideration was not important, because the plaintiff's own evidence showed that the omnibus was coming down the hill at a great pace, and therefore the onus was on the plaintiff to show that the act of which he complained, being an act of such a character that it could not have been within the scope of the authority of any one except the driver, was authorized, and in his opinion the mere absence of the driver did not make it necessary that the case should be left to the jury.

LORD JUSTICE ROMER said he agreed in thinking that the appeal failed. He was of opinion that the presumption of authority which would have existed in the plaintiff's favour had been rebutted by the plaintiff's own witnesses, when it was proved that the person who was driving the omnibus was not an authorized driver, but only a conductor who from his position alone was clearly not authorized by the defendant company to drive. The onus was thus cast upon the plaintiff to give further evidence of authority, but no such evidence was given, neither was any case of necessity made out or even alleged.

[Solicitors—Osborn and Osborn, for the plaintiff; Hicks, Davis, and Hunt, for the defendants.]

Chan. Div. } 1900.
(Byrne, J.) } July 10.

IN RE COLE (INFANTS).*

Infant—Custody—Religious education—Change of religion by mother after the father's death.

Mr. Justice Byrne delivered judgment in the above application involving the custody of the infant children of a widow who some two years after her husband's death had become a Roman Catholic, she having previously been a Protestant, and her husband having lived and died a Protestant.

His LORDSHIP said,—This is an application in relation to the care and custody of the infant children of the late Mr. W. H. Cole and of M. M. Cole, his widow. The parents were married on April 12, 1877. The father died on April 11, 1894. There were five children of the marriage then living, all of whom are alive now—viz., one son and four daughters. The son, who was born in

1878, is now of age. The four daughters are Lillian, who was 12 years of age at her father's death, and is now 18, Hilda, who was then nine and is now 15, Winifred, who was then nearly five and is now 11, and Dora, who was then two and is now eight. The father, who died after a long illness from consumption, left nothing and the children are without means. The mother earns a living as a nurse but is unable properly to support or to provide a permanent home for the infants. She hopes hereafter to be able to establish herself in the management of a private nursing home, but at present that is nothing more than a hope. After the father's funeral the future of the children was discussed between the widow and her husband's father and two brothers. The father and one brother and a sister arranged to make a weekly contribution towards the support of the widow and four of the children and Mr. James Cole, the other brother, who was married but without children, offered to adopt Winifred and bring her up as his own child. This offer was accepted by the mother, and accordingly this child was handed over to James Cole and his wife and has remained with them ever since, having been duly and properly maintained and educated by them. She has been brought up in the Protestant religion, which was that of her father and at that time the religion of her mother also. Up to about April, 1896, that is to say for about two years, Mrs. Cole, the widow, assisted by the contributions from her late husband's family, kept up a home in Canterbury, all the children being brought up as belonging to the Church of England, the eldest daughter being a constant attendant at Sunday school. The eldest son always has been and remains a Protestant. At about the date I have mentioned Mrs. Cole adopted the Roman Catholic religion and sent her two eldest daughters, Lillian and Hilda, to a Roman Catholic convent school in Paris, where they have ever since remained. I was asked to postpone giving judgment until I should have seen these girls, so as to be satisfied that they are well and contented. I have now seen them and am satisfied that they are well cared for. They expressed themselves as being very happy and contented, and I saw no reason whatever to doubt their statements. Having regard to the age of these girls and to the length of time they have now been brought up and educated in the Roman Catholic faith, I do not think it would be right to disturb existing arrangements with regard to them even if an alternative scheme were before me, as it is not. Their brother Sydney Cole and their uncle James Cole, indeed, by their counsel expressed themselves as willing that present arrangements should be undisturbed as to these two children subject to my seeing them, as I have done. In regard to the child Winifred I think that I should be acting not only unwisely, but in contravention of principles which have been laid down by the Court as guides in such matters if I were to allow her to be removed from the care of her uncle simply to be sent to a Roman Catholic boarding school, which is the alternative suggested, although she has not arrived at an age when religious convictions are very deeply seated. She has been for six years well and kindly brought up by her paternal uncle and his wife, who appear in every way to have done their duty by her, and apart from other considerations which I shall have to refer to more particularly when I come to deal with the case of the youngest child I do not think that such an arrangement as was made by her mother and the paternal uncle in reference to the adoption of this child ought to be lightly disturbed. She is being brought up in the religion of her late father, and there is no suggestion that she is otherwise than well cared for and happy. A warm affection, as might be expected under the circumstances, exists between the child and her adopted parents. The case of the youngest child is more difficult to deal with. She is now eight years old

*Reported by E. B. SCHOMBERG, Esq., Barrister-at-Law.

and has been placed in a Roman Catholic boarding school in England by her mother. There is no question in this case of taking away a child from a mother's care ; but I have to consider whether the custody and upbringing of the child should be with the paternal uncle, who offers to undertake to maintain and educate her as one of his own, where she will have the companionship of her sister and where she will be brought up in the faith of her father, or whether she is to be brought up in the Roman Catholic faith by strangers. Undoubtedly I have mainly to consider (a) the welfare of the child ; (b) the wishes of the mother ; and (c) the wishes and religion of the father. As to the first point I have no reason to doubt that so far as physical and educational advantages are concerned the child would be well cared for and well educated for her station in life whichever course were adopted, but with her uncle she would have the advantage of the care of kind relatives and (a matter to which I attach very great importance) the companionship of her sister, a little older than herself. As to the second point, the mother undoubtedly desires the child to be educated as a Roman Catholic at a Roman Catholic boarding school. As to the wishes and religion of the father, I have to consider the facts. The father was all his life attached to the Church of England, and he appears to have taken a real interest in religious matters. He expressed dislike to what he considered to be ritualistic practices in the Church of England, and, although he occasionally attended Roman Catholic services and is stated by his widow to have once used an expression which might be construed as telling her she might change her faith after his death, I think that the true result of the evidence is that he was and always continued to be a member of the Church of England. He and his wife were married and their children were baptized according to the rites of that Church ; he was attended during his last illness by a Church of England clergyman, and his Burial Service was conducted by the same clergyman. After the father's death the mother continued to be a Protestant for about two years, bringing up her children in that faith, the eldest child, Lilian, as I have mentioned, being a constant attendant at Sunday school. Then came the change of religion on the part of the mother and the breaking up of the home. In the case of "*In re Magrath*" (9 *The Times* L.R., 66 ; L.R. [1893], 1 Ch., 143), Lord Lindley says (p. 148), in reference to the matter of having regard to the religion of the father :—"As regards religious education, it is settled law that the wishes of the father must be regarded by the Court and must be enforced unless there is some strong reason for disregarding them. The Guardianship of Infants Act, 1886, which has so greatly enlarged the rights of mothers after their husbands' deaths, has not changed the law in this respect. This was decided by Mr. Justice Stirling in '*In re Scanlan*' (4 *The Times* L.R., 611 ; L.R., 40 Ch.D., 200), and is unquestionable. The consequence is that, notwithstanding that Act, a widow may still find herself compelled to bring up her child in a religion which she abhors. The wishes of the father, if not clearly expressed by him, must be inferred from his conduct. If the father is dead it will be naturally inferred that, in the absence of evidence to the contrary, his wish was that the children should be brought up in his own religion—that is, the religion which he professed. This inference is one which the Court, in the absence of evidence to the contrary, is bound to draw, and is practically not distinguishable from a rule of law to the effect that an infant child is to be brought up in its father's religion unless it can be shown to be for the welfare of the child that this rule should be departed from, or the father has otherwise directed." Under all the circumstances

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I think it would be right in the present case that the youngest child should be committed for the present, at all events, to the care and custody of the paternal uncle, James Cole, and I think the proper order to make will be to appoint him to act as guardian of the two youngest children jointly with the mother and to commit the custody of these children to him until further order, he undertaking duly and properly to maintain, clothe, and educate them while under his charge ; the mother to have any access to them she wishes, if she gives an undertaking that whilst in her charge nothing shall be said or done with her knowledge or assent to tend to lead them away from the Protestant religion. I think the children ought to be allowed to stay with her if she wishes it at reasonable times and for reasonable periods. There will be liberty to apply, so that in the event of change of circumstances rendering it proper or desirable any alteration or modification of the present order may be made. His Lordship said that he should add that there was not a word which had been said against the kindness and goodness of any one concerned who had had anything to do with the children.

Mr. Younger, Q.C., and Mr. Dittin appeared for the applicant ; Mr. Levett, Q.C., and Mr. E. F. Lankester for the respondents.

[Solicitors—Nisbet, Daw, and Nisbet ; Leathley and Willis.]

Chan. Div. }
(Byrne, J.) }

1900.
July 10.

MARSHALL AND CO. V. BULL AND PETTY.*

Copyright—Drawings and designs—Infringement
—Unassignable licence—Registration of copyright after grant of licence.

This case raised a question as to copyright on the sale of electro blocks of designs or pictures. The plaintiffs were wholesale manufacturers of furs, mantles, and coat suits in an extensive way of business at Manchester and Glasgow. In September, 1898, they published a catalogue of newest designs for the winter season of that year containing 12 illustrations. Messrs. Evans and Williams, who were the plaintiffs' customers, received one of these catalogues, and the plaintiffs, at their request, supplied them with nine electro blocks of the illustrations, charging 4s. 6d. apiece. Messrs. Evans and Williams handed over these blocks to the defendants, Messrs. Petty and Sons, a firm of "fashion printers," for production in Messrs. Evans and Williams's catalogue, and it was stated that Messrs. Petty and Sons at the same time purchased the blocks of Messrs. Evans and Williams, deducting the price from their charge for the catalogues supplied to them. In November, 1898, Messrs. Petty and Sons produced for the defendants, Messrs. Bull and Sons, drapers at Oxford and Reading, a fashion catalogue containing eight illustrations from the blocks in question, but with different names. The plaintiffs thereupon registered under the Copyright Act, 1842 (5 and 6 Vict., c. 45), their catalogue containing the 12 illustrations, and brought the present action against Messrs. Petty and Sons and Messrs. Bull and Co. for an injunction restraining the reproduction and sale of the illustrations, and claiming delivery up of the blocks. The action as against Messrs. Bull and Co. was stayed on terms which were not stated. The defendants Messrs. Petty and Sons stated that they had purchased the blocks of Messrs. Evans and Williams without any conditions or restrictions, and contended, amongst other defences, that

*Reported by R. B. SCHOMBERG, Esq., Barrister-at-Law.

the plaintiffs had no copyright in the illustrations as they had not been registered under the Fine Arts Copyright Act, 1862 (25 and 26 Vict., c. 68), and that registration of the catalogue under the Act of 1842 simply as a book was not sufficient to protect the illustrations separately.

Mr. Warrington, Q.C., Mr. Rowden, Q.C., and Mr. E. S. Ford appeared for the plaintiffs; Mr. Bray, Q.C., Mr. Willis Bund, and Mr. G. F. Hart for the defendants Messrs. Petty and Sons; and Mr. Levett, Q.C., and Mr. Scrutton for the defendants Messrs. Bull and Co.

MR. JUSTICE BYRNE said that when the plaintiffs sold the blocks to Messrs. Evans and Williams it was not in the minds of either party that the blocks would be used for any other purpose except for the purpose of Messrs. Evans and Williams's catalogue. He found, as a fact, that the bargain between the parties was that a licence was given to Messrs. Evans and Williams to use the blocks for that purpose only. The defendants, Messrs. Petty and Sons, had insisted on the rights of Messrs. Evans and Williams and contended that they were entitled after having acquired the blocks from the former to use them for any catalogue. Now, quite apart from the question whether a licence must or must not be in writing, he was of opinion that the case of "*Cooper v. Stephens*" (11 *The Times* L.R., 283; [1895] 1 Ch., 567), when once he had arrived at the conclusion of fact as to the actual bargain, really substantially, if not entirely, covered the questions of law taken by the defendants, Messrs. Petty and Sons, in this case. "*Cooper v. Stephens*" was a case where the plaintiffs were the registered owners of the copyright in books containing illustrations drawn by themselves of carriages, and their principal business was to supply copies of the drawings to persons in the carriage trade for advertising purposes, the copies being generally printed by themselves and supplied to the customers on advertising sheets. Occasionally, however, their customers wished to print the designs themselves with other matter not printed by the plaintiffs, and in these cases the plaintiffs sold the electro blocks. One Lilley, having thus acquired two blocks, afterwards allowed the defendants to use them. There was then no written licence from the plaintiffs to Lilley or from him to the defendants or written agreement with reference to the use of the electros. At the trial, it was found that three other drawings were copied from the plaintiffs' book. Mr. Justice Romer held that the sale of the blocks conferred no copyright on Lilley, but was a mere licence to use them, and that a substantial part of the block had been taken by the defendants in that case. In the present case *a fortiori*, where it was eight out of 12 of the drawings, there was a very substantial part of the plaintiffs book taken. The case of "*Cooper v. Stephens*" practically covers, if not entirely, the points of law that had been taken in the present case. The first point, speaking generally, was that the registration was insufficient in the present case, the plaintiffs not having registered their copyright prior to the transaction when the blocks were sold for the very purpose he had mentioned, and it was said that if a man being possessed of a copyright in a book, not having registered that copyright, chooses to sell or license to another to use one of the illustrations in that book, he is thereby debarred from afterwards asserting his right in the copyright in that portion of the book because he had not registered under the Fine Arts Act, 1862. He did not think that argument well founded. It was said it did not appear in the case of "*Cooper v. Stephens*" whether the book had or had not been registered prior to the licence in question. Certainly nothing was said to show that it had been registered prior to that date; but, whether that was so or not, he was of opinion that a man,

being possessed of a copyright in a book, did not lose that copyright by reason of the grant of a partial licence or of a licence to use it, and that he was not prevented from suing an infringer if, before action brought, he registered his book. In other words, he did not by allowing a man to use a picture or pictures, which were a portion or portions of his book, lose his copyright in the book because he had not registered under the Act of 1862 for the protection of engravings or works of fine art. Another point taken was that purchasers of blocks might use them as they pleased. That depended, in his Lordship's mind, entirely upon the bargain made when the sale took place, and it did not appear to him that in point of law, under circumstances such as the present, the bargain was to be construed otherwise than as a licence to use for a particular purpose, merely because in order to allow that licence of user to be made use of a block or means of copying was supplied to the person to whom the licence was granted. The plaintiffs were entitled to an injunction and delivery up of the blocks.

Chanc. Div. }
(Farwell, J.) }

1900.
July 11.

ATTORNEY-GENERAL V. BARKER.*

Nuisance—What amounts to—Tramway across road—Sanction of County Council—Injunction.

In this action, which raised an important question as to highways, the Attorney-General, at the relation of William Norman Greenwood, Harold Greenwood, Percy Greenwood, and Oscar Greenwood, and the said relators as plaintiffs, sought a mandatory injunction to compel the defendants, James Barker and Joseph Haigh, to remove the rails, tramplates, and other articles used in the construction of a certain tramway so far as the same crosses two several highways, and to restore the said highways to the condition in which the same were previously to the construction of the said tramway, and an injunction to restrain the defendants from constructing any tramway across the said highways so as to constitute a nuisance.

Mr. Hughes, Q.C., and Mr. R. F. MacSwinney appeared for the plaintiffs; and Mr. Younger, Q.C., and Mr. Stewart Smith for the defendants.

The relators are tenants in common in fee simple of the mansion-house and grounds called Greenwood Leghe, situated near Ingleton, in the West Riding of Yorkshire, and three of them reside in the mansion-house. The defendants are the owners of the Ingleton Collieries and Brickworks, which lie about two-thirds of a mile to the west of Greenwood Leghe. Between the collieries and the mansion-house lie in the following order:—(1) A narrow highway known as Barber Top-lane (used principally as an agricultural road to the adjoining farm-lands); (2) a highway known as the Keighley and Kendal road (hereinafter called the "main road," and being the main road between those two towns); and (3) a branch line of the Midland Railway Company. The relators own all the fields except one lying between the Ingleton Collieries and the Midland branch line. There are the following approaches to the mansion-house of Greenwood Leghe:—(1) The principal approach is along a carriage drive which starts from the main road and crosses the branch line by a bridge; (2) the second approach is by a cart road, which also starts from the main road and crosses the branch line by a bridge; and (3) the third approach is from the main road into a lane called Green-lane, and thence along a back carriage drive. The main road was constructed under an Act of Parlia-

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

ment in 1827, and its control is now vested, by virtue of the Local Government Act, 1888, in the county council of the West Riding. The control of Rarber Top-lane is now vested, by virtue of the Local Government Act, 1894, in the Settle Rural District Council. By a letter from their clerk, dated April 27, 1898, the Settle Rural District Council consented to the construction by the defendants of a tramway across Rarber Top-lane, so far as they had power to do so. Later in the same year the defendants applied to the county council of the West Riding for permission to carry the tramway across the main road at Ingleton, and an agreement, dated December 31, 1898, and purporting to be made between the county council and the defendants, was put in evidence, by which the council "to the extent of their lawful powers" agreed to permit the defendants to construct a temporary tramway on a gauge of 24in. across the main road. There were also provisions as to the methods of constructing and working the tramway so as to ensure the convenience and safety of the public, and the defendants agreed to indemnify the council against all actions and proceedings in relation to the laying down of the tramway and against all damages that might be incurred in respect of accidents or injuries. This agreement was duly executed by both defendants, but was never sealed by the county council. On February 27, 1899, the Highways Committee, "to the extent of the lawful powers of the county council," acceded to an application by the defendants to permit the substitution of a tramway with a gauge of 4ft. 8½in., instead of the 24in. gauge authorized by the agreement, and this resolution was endorsed on the agreement and signed by the solicitor to the council. Early in 1899 the relators gave notice of their objection to the construction of the tramway, and after correspondence between the parties the writ in the present action was issued on June 16. The tramway was completed by the defendants in the following August. The tramway runs from the Ingleton Collieries to the Midland branch line, crossing on the level both Rarber Top-lane and the main road, the latter at a point between two of the approaches to Greenwood Leghe—viz., the front carriage drive and the cart road above mentioned. The space between the rails on both level crossings is paved with square sets, and a similar paving is extended 18in. on the outward side of the rails on the main road crossing. Railway trucks are drawn by horses backwards and forwards along the tramway, carrying principally bricks, but also a small quantity of coal and red ash.

MR. HUGHES said that the level crossings constituted both a public and private nuisance, and could not be authorized by the local authorities. A level crossing was *prima facie* a nuisance, and there was no need to prove public injury—"Attorney-General v. Shrewsbury Bridge Company" (21 Ch.D., 752), "Attorney-General v. London and North-Western Railway Company" ([1900] 1 Q.B., 78)—as its construction was an illegal act. It was a breach of section 118 of 3 Geo. IV., c. 126, which was still in force, and which prohibited the breaking-up of any turnpike road. Counsel also referred to the following cases:—"Reg. v. Charlesworth" (16 Q.B. Rep., 1,012); "Reg. v. Train" (2 B. and S., 640); "Mayor of Tunbridge Wells v. Baird" ([1896] App. Cas., 434); "Goodson v. Richardson" (L.R., 9 Ch., 221); "Salt Union v. Harvey" (13 The Times L.R., 297). The evidence called by the plaintiffs, which referred principally to the level crossing over the main road, was to the effect that the crossing and trucks approaching it could not be seen for some distance on either side owing to intervening buildings and the walls that bounded the road, that the crossing was liable to frighten horses, and that it

severely jolted persons who passed over in vehicles and on bicycles. One of the plaintiffs stated that in order to avoid the crossing he sometimes when driving used the back approach, which he would otherwise not do because of a steep ascent in Green-lane. A witness, who had been employed to watch the crossing, said that between March 16 and July 3, 1900, he had counted 166 trucks of bricks, six of coals, and seven of red ash. Evidence was also given that the existence and user of the tramway would depreciate the plaintiffs' property as a building estate.

A number of witnesses were called for the defence, who denied that either of the level crossings was a nuisance or dangerous to traffic. The defendant James Barker said that he had complied with all the requisitions of the county council, that on an average only four or five trucks a day passed along the tramway, that the trucks were always preceded by a man whose business it was to see if the lane and the road were clear, and that he had no intention of using a locomotive on the tramway. The chairman of the Settle Rural District Council said that a resolution had been passed by the council consenting to the level crossing over Rarber Top-lane, and a member of the Highways Committee of the West Riding County Council said that the committee had passed a resolution sanctioning the level crossing over the main road. As Mr. Justice Farwell had objected to the informality of the evidence with respect to the action of the county council, Mr. Wardell, assistant solicitor to the council, was called by Mr. Younger and produced the minute of the resolution passed by the Highways Committee sanctioning the level crossing, and also the report of the committee to the council in which that resolution was embodied. He said that in 1889 the council had delegated to the Highways Committee powers under sections 6 and 11 of the Local Government Act, 1888. In ordinary cases, such as the application by the defendants, the committee reported to the council, and the council adopted the report.

In answer to Mr. Hughes, the witness said he had not brought with him the minutes showing that the report of the committee had been adopted by the council, but he had no doubt it had been duly adopted. So far as he knew, the resolution of the committee sanctioning the alteration of the gauge of the tramway had never been reported to the council.

MR. YOUNGER contended that so far as the allegation of a private nuisance was concerned, the plaintiffs must prove special and particular damages—"Winterbottom v. Lord Derby" (L.R., 2 Ex., 316), "Reg. v. Metropolitan Board of Works" (L.R., 4 Q.B., 358), "Benjamin v. Storr" (L.R., 9 C.P., 400), "Caledonian Railway Company v. Walker's Trustees" (7 App. Cas., 259). This they had failed to do. There was no proof that they intended to turn their land into a building estate and the evidence as to possible depreciation was altogether too vague. As to the allegation of a public nuisance, the plaintiffs started with the assumption that a level crossing was necessarily a nuisance. That assumption was rebutted by "Matson v. Baird" (3 App. Cas., 1,082). What the local authorities had done was incident to their control of highways under the Local Government Acts, and was a reasonable exercise of their powers. Even though the agreement with the defendants had not been sealed by the council, there had been part performance by the defendants, and that was sufficient—"Mayor of Kidderminster v. Hardwick" (L.R., 9 Ex. 13), "Melbourne Banking Corporation v. Broughan" (4 App. Cas., 156), "Mayor of Oxford v. Crow" ([1893] 3 Ch., 535).

MR. JUSTICE FARWELL, after describing the nature of the action and the *locus in quo*, said that the first question he had to consider was one of fact—were the

level crossings constructed by the defendants a public nuisance? He would deal first with the level crossing on the main road. Mr. Hughes had invited him to hold that the defendants had done something which was forbidden by statute. So far as he knew, that point had not been raised in any of the reported cases, and he preferred to regard himself as a jury dealing with a pure question of fact. There had been a great deal of evidence on both sides, including that of a number of experts. Experts, however, only gave their opinion one way or the other, and he thought it better to deal with the outside evidence of fact. The plaintiffs' witnesses had spoken of actual inconvenience suffered by themselves, and he saw no reason to doubt the accuracy of their statements. It was clear that horses had shied and stopped dead at the crossing, and that vehicles had been jolted. It was true that the defendants' witnesses had said that they experienced no discomfort, but the evidence of 20 witnesses who had felt nothing did not deserve so much consideration as the evidence of six witnesses who had felt something. Some people felt a jolt more than others, and horses differed both in age and temper. It was a question of degree. It was clear also that cyclists, whose claims merited attention, ran some risk in coasting down the gentle slope leading to the crossing, though he was not concerned to say whether a cyclist was entitled to coast or not. He found as a fact that the crossing on the main road was a public nuisance. As to the crossing in Rarber Top-lane, the evidence was not so forcible, though the narrowness of the lane added to the danger with a nervous or restive horse. On the whole he thought the facts were sufficiently strong to prove that this crossing also was a public nuisance. Then came the question of law raised by the defendants. It was argued that the local authorities had sanctioned the construction of the tramway. The only evidence of the sanction in the case of Rarber Top-lane was the oral testimony of a witness and a letter from the clerk of the Settle Rural District Council to the defendant Barker. That was not the proper way of proving the sanction of a public body, and he must disregard it. The evidence as to the authorization by the county council of the crossing over the main road was in a curious condition. The agreement with the defendants had never been sealed by the council, although the defendants had been warned in May, 1899, that the plaintiffs did not admit the agreement. There had apparently been a delegation of authority by the council in 1889 to the Highways Committee. But no resolution had been produced showing that the committee could sanction anything without referring the matter back to the council, and it was clear that at any rate the resolution by the committee for the alteration of gauge had never been reported to or adopted by the council. He was, therefore, not convinced that the defendants had proved that they had got the sanction of the county council. But even assuming that they had got such sanction, had the county council power to allow the construction of that which the Court held to be a nuisance? The council were given the management of the roads under the Act of 1888, and the roads were vested in them for the purpose of maintaining and using them as roads. There was nothing allowing the council to destroy a road *in toto*, and, therefore, he thought there was no power which allowed the council to interfere with a road so as to cause what the Court found as a fact to be a nuisance. He held that the council had no power to grant leave to commit a nuisance. The case of "*Matson v. Baird*" was distinguishable, and involved no question of nuisance at all. Then it was argued that the tramway was beneficial because it relieved the traffic which would otherwise pass over a portion of the road. That argument was disposed of by "*Reg. v. Train*." It

was not possible to set off against a nuisance some convenience with regard to the user of another part of the road. Then he had to consider the case as it affected the relators. He agreed that special damage must be proved, and he thought that such damage had been proved by the evidence as to the depreciation of the plaintiffs' land as a building estate and the inconvenience suffered by the plaintiffs in being debarred from access by their front drive. The plaintiffs were accordingly entitled to the injunctions which they sought, and the defendants must pay the costs.

The mandatory injunction was stayed for a month with a view to an appeal.

[Solicitors—Ridgdale and Son, for Wm. Hartley, Settle, for the plaintiffs; Gibson, Weldon, and Bilbrough, for Thompson and Co., Lancaster, for the defendants.]

House of Lords (Lord Halsbury, L.C.,
Lords Shand, Davey, and Robert-
son) } 1900.
July 12.

ASSESSMENT COMMITTEE OF CAMBERWELL V. ELLIS.*

Poor Rate—Assessment—Publichouse—Increase of value—Premium paid for lease—Valuation (Metropolis) Act, 1869, secs. 46 and 47.

Decision of the Court of Appeal (*ante*, p. 39) affirmed.

This was an appeal from an order of the Court of Appeal (the Lord Chief Justice and Lords Justices A. L. Smith and Vaughan Williams), dated November 18, 1899, and the question was whether the appellants were justified in increasing the assessment of the respondent's premises between two quinquennial valuations. The hearing below is reported *ante*, p. 39; L.R. [1900], 1 Q.B., 68; 69 L.J., Q.B., 202.

The respondent appealed to the Court of quarter sessions for the County of London against the assessment, but his appeal was dismissed, subject to a case stated for the Queen's Bench Division. The Divisional Court (Mr. Justice Lawrence and Mr. Justice Channell) dismissed the appeal, but their decision was reversed by the Court of Appeal, and the premises struck out of the supplemental valuation list. The material parts of the case, in which the respondent in the House of Lords is described as "the appellant," were as follows:—1. The appellant is and has been since October, 1896, the occupier of a publichouse known as the Adam and Eve, High-street, Peckham, in the parish of Camberwell. 2. At the quinquennial valuation in 1895 the gross and rateable values of the said publichouse were fixed at £485 and £405 respectively, which values were duly entered in the quinquennial valuation list made in that year. 3. By a provisional list made in December, 1896, the assessment of the said publichouse was increased by the overseers to £600 gross and £500 rateable value, and objection was made by the appellant to the said increased assessment on the ground that the said publichouse had not in the course of the year in which the said provisional list was made increased in value by the addition thereto or erection thereon of any building, nor had there been any increase of value from any cause within the meaning of section 47 of the Valuation (Metropolis) Act, 1869. 4. At the hearing of the objection the assessment committee endeavoured to get from the appellant information as to the premium given by him for the lease of the said public-

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

house. This information the appellant refused to give, and the assessment committee, after hearing the said objection and viewing the publichouse, reduced the assessment to £575 gross and £485 rateable value. 5. In the supplemental valuation list made in 1897 the appellant's publichouse was again valued and assessed at £575 gross and £485 rateable. 6. The appellant objected, and on appearing before the assessment committee contended *inter alia*—(1) That the said publichouse had been improperly included in the provisional list, and therefore ought not to be included in the supplemental list and was therein too highly rated; (2) that no alteration in the value of the publichouse had taken place during the 12 months preceding the making of the supplemental valuation list within the meaning of section 46, subsection 1, of the Valuation (Metropolis) Act, 1869; and (3) that the overseers were not in law entitled to consider or in any way to act on any sum of money paid or supposed to have been paid for the publichouse either since the date of the valuation list in force at the time of the making of the said provisional list or at all. 7. The assessment committee refused to grant the appellant any relief, and he appealed to the quarter sessions for the County of London. 8. At the hearing of the appeal counsel for the appellant again objected to any questions being asked or any evidence being given about the premium paid by the appellant. The Court, however, over-ruled the objection and the fact was elicited that the appellant had paid £16,400 as the consideration for his lease. No evidence was given as to the precise amount of the premium paid in 1895 or any time previously, but it was admitted by one of the appellant's witnesses that assuming the valuation appearing in the quinquennial list made in 1895 to have been calculated according to the method usually adopted in the parish of Camberwell the valuation must have been based on a supposed payment of a premium of about £6,400. The assessment committee, however, at the time of the revision of the quinquennial valuation list did not in fact know the precise amount of the premium which had been paid by the then occupier. Evidence was given by a valuer on behalf of the respondents that there had been since the date of the quinquennial valuation list a general appreciation of licensed premises throughout the metropolis, and that, in his opinion, the annual value of the said publichouse had between April and October, 1896, increased by about £100. It was, however, admitted that there had been no structural alteration to the publichouse. No evidence was given of any circumstances specially affecting the annual value of the publichouse. The respondents contended they were not bound to give any such evidence, but that it was enough for them to show that the value had in fact increased. It was further admitted that no publichouses had been placed in the provisional or supplemental lists except such as had in fact been sold since the date of the quinquennial valuation thereof, although publichouses in the neighbourhood had generally increased in value. 9. For the assessment committee it was contended that it was not necessary that there should be a structural alteration of the rated premises in order to warrant their insertion in a supplemental list, that the facts mentioned as to the premiums given for the lease of the publichouse were evidence of an alteration in matters stated in the quinquennial valuation list during the 12 months preceding the making of the supplemental list within section 46 of the Valuation (Metropolis) Act, 1869, and that the payment of such premium showed that there had been such a material and unforeseen alteration of the value of the publichouse as to warrant its insertion in the supplemental list. 10. For the appellant it was contended that the facts hereinbefore mentioned were not in law any evidence of an altera-

tion within the meaning of section 46, subsection 1 of the Valuation (Metropolis) Act, 1869, and that all evidence as to the amount of premium paid by the appellant for the publichouse in October, 1896, was irrelevant and inadmissible and that the amount of such premium in the absence of any evidence save as hereinbefore stated as to the premiums previously paid could not afford any indication of an alteration in the value of the publichouse. 11. The Court of quarter sessions gave judgment confirming the values in the supplemental list. 12. The questions for the opinion of the Court are :—1. Whether the alteration in value which took place during the 12 months preceding the making of the said supplemental valuation list was in law an alteration within the meaning of section 46, subsection 1 of the Valuation (Metropolis) Act, 1869. 2. Whether the amount of premium paid by the appellant in October, 1896, for the said premises ought to have been received in evidence. 3. Whether the amount of such premium was in law any evidence of an alteration within the meaning of the subsection hereinbefore mentioned.

Mr. Balfour Browne, Q.C., Mr. Macmorran, Q.C., and Mr. Ryde were counsel for the appellants; Mr. Littler, Q.C., Mr. Page, Q.C., and Mr. W. Russell for the respondent were not heard.

THE LORD CHANCELLOR, in moving that the appeal should be dismissed, said that the questions reserved were questions of law and not of fact. If the quarter sessions had found as a fact that there was an alteration in value, their Lordships would have had no power to disturb such a finding. But the question submitted was whether such alteration was in law one which came within the meaning of section 46. It appeared to his Lordship that there was no evidence of alteration within that section even if the value of the house was greater in one year than in the other. The Act of 1869 for obvious reasons, aiming at a uniform assessment in the metropolis and to prevent the recurrence of the same question—to the great expense of the parish and the vexation of the ratepayer—from year to year, had determined that the assessment once made should continue in force for the statutory period. But it was felt that difficulties might arise if the list were altogether unalterable, and the statute provided that if there were any alteration in a particular hereditament which was increased in value by structural alteration or "any cause whatever," inquiry should be made into the circumstances of such case. The words in the clause following the reference to structural alteration were wide but intelligible. The statute did not attempt to define the conditions of the clause's operation. It would be extremely dangerous to attempt to lay down a proposition to cover every possible case; each case must stand by itself; and he would not attempt to lay down any principle. But there must be definite circumstances to which the alteration was assignable; the mere fact that there had been an alteration of value was not sufficient. As matter of law, in answer to the first question he would say that evidence that the house was worth more than the amount at which it was assessed ought not to be received. It was remarkable that there was no evidence of the supposed value at the quinquennial valuation. One might have expected a statement showing a gradual increase and a comparison between the two periods. There was here nothing of the kind, and in answer to the second question he would say that in itself and apart from such comparison and special circumstances the amount of premium afforded no guide. In answer to the third question, the amount of the premium was not in law, apart from such comparison as he had referred to, evidence of alteration within the meaning of the statute.

He agreed, therefore, with the judgment of the Court of Appeal pronounced by Lord Justice Vaughan Williams; but he would hesitate to adopt some of the reasons or to accept the illustrations, from the cycle trade, gunpowder, and the like adduced by the learned Judge. In moving the dismissal of the appeal he did so simply on the facts before their Lordships, and did not desire to lay down any general proposition.

LORD SHAND was of the same opinion. If such grounds of alteration were to be recognized as this appeal was based upon there might as well be no quinquennial valuation at all. To establish a case such as that of the appellants there must be some definite cause similar in character to those referred to in the statute, additions or erections, or the like. A general appreciation of licensed premises was certainly not enough for the purpose. He did not deny that some of the circumstances which had in the course of the argument been referred to by Lord Davey—the building of a bridge or the establishment of a large factory—might justify such an intermediate valuation. But the onus of proof was upon the person demanding alteration, and there was here no justification for the claim.

LORD DAVEY said that the first thing was to construe the words of section 47:—"If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in amount." He agreed that the words could not be confined to cases of structural alteration, but he thought the words "from any cause" were to be read as indicating causes *ejusdem generis* with those specified, in the sense that the cause must affect the value of the particular property. He agreed with Lord Justice Vaughan Williams that it lay upon those who desired to alter the assessment to prove the nature of the cause for the alteration in value. It was insufficient to state simply that there had been an alteration; a definable cause must be assigned and shown to affect the value of the particular property. It might also affect other properties, but it must be proved to influence the value of the hereditament in question. He agreed with the Lord Chancellor in his observations on the object of the quinquennial valuation and the danger of nullifying the beneficial results which were intended. Various illustrations had been put, but he thought it wiser to follow the Act itself and not to attempt an exact definition of the circumstances which would justify a fresh assessment. He should, like his noble friend, hesitate to accede to some of the illustrations given by the Court of Appeal. It was enough to say that, in his opinion, a general increase in the value of this class of property was not sufficient to justify a re-assessment, and he would answer the questions in the case stated in the same way as his noble and learned friend on the woolsack.

LORD ROBERTSON concurred with all that had been said by their Lordships. The general scheme of the Act was that the valuation was to stand for five years irrespective of fluctuations of general value which might occur during that period. But the Legislature also dealt with the case of individual hereditaments, the value of which happened to have been altered not by general economic or social change but by change in their own individual conditions affecting value. In the present instance nothing appeared to show anything special or individual in the cause of the alleged enhancement of the value of this house, so as to bring the case within the scope of the sections founded on.

The appeal was accordingly dismissed.

[Solicitors—Marsden and Son, for the appellant; Maitlands, Peckham, and Co., for the respondents.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.J.J.) 1900. July 12.

HOVENDEN AND SONS V. MILLHOFF.*

Principal and Agent—Secret commission—Bribe to purchaser's agent—Liability of vendor to repay.

This was an application by the plaintiffs for judgment or a new trial in an action tried before Mr. Justice Grantham and a special jury, reported in *The Times* of May 4 and 8. The action was brought to recover the amount of certain sums alleged to have been paid by the defendant to the plaintiffs' buyers, and for the return of alleged over-charges for goods sold by the defendant to the plaintiffs.

The plaintiffs were wholesale perfumers and hair-dressers' sundrymen, carrying on business in Berners-street and in the City-road. The defendant was a tobacconist, who formerly carried on business in partnership with a man named Drapkin. The plaintiffs employed buyers, and they bought from the defendant cigars and cigarettes for several years, amounting in the whole to the value of £28,000. The plaintiffs discovered that the defendant had been in the habit of giving presents to the plaintiffs' buyers at midsummer and Christmas, and brought this action. The defendant proved at the trial that the charges for the goods sold to the plaintiffs were fair and reasonable, and were not excessive. The questions left to the jury and their answers were as follows:—(1) Did the defendant fraudulently conspire with any of the plaintiffs' buyers to charge excessive prices for goods?—No. (2) Were the prices excessive?—No. (3) Did the payments, being admittedly unknown to the plaintiffs, have any effect on the minds of the agents in favour of the defendants, in inducing the agents to give the orders and to pay the prices stipulated for?—Yes. (4) If yes, what were the damages?—One farthing. The learned Judge, upon these findings, entered judgment for the defendant.

Mr. JELF, Q.C. (Mr. Courthope-Munroe and Mr. W. H. Leese with him), for the plaintiffs, said that, though the plaintiffs had failed to prove that the charges for the goods were excessive, yet it was clear law that when a bribe was paid to a servant in a case like the present, the servant's master could recover the amount of the bribe from the person giving it—"Grant v. Gold Exploration and Development Syndicate" (*ante*, p. 86, and [1900] 1 Q.B., 233). The effect which the bribe had upon the mind of the person bribed was immaterial—"Shipway v. Broadwood" ([1899] 1 Q.B., 369). The verdict of the jury here upon the admitted facts was absurd. Once the payments were admitted, the only question was what was their amount, and when that was ascertained the plaintiffs were entitled to recover that amount from the defendant. It was suggested that the payments amounted to about £700, and the plaintiffs asked for an inquiry to ascertain the amount. The payment of these presents or bribes extended over about 14 years. The jury must have misunderstood the question they had to decide, and thought that, as the prices for the goods were not excessive, they must give a verdict for nominal damages. He also referred to "Salford Corporation v. Lever" ([1891] 1 Q.B., 168), "Shickle v. Lawrence" (2 *The Times* L.R., 776).

Mr. MARSHALL-HALL, Q.C., and Mr. R. E. MOORE, for the defendant, contended that the case set up by the plaintiffs on the pleadings was that there was a fraudulent conspiracy to charge the plaintiffs excessive prices for the goods, and the jury negatived this. That was the issue. The jury found that the prices charged were

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

not excessive. It was proved that the prices charged to the plaintiffs for the goods were the lowest market prices. The presents given to the plaintiffs' buyers were not bribes; they were not given in pursuance of any prior agreement, and they did not increase the prices charged for the goods. The amount of the presents could not be recovered. In no case had a plaintiff recovered payments made to an agent unless a fraudulent intent was proved. In all the cases the payments had swollen the price of the goods. The recovery of money from the agent stood on a different footing. Further, the parties agreed at the trial to leave it to the jury to fix the amount, and the plaintiffs could not now complain that the jury had awarded them too small a sum.

The COURT allowed the application, and directed that judgment should be entered for the plaintiffs.

LORD JUSTICE A. L. SMITH said that the plaintiffs, who were perfumers, had during a period of 12 years been purchasers of tobacco from the defendant, the value of the tobacco so purchased amounting altogether to £28,000. In 1899 the plaintiffs found out that the defendant had been in the habit of paying their agents 2½ per cent. on the invoice price of the tobacco, such payment having been at the time quite unknown to the plaintiffs. They accordingly commenced this action, in which they claimed recovery of the amount of the secret commissions paid by the defendant, and the return of certain overcharges, and also damages for conspiracy. The charge of conspiracy was negatived at the trial, and the question which they now had to consider was whether the commissions or bribes paid by the defendant could be recovered by the plaintiffs against the defendant. The jury found, in effect, that the defendant had paid the plaintiffs' agents a bribe of 2½ per cent. commission amounting to £710, but, though they found that that was proved, they returned a verdict for one farthing damages. In his opinion it was clear that, where a vendor bribed the vendee's agent by paying him 2½ per cent. on the invoice price, the meaning of that was that the price charged to the vendee was loaded by the amount so paid by the vendor to the vendee's agent. When the vendee discovered the payment, he was entitled to complain that the vendor had overcharged him by the amount of the bribe and to demand that it should be paid back to him again. He thought that, when it was proved that the bribe had been paid, the jury ought to have been directed that the amount which the plaintiffs were entitled to recover was the amount by which the price charged to the plaintiffs had been enhanced. The consequence of the bribe was that the defendant obtained an enhanced price, and that was the measure of damages. In his opinion, therefore, the verdict of the jury for a farthing damages was clearly and altogether wrong. The fact that Mr. Justice Grantham had directed judgment to be entered for the defendant seemed still more astonishing. He thought that the application should be allowed, and, as neither party wished that the expense of a new trial should be incurred, the judgment would be set aside, and judgment would be entered by consent for the plaintiffs for £710 damages.

LORD JUSTICE VAUGHAN WILLIAMS said that he entirely agreed. He referred to the judgment of Lord Justice Collins in "*Grant v. Gold Exploration and Development Syndicate*," and said it seemed to be clear that the amount of the bribes could be recovered as money had and received by the defendant to the plaintiffs' use.

LORD JUSTICE ROMER delivered judgment in the following terms:—The Courts of law of this country have always strongly condemned and, when they could, punished the bribing of agents, and have taken a strong view as to what constitutes a bribe. I believe the mercantile community as a whole appreciate and

approve of the Courts' views on the subject. But some persons undoubtedly hold laxer views on the subject. Not that these persons like the ugly word "bribe" or would excuse the giving of a bribe if that word be used, but they differ from the Courts in their view as to what constitutes a bribe. It may, therefore, be well to point out what is a bribe in the eyes of the law. Without attempting an exhaustive definition I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent—that is to say, without the knowledge and consent of the principal—then the gift is a bribe in the view of the law. If a bribe be once established to the Court's satisfaction, then certain rules apply. Amongst them the following are now established, and, in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, the Court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the Court will presume, in favour of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable. Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, the Court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it. As to the above assumption, we need not determine now whether it could in any case be rebutted. As at present advised, I think in the interests of morality the assumption should be held an irrebuttable one; but we need not finally decide this, because in the present case there is nothing to rebut the presumption.

Chan. Div. } 1900.
(Stirling, J.) } July 12.

IN RE DE WILTON—DE WILTON V. MONTEFIORE.*

Husband and Wife—Marriage—Validity.

A marriage between two Jewish British subjects, an uncle and a niece, contracted at Wiesbaden, where it would have been legal, held to be invalid by the law of England.

This was a summons raising a question as to the shares into which, in the events which had happened, the residuary estate of the testatrix, Mrs. Laura Judith De Wilton, was divisible. This involved a further question as to the validity of a marriage contracted between a daughter of the testatrix and her maternal uncle, both of the parties being of the Jewish faith and the marriage having been solemnized according to the rites and usages of the Jews at Wiesbaden, where such a marriage would have been legal.

The testatrix by her will, dated July 30, 1889, gave certain stocks and securities to her trustees upon trust to divide the same into three equal shares, and declared that her trustees should stand possessed of one of such shares upon trust to pay the income thereof to her daughter, Consueloe, during her life, and after her death to stand possessed of such share in trust for the children or remoter issue of such daughter born or to be born during her life, or within 21 years after her death as

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

the daughter should appoint, and in default of appointment in trust for all the children of the daughter, who being sons should attain 21 or being daughters should attain that age or marry. And if there should be no child or other issue of such daughter who should attain 21, or being daughters should marry, then after the death of the daughter and default or failure of children or issue, the testatrix declared that the said share of the trust fund should accrue to the shares of any other daughter or daughters who should be living at her death in equal shares. And the testatrix further declared that the trustees should stand possessed of another of such one-third shares upon the like trusts in favour of her daughter Eugenie and her issue. After disposing of the remaining one-third share the testatrix gave her residuary estate to the trustees in trust for all her children, including any who might have died in her lifetime leaving issue living at the death of the testatrix, and so that the share of any child who might have died in her lifetime leaving issue as aforesaid should devolve on his or her representatives in the same manner as if he or she had survived the testatrix and died immediately after her. And she directed that the trustees should retain the share of each daughter in the residuary trust fund and hold the same upon the like trusts in favour of each such daughter, her children, or issue as were thereinbefore declared of and concerning their said respective one-third share of the beforementioned trust fund. By a codicil dated June 12, 1893, the testatrix, after reciting that her daughter Eugenie had recently died, revoked the trusts in favour of Eugenie and her issue of and concerning the one-third share of the first-mentioned trust fund, and disposed of it otherwise, and in all other respects she confirmed her will. She afterwards made further codicils, which did not affect the present question. On January 30, 1899, the testatrix died. The question arose as to the share which would have come to the daughter Eugenie if she had survived her mother. Mrs. De Wilton was by birth a Jewess, but married a Christian in accordance with the rites of the Church of England. Her daughter Eugenie was brought up as a Christian. In 1876 Eugenie De Wilton became engaged to be married to her maternal uncle, Joseph Gompertz Montefiore. Both were British subjects domiciled in England. Mr. Montefiore was an adherent of the Jewish faith. Miss De Wilton was desirous of being admitted to the same faith, but could not be so admitted according to the rules of the synagogue to which Mr. Montefiore belonged, nor could she be married. They therefore went to Wiesbaden, in Germany, where, on August 20, 1876, they went through the form of civil marriage, and afterwards of marriage according to the custom and practice of the Jews. At that time Miss De Wilton had not been formally admitted into the Jewish faith, but she was so admitted at Paris on September 17, 1876; and afterwards, on the same day, she there went through the form of marriage with Mr. Montefiore according to the Jewish custom and practice. The evidence showed that such a marriage was valid according to the law in force at Wiesbaden. There were issue of the marriage five children, of whom four were still living. The testatrix appeared in her lifetime to have recognized them as children of her daughter. The question was whether the testatrix's daughter Eugenie left children or issue within the meaning of the will of the testatrix.

Mr. Dicey, Q.C., and Mr. B. Cohen appeared for the children of the daughter, and Mr. Henriques for other parties.

MR. JUSTICE STIRLING, after stating the facts, said that two contentions were raised on behalf of the children—(1) that the marriage was valid; if so, they were children of the testatrix's daughter according to

the strictest construction of the word; and (2) that even if the marriage were invalid the language of the will was such as to include them under the designation "children" as used in the will of the testatrix. Considering the second point first, it was based on the doctrine laid down by Lord Cairns in "*Hill v. Crook*" (L.R., 6 H.L., 265) and by the Court of Appeal in "*In re Joddrell*" (44 Ch.D., 590)—viz., that the will was to be taken as a dictionary to find the meaning of the terms used by the testatrix. If, for example, the testatrix had referred to her daughter Eugenie as the wife of Mr. Montefiore (as she had done with respect to her two sisters), his Lordship would have had no difficulty in holding that the children of Eugenie must include those who had sprung from the union referred to. Unfortunately, nothing of the kind was found in the testamentary dispositions of the testatrix. What were relied on were the expressions found in the codicil, and particularly the confirmation of the will found in it. If in the will or codicil anything had been found showing an indication in the will that the testatrix regarded her daughter Eugenie as having left children or issue her surviving, his Lordship would willingly have applied the rule to which he had referred; but after careful examination of those instruments he had failed to find anything which satisfied him that the testatrix used the words "issue" or "children" otherwise than in their proper legal meaning, and he regretted (so far as he could properly express such a sentiment) that he was unable to decide on that ground in favour of the children. His Lordship had then to consider the first point—viz., the validity of the marriage. It was not disputed that the marriage of an uncle and niece, being British subjects domiciled in England, was void under the statute 5 and 6 William IV., c. 54. That depended on the enactments contained in 32 Henry VIII., c. 38, as judicially interpreted, the leading authorities being Coke's 2nd Inst., p. 683, "*Reg. v. Chadwick*" (11 Q.B., 173), and "*Brook v. Brook*" (9 H.L.C., 193). The last-mentioned case established that such a marriage was void although celebrated in a country where it would be legal as between persons domiciled there. It was said, however, that none of those statutes had any application to Jews, and it was contended that two such persons, if of the Jewish persuasion, might according to English law contract a valid marriage. There was no decision to that effect. The argument was based on the language of Lord Stowell in the case of "*Lindo v. Belisario*" (1 Hagg. Cons., 216) and on that of the Legislature in various Acts of Parliament dealing with the subject of marriage. The history of the Jews in this country, so far as it was material to the present question, was given in a note to the report of "*Lindo v. Belisario*" (1 Hagg. Cons., p. 217). His Lordship referred to that report, and, continuing, said that from that time forward (1673) the Jews appeared to have been permitted to reside in England and to practise the rites of their religion, and in particular to solemnize marriages according to their own usages. For a long time no legislative provision was made on the subject of their marriages; but by section 18 of Lord Hardwicke's Act (26 Geo. II., c. 33), intituled "*An Act for the better preventing of clandestine marriages*," it was enacted that "nothing in this Act contained shall extend to that part of Great Britain called Scotland nor to any marriages among the people called Quakers or among the persons professing the Jewish religion, where both parties to any such marriage shall be of the people called Quakers or persons professing the Jewish religion respectively, nor to any marriage solemnized beyond the seas." In that state of things the case of "*Lindo v. Belisario*" was decided. It was the first case in which the validity of a Jewish marriage was considered by an Ecclesiastical Court. In dealing with it Lord Stowell used language which would not have

been inappropriate if the question before him had related to the capacity of the contracting parties as well as to the formalities of the marriage. In fact, however, the question related to the formalities only; it was one of intricacy and difficulty, and his Lordship was unable to find anything in the judgments which indicated that the observations to which he had referred were directed to anything beyond that which the learned Judge was called on to decide; certainly he could not look on them as an authority for the proposition that the capacity of members of the Jewish faith to contract marriage was regulated by their own law and not by the law of this country. The question in "*Reg. v. Mills*" (10 Cl. and Fin., 734) was also one of form, and to it the remarks of Lord Brougham (see p. 736) and Lord Campbell (see p. 794), cited in argument, appeared to have been addressed. His Lordship then turned to the language of the statutes. Reliance was chiefly placed on that found in 6 and 7 Wm. IV., c. 85, sections 2 and 3, and 4 Vict., c. 72, section 5, where it was enacted that persons professing the Jewish religion "may continue to contract and solemnize marriage according to the usages . . . of the said persons." It was contended that, inasmuch as contract was spoken of in addition to solemnization, it must be taken that the Legislature had treated as valid marriages contracted in accordance with the rules of the Jewish law, not merely as regards the form of marriage, but also as to the capacity of the contracting parties. His Lordship was unable to arrive at that conclusion. In the first place, the word "usages" was more apt with regard to matters of form than in relation to capacity of parties. Next, both these statutes (like 26 Geo. II., c. 35) dealt with the formalities of marriage, and an enactment with respect to capacity was, *prima facie* at least, beyond the purview of them. Again, in the statute 10 and 11 Vict., c. 58, passed for the express purpose of removing doubts as to the validity of the marriages of Quakers and Jews "solemnized according to the usages of those denominations respectively," it was declared and enacted "that all marriages so solemnized were and are good in law to all intents and purposes whatsoever"; that declaration and enactment related to form only. It was further to be remarked that, although in the statutes just mentioned, as in many others relating to formalities of marriage (as, for example, 4 Geo. IV., c. 76; 19 and 20 Vict., c. 20; and 61 and 62 Vict., c. 58), there was found an express exception of Jewish marriages, there was no such exception in 5 and 6 Wm. IV., c. 52, which dealt with capacity. In his Lordship's opinion, therefore, the marriage in question was not valid according to the law of England, and the fund must be distributed on the footing of the testatrix's daughter, Eugenie, having died in her lifetime without leaving issue.

[Solicitors—Emanuel and Simmonds.]

Chan. Div. }
(Farwell, J.) }

1900.
July 12.

EARL OF LONSDALE V. CRAWFORD.*

Settled Land Acts—Mining leases—Rent, whether capital or income—Will—Construction.

This summons, which was taken out under the Settled Land Acts, 1882 and 1890, raised the question whether the plaintiff, Hugh Cecil, Earl of Lonsdale, need set aside as capital money arising under the said Acts any part of the rents reserved under certain mining leases granted by the plaintiff of hereditaments comprised in a certain settlement of February 7, 1876. On the conclu-

sion of the arguments on July 6 his Lordship reserved judgment.

Mr. Hamilton, Q.C., and Mr. W. Brinton appeared for the Earl of Lonsdale; Mr. Hughes, Q.C., and Mr. R. F. MacSwinney for the Hon. Lancelot Edward Lowther; and Mr. Younger, Q.C., and Mr. Charlton Hawkins for the Right Hon. James Lowther.

MR. JUSTICE FARWELL read the following judgment:—This is a summons under the Settled Land Acts asking for a declaration that no part of the rents reserved under certain leases of the Lonsdale estates settled by the will of Henry, late Earl of Lonsdale (which rents vary with the selling price of the minerals gotten) need be set aside as capital money under the Settled Land Acts, and the answer to this depends upon whether the leases in question were granted under the Settled Land Acts or under the power in the will. These leases fall under two heads (1) those granted between the Settled Land Act, 1882, and that of 1890; and (2) those granted after the latter Act. Henry, late Earl of Lonsdale, made his will on February 7, 1876, and died August 15, 1876. He devised large estates in the north of England to uses under which there were several successive tenants for life, with remainder to the issue in tail male of each according to seniority. The last Earl of Lonsdale (St. George) was one of such tenants for life, and in May, 1881, he purchased the reversionary life interest of his brother, the present Earl, and conveyed it to trustees (of whom the defendant, Mr. James Lowther, is the sole survivor) on trusts for management and for the maintenance of the earldom. The present earl has no legal right to call for any payment from the trustees, but it is conceded by all parties that he is tenant for life within the meaning of the Settled Land Acts. St. George, Lord Lonsdale, died on February 8, 1882, without issue, and since then the estates have been managed by the trustees of the settlement of 1881. The will of Henry, Lord Lonsdale, contains a power of granting leases for 21 years for ordinary purposes, 99 years for building purposes, and 60 years for mining purposes, and in each case the donee of the power is the same. The power as to mining leases is as follows:—"Provided always and I hereby declare that it shall be lawful for every person hereby made tenant for life of the said manors and hereditaments hereinbefore devised in strict settlement as and when he shall be entitled to the possession or the receipt of the rents and profits of the same manors and hereditaments . . . to appoint by way of lease all or any of the mines, coals, stones, clay, sand, and mineral substances in, under, or upon the same premises . . . so as there be reserved on every such appointment the best rents, tolls, duties, royalties or reservations by the acre, ton, or otherwise that can be reasonably gotten without taking anything in the nature of a fine or premium, and so as there be contained in every such appointment a condition of re-entry for non-payment or non-delivery within a reasonable time to be therein specified of the rents, tolls, duties, royalties or reservations thereby reserved, and so as the appointee or appointees do execute a counterpart thereof and do thereby covenant for the due payment or delivery of the rents, tolls, duties, royalties, or reservations thereby reserved. Provided always that the reservation of rents, tolls, duties, or royalties the amount of which shall vary with or according to the acreage worked or the minerals, coals, stone, clay, sand, or substances gotten shall not be taken to be in the nature of a fine or premium, though the effect of such reservation may eventually be disadvantageous to the remainderman." Many leases of the settled minerals have been granted since 1883, and I am asked to assume for the purpose of my decision that they have all been granted by the present earl with the consent of the trustees or trustee of the settlement, and are expressed to be made in exercise of every power

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

or authority enabling the present earl. The defendants contend that these leases cannot have been granted under the power in the will, but that, if they can be supported at all, they must take effect under the Settled Land Acts. It is said, first, that the power of leasing in the will is no longer exercisable. It is not contended that the power has been extinguished by the alienation of the life estate, for it is now well settled that a power appendant may be exercised by the donee thereof although the estate to which it was appendant be gone, provided there is no derogation from the rights of the alienee of the estate, and of course there is no such derogation here, because Mr. Lowther has assented to all the leases that have been granted. But it is said that, as a matter of construction, the present earl does not answer the description of the person to whom the power is entrusted. I am unable to adopt this view. A power of leasing is one of those powers of management which are inserted in settlements for the benefit of the settled estate generally. Its exercise is fenced about with provisions for the safety of the remaindermen, and, as was pointed out in "*Alexander v. Mills*" (L.R., 6 Ch., 124), there is no presumption that a testator would prefer that the estates should remain unleased or unsold rather than that a tenant for life, possibly the testator's son or grandson, should exercise or assent to the exercise of leases and sales after he had parted with his life estate. I do not forget that I am dealing with a mineral lease in which the tenant for life consumes a part of the inheritance, but the other powers of leasing, and the similar powers of granting licences to copyholders and of consenting to sales and enfranchisements and partitions are expressed in similar terms. In my opinion the words "as and when he shall be entitled to the possession or the receipt of the rents and profits, &c.," applied as in this will to a number of persons taking in succession, refer to the falling into possession of the several life interests and not to the actual unencumbered beneficial enjoyment thereof. The words may be paraphrased "as and when his life estate shall be in possession." Authority is of little assistance in construction cases, but "*Long v. Rankin*" (Sugden on Powers, Appendix, 895) is a strong authority on a similar provision. The next objection is this—the leases reserve a rent varying with the selling price of coal, in accordance with the custom of the county. It is said that this is not authorized by the power, and that the leases for this reason cannot have been granted under the power. Now the power clearly authorizes the reservation of a rent in kind. Such a reservation necessarily involves a variation in value, for it is practically certain that the value of coal will vary in a term of 60 years, and it would, in my opinion, be absurd to hold that the tenant for life could reserve a varying rent if he reserved it in kind, but could not do so if he reserved it according to the selling price, although the result would be exactly the same except for the additional convenience to the lessors of the latter method. It is contended that the proviso at the end of the powers is limited so as to exclude the case of such a varying rent, but this proviso is inserted to meet the cases where a varying rent is not necessarily implied in the exercise of the power. I cannot infer, from the absence of an expression, which would be unnecessary, including such leases, an intention to exclude them and therefore to abrogate the power of leasing at varying rents already expressly given. I hold, therefore, that the power in the will authorized the grant by the earl, with the consent of Mr. Lowther, of the leases in question. But then it is said that they might equally have been granted under the Settled Land Act, 1882, and it is admitted that such of them as are made after 1890 could have been granted under that Act and the Act of 1890; and it is said that I ought to hold that

the requirement of section 11 of the Act of 1882 is imposed by section 56 of the same Act on all the leases. It was argued, on the other hand, that the leases granted before 1890 could not have been granted under the Act of 1882 alone, because it is said that rents varying according to the price of minerals were not authorized by that Act. In the view that I take it is not necessary for me to determine this. I assume for the purposes of my judgment that such leases could have been granted, and I draw no distinction, therefore, between leases granted before and leases granted after the Act of 1890 came into operation. Under the will the tenant for life is entitled to the whole of the rents, &c., arising from leases of the minerals. Section 11 provides:—"Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows—namely, where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits." If, therefore, section 56 has the effect for which the defendants contend, it will deprive a tenant for life of a part of his income without compensation. Now, it is a sound rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it—see *per Lord Esher* in "*Attorney-General v. Horner*" (14 Q.B.D., at p. 257). Am I so obliged? The first subsection of section 56 merely preserves powers under settlements; the second subsection causes the difficulty. It says:—

"But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts, or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act."

I think that the provisions here referred to are provisions connected with the execution of the power—*e.g.*, consent of a third person—not with the results of such execution; it deals with the act of execution, not with the proceeds thereof, and this is borne out by the sentence "and accordingly," which shows the purview and scope of the subsection and limits its generality. I therefore hold that section 56 does not override the provisions of the will in this respect. But then it is said that the leases are granted in execution of all powers and authorities and are therefore executed under the power in the Act. Now, it is common practice for a man to purport to execute all powers. He does so in order to avoid the risk of his appointment being defeated by the failure of the particular power primarily applicable, while he has another which would, if exercised, supply the defect. In the same way, it used to be common practice to find that a man both appointed and granted in order that if either the appointment or grant failed the other might supply the deficiency. But in both those cases the property can in fact pass once only, and it must so pass by means of the first effective available legal means. If a man has once effectually appointed the property he cannot afterwards grant the same property, either by the same or any subsequent deed, because there is nothing on which the grant can operate. So, if he has effectively appointed under a power created by one instrument, he

cannot again appoint the same property under a power created by another instrument, because there is no subject-matter on which the latter power can operate. The mere fact, therefore, that he purports to execute all powers does not prove that he has executed the statutory power, but I have to ascertain which he has in fact executed. The only suggestions made by counsel were that the power earlier in point of time should be taken to be executed rather than the later, and that the power more favourable to the donee of the power should be presumed to be executed rather than that which would deprive him of income. In the present case both these presumptions coincide, and nothing is suggested against them. I therefore hold that the power in the will, and that only, has been executed, and I answer the question in the summons by saying that no part of the mineral rents need be set aside.

[Solicitors—Ellis and Ellis, for all parties.]

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.JJ.) } July 16.

EARLE V. KINGSCOTE.*

Husband and Wife—Wife's torts—Husband's liability—Married Women's Property Act, 1882. Decision of Byrne, J. (*ante*, p. 63), affirmed.

This was an appeal against the decision of Mr. Justice Byrne which was reported in *The Times* of November 27 and December 2 last, and *ante*, p. 63.

The plaintiff, a widow lady, residing at Andover, brought the action against Mrs. Georgiana Kingscote and her husband, Colonel Howard Kingscote. The plaintiff's case was that in May, 1898, she was induced by Mrs. Kingscote to lend her the sum of £5,300, the only security which the plaintiff got being Mrs. Kingscote's I.O.U. Subsequently, in July, 1898, the plaintiff was requested by Mrs. Kingscote to join her in the purchase of some shares which Mrs. Kingscote said had been recommended to her by a financier, and for that purpose she asked the plaintiff to raise a sum of £2,000 to be invested in the purchase—one-half of the shares being for the plaintiff and the other half for Mrs. Kingscote, who offered to be responsible for any loss by the plaintiff, and agreed that her (Mrs. Kingscote's) shares should be charged to make good any loss which might accrue to the plaintiff in respect of the advance. The plaintiff stated that she was at first unwilling to entertain Mrs. Kingscote's proposal, but, on Mrs. Kingscote's representation that she would by the investment in the shares be able in three months to repay the £5,300 already lent, the plaintiff consented to find or raise by promissory notes the sum of £2,000 to pay for the shares when they had been purchased. On July 23, 1898, Mrs. Kingscote telegraphed to the plaintiff that she had bought the shares and that it—meaning the investment—was a real good thing. On July 25 she further telegraphed to the plaintiff to direct a solicitor (who was the same solicitor who had acted in the £5,300 transaction) to let her (Mrs. Kingscote) have £2,000 on the plaintiff's guarantee, and again on the same day sent another telegram to the plaintiff asking her to telegraph to the solicitor, but not to mention the shares to him. The plaintiff, relying on Mrs. Kingscote's representation, telegraphed as requested to the solicitor, and signed and posted two promissory notes or bills for £1,000 each, payable to the solicitor. The name of Mrs. Kingscote did not appear upon the bills, but they were accepted by the solicitor, discounted by Jay, and the proceeds paid to Mrs. Kingscote, as the plaintiff stated, for the purpose of paying for the shares. The bills became due on October 28 following,

and the plaintiff paid the amounts due thereon and took them up. The present action having been commenced by the plaintiff to protect her interests in the shares, Mrs. Kingscote, in opposition to a motion against her for interlocutory relief, swore an affidavit alleging that she had never purchased any shares with the £2,000. The plaintiff stated that if the affidavit was true it was contrary to other statements made by Mrs. Kingscote to the plaintiff, and that she had been induced by the false and fraudulent representation that the shares had been purchased to advance the £2,000. While the motion was pending £500 was paid to the plaintiff on account. The plaintiff claimed both against Mrs. Kingscote and her husband repayment of the £2,000. It was consented on behalf of Mrs. Kingscote that judgment for £1,500 should be given against her. The question, however, arose whether any judgment could be recovered against Colonel Kingscote. It was stated on his behalf that the transactions in question were without his knowledge or authority and that he had not participated in the use of the money, and it was argued, on the authority of "*Liverpool Adelphi Loan Association v. Fairhurst*" ([1854] 9 Exch., 422), that, although a married woman is answerable for torts committed by her during coverture, including frauds, and may be sued for them jointly with her husband, yet she cannot be sued for a fraud "when it is directly connected with a contract with her and is the means of effecting it and parcel of the same transaction," and that the husband was therefore no more answerable for the torts in question than he would have been for his wife's contracts. Mr. Justice Byrne held that Colonel Kingscote was liable in damages for his wife's tort, and that the law on the point was as laid down in "*The Liverpool Adelphi Loan Association v. Fairhurst*." The contract was effected prior to and independently of the fraud complained of, and his Lordship was unable to say that the fraud was "the means of effecting" the contract in the sense in which that expression was used in the case referred to. Colonel Kingscote appealed.

Mr. Latham, Q.C., Mr. Elgood, and Mr. Stuart Sankey were for the appellant; Mr. Levett, Q.C., and Mr. W. Baker were for the plaintiff.

Upon the appeal a question was raised (which was not raised in the Court below) as to the effect of the Married Women's Property Act, 1882, upon the husband's liability.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the question was whether the fraudulent misrepresentation by Mrs. Kingscote that she had bought the shares was so connected with the contract for the joint purchase of the shares that no action would lie against the husband for the fraud because it would be an attempt to turn the contract into a tort. Mr. Justice Byrne had stated the law to be that the exemption of the husband from his common law liability for his wife's torts must be limited to cases in which the fraud was not only directly connected with the contract and parcel of the same transaction, but was also the means of effecting (in the sense of obtaining) the contract. In his Lordship's opinion, the learned Judge had correctly laid down the principle of law and had correctly applied it to the facts of this case. No doubt it was difficult to draw the line, but the learned Judge had pointed out the true distinction to be deduced from the cases of "*Liverpool Adelphi Loan Association v. Fairhurst*" (9 Ex., 422) and "*Wright v. Leonard*" (11 C.B., N.S., 258). Here there was a subsisting contract at the time of the misrepresentation, and his Lordship (the Master of the Rolls) came to the conclusion that the misrepresentation was not the inducement of the contract and was not the means of effecting the contract, but should be regarded as an independent

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

misrepresentation for which the husband was liable to be sued. It was then contended that the law as to the husband's liability had been altered by the Married Women's Property Act, 1882, and this Court was asked to overrule "*Seroka v. Kattenburg*" (17 Q.B.D., 177), which was opposed to that contention. Speaking for himself he thought that that authority was quite right. That Act enabled a married woman to acquire and hold any property as her separate property and it enacted that she should be capable of entering into and rendering herself liable in respect of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and then it enacted that the husband need not be joined as a party. It was said that it was involved in that that the husband could not be so joined. Whatever might be the foundation of the husband's liability, down to 1882, at any rate, it was established that the husband, whether the wife had separate property or not, was liable to be sued for the wife's torts jointly with the wife and it would be a strong thing to hold that the effect of the enactment above referred to was to take away that liability. The appeal would be dismissed.

LORD JUSTICE RIGBY concurred. In his opinion the false representation did not induce the contract, but only induced the plaintiff to suppose that her liability to perform the contract had arisen, when in fact it had not. With regard to the Married Women's Property Act, he had considerable doubt as to its meaning, but he did not find in that Act any words which would release the husband from the liability which attached to him at common law, and he thought it safer to assume that the Act had no such intention.

LORD JUSTICE COLLINS agreed on both points, but he did not share the doubts entertained by Lord Justice Rigby as to the effect of the Married Women's Property Act.

[Solicitors—Powell and Burt; Fraser and Christian.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.J.J.) } 1900.
July 16.

THE VESTRY OF ST. MARYLEBONE V. THE SHERIFF OF LONDON.*

Sheriff—Rates—Seizure of goods of person from whom rates due—Liability of sheriff to pay rates on demand—Local Act, 35 Geo. III., c. 73.

Decision of Bigham, J. (*ante*, p. 50), affirmed.

This was an appeal by the defendant from the judgment of Mr. Justice Bigham at the trial of the action without a jury, reported *ante*, p. 50: [1900] 1 Q.B., 111. The action was brought to recover £18 19s. 3d. under section 195 of the Local Act (35 Geo. III., c. 73) in respect of parochial rates due to the plaintiffs from a man named Bush, whose goods had been taken in execution under a writ of *fi. fa.* by the defendant as Sheriff of London.

By section 195 of the above Act, when the goods of any person liable to pay any rate "by virtue of this Act shall be taken in execution" by the sheriff before the rate shall have been paid, then the sheriff, on demand being made by the rate collector, shall in the first place pay to the collector such rate, provided that the sheriff shall not be charged with the payment of more than one

year's rate or of a larger sum than the value of the goods taken in execution. Section 179 of this Act authorized the levying of five distinct rates, one being a poor-rate. On November 17, 1898, the defendant, as sheriff, seized the goods of Bush under a *fi. fa.* in execution of a judgment, and on November 24 the defendant being still in possession, the plaintiffs' rate collector made a demand upon the defendant for the payment of £18 19s. 3d. for parochial rates owing at that time by Bush. This sum of £18 19s. 3d. comprised a poor-rate, a general rate, a sewers rate, and two other small rates. The minutes of the vestry, in which was entered the resolution ordering the rates, recited that the poor-rate was made in pursuance of the powers and authorities of, among other Acts, the 35 Geo. III., c. 73. The amount so demanded from the defendant was less than the value of the goods or of the judgment debt. On November 25, before the goods were removed from the premises or sold, the defendant received from Bush the amount of the judgment debt, and handed over this amount to the judgment creditor. The defendant thereupon withdrew from possession without having paid the rates. Mr. Justice Bigham held that the goods were "taken in execution" within the meaning of the Act, and that, though some of the rates were levied under the Metropolis Management Act, 1855, by section 161 of that Act the overseers had the same powers, remedies, and privileges in respect thereof as they had for levying money for the relief of the poor under 35 Geo. III., c. 73. He accordingly gave judgment for the plaintiffs.

Mr. A. T. LAWRENCE, Q.C., and Mr. P. ROSE-INNES, for the defendant, contended that the rates in respect of which the demand was made on the defendant were not rates which the judgment debtor was liable to pay "by virtue of" the Act of 35 Geo. III., c. 73. All the rates, except the poor-rate, were levied under the Metropolis Management Act, 1855. As regards the poor-rate, section 161 of the Act of 1855 transferred only the general powers of the overseers as to the collection of the rate and not the special powers under a local Act. The Act of Geo. III., therefore, did not apply. They referred to "*Paddington Vestry v. Great Western Railway Company*" (28 L.J., M.C., 59). They further contended that the goods had not been "taken in execution" within the meaning of section 195 of the Act of Geo. III. Those words meant removed from the premises.

Mr. ENGLISH HARRISON, Q.C. (Mr. Herbert Nield with him), for the plaintiffs, contended that the overseers (which word by section 250 of the Act of 1855 included rate collectors) had, by section 161 of the Act of 1855, the same powers as were given by the Act of Geo. III. in respect of the poor-rate. Therefore, the overseers had, in regard to the levying of all rates, the same powers as were given by the earlier Act. [LORD JUSTICE ROMER referred to "*Vaughan v. Imray*" (28 L.J., M.C., 78).]

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that it was perfectly clear that these goods had been "taken in execution" within the meaning of section 195 of 35 Geo. III., c. 73. Goods were taken in execution when they were seized by the sheriff. With regard to the other point, he had had considerable doubt, but he had come to the conclusion that Mr. Justice Bigham was right. Were these parochial rates payable "by virtue of" the Act of Geo. III.? The rates due were the poor-rate, the general rate, the sewers rate, and two other small rates. Taking first the poor-rate, in his opinion that rate was levied by virtue of the Act of Geo. III. That Act had not been either expressly or impliedly repealed. The Metropolis Management Act, 1855, did not deal with the poor-rate

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

at all. That Act dealt with a new rate, and the old corresponding rates were gone. But the poor-rate remained untouched. The judgment debtor was, therefore, liable to pay the poor-rate by virtue of the Act of Geo. III., and section 195 of that Act applied. Then, with regard to the other rates, they were leviable under the Metropolitan Management Act, 1855. By section 161 of that Act the overseers were to make separate rates—called a sewers rate, a lighting rate, and a general rate, “and the said overseers shall, for the purpose of levying such rates, proceed in the same manner, and have the same powers, remedies, and privileges as for levying money for the relief of the poor.” One of the powers, remedies, and privileges was that given by section 195 of the Act of Geo. III.—namely, the power of demanding from the sheriff the sum due for rates. Therefore, with regard to these rates also, the remedy given by section 195 was applicable. The defendant, therefore, must pay the sum due for rates from the judgment debtor. The appeal must therefore be dismissed with costs.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER delivered judgment to the same effect.

[Solicitors—Clark, Greenwells, and Co., for the plaintiffs; W. and T. Burchell, for the defendant.]

Chan. Div. } 1900.
(Cosens-Hardy, J.) } July 17.

IN RE METROPOLITAN FIRE INSURANCE COMPANY
(LIMITED).*

Company—Winding up—Contributories—Application to remove name—Offer withdrawn before acceptance.

HIS LORDSHIP gave the following judgment, reserved from his sitting in company matters last week:—This is a summons by Mr. Wallace asking that his name may be struck off the list of contributories of the company. Mr. Wallace was a shareholder in the Commercial Fire Insurance Company of Scotland (Limited). This company was wound up in April, 1898, all its assets being transferred to the Metropolitan upon the terms of an agreement dated April 14, 1898, and made between the Commercial and its liquidators of the one part and the Metropolitan of the other part. By this agreement the Commercial and its liquidators agreed to transfer and make over to the Metropolitan all the goodwill and assets of the Commercial. The consideration for the transfer was partly an undertaking to pay and discharge all the debts and obligations of the Commercial, next an indemnity against all the costs of the winding-up of the Commercial, next the taking over of the whole staff of the Commercial, and then followed these clauses:—(5) “As a further part of the consideration for the said transfer every member of the Commercial shall, in respect of each share therein held by him or her, be entitled as of right to claim an allotment to himself or herself or to his or her nominee or nominees of either (first) a debenture bond for £1 10s. carrying interest at the rate of 4 per cent. per annum as from the 14th day of February, 1898, or (second) two ordinary shares of the Metropolitan of £5 each, with the sum of £1 credited as paid up on each of such shares, and the Metropolitan shall forthwith and within one month from the date hereof allot and issue the debenture bonds and shares so claimed, subject, however, to this condition—that the Metropolitan shall

not be bound to allot shares under this agreement to any one to whom under their articles of association they could have objected as a transferee of shares. (7) A member of the Commercial entitled to claim an allotment of debenture bonds or of shares of the Metropolitan in terms of Clause 5 hereof must claim the same within 21 days from the date hereof by sending in to the Metropolitan or to the liquidators of the Commercial a claim in writing for an allotment of the debenture bonds or the shares as they may elect, and such claim must be signed by the member making the same, and, when it requests that an allotment of shares may be made to a nominee or nominees of such member, it must be countersigned by such nominee or nominees. (8) The liquidators of the Commercial shall, within seven days from the date hereof, give notice in writing to each member of the Commercial, stating the amount of debenture bonds and the number of shares which the member is entitled to claim as of right under this agreement and the time within which the claim for an allotment as aforesaid must be sent in, and there must be enclosed therewith proper forms of claim for debenture bonds and for shares addressed to the Metropolitan for signature by the member. The notice aforesaid shall in each case be given by sending the same through the post addressed to the member at his or her registered address as appearing on the register of members. (9) Members of the Commercial, other than dissentient members hereinafter mentioned, entitled to claim as aforesaid but who shall not within the period of 21 days before mentioned claim, shall be held to have elected to claim debenture bonds, and the liquidators shall immediately on the expiry of said 21 days nominate all such members other than dissentient members who do not claim for an allotment of the debenture bonds, which they are respectively entitled to claim under Clause 5 hereof, and the Metropolitan shall forthwith allot such debenture bonds to the nominees of the liquidators.” And by Clause 10 provision was made for the payment, so far as necessary, by the Metropolitan of the amount payable to any dissentient members of the Commercial. The liquidators sent a notice to Mr. Wallace. It is not forthcoming, but I presume it was in pursuance of Clause 8. Mr. Wallace on April 23, 1898, signed a document addressed to the directors of the Metropolitan, which, so far as material, was as follows:—“As the holder of five shares in the Commercial, I claim an allotment of ten ordinary shares of the Metropolitan of £5 each credited as paid up to the extent of £1 per share, being the proportion to which I am entitled under the agreement, and I hereby agree to accept such shares and to pay the further moneys payable thereon when called upon.” On July 2 Mr. Wallace wrote to the Metropolitan withdrawing his application for ordinary shares. This was acknowledged by the general manager on July 6. Mr. Wallace's letter was forwarded by the Metropolitan to the liquidators of the Commercial, who on July 8 wrote a reply to Mr. Wallace treating him as entitled to debentures instead of shares. Notwithstanding this, the shares were allotted to Mr. Wallace in the autumn of 1898, and the question for my decision is whether the allotment was valid. The answer must, I think, depend upon this. Was the document of April 23, 1898, an application which could be withdrawn before acceptance, or was it an acceptance of a prior offer made to him by the Metropolitan? Upon the whole, I think the former is the true view. There was no direct relation between the Metropolitan and Mr. Wallace prior to April 23. The contract of April 14, 1898, was made between the two companies, and the allotment of shares or the issue of debentures would have been a satisfaction *pro tanto* of the obligations entered into by the Metropolitan with the Commercial. I do not think that a shareholder in the Commercial can be deemed to have acquired any direct right under that contract as against

*Reported by D. FITCHER, Esq., Barrister-at-Law.
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the Metropolitan. It seems to me that it was open to the Metropolitan to refuse the application, and that, even if such refusal had been wrongful, the only persons who could have claimed compensation would have been the parties to the agreement. It has been argued that the liquidators must be deemed agents of the Metropolitan in sending the notice to Mr. Wallace, thus making it a notice by the Metropolitan, but there is nothing in the written documents to support this theory, and there is no evidence of agency apart from the documents. The reasoning of the Lords Justices in "*In re New Eberhardt Company, ex parte Menzies*" (43 Ch.D., 118) seems inconsistent with this view. The result, in my opinion, is that the application succeeds and the applicant's name must be removed from the list of contributories and the liquidator must pay the costs.

Mr. Herbert Jacobs was for the applicant; Mr. Whinney for the company.

[Solicitors—Rowe and Maw; Amery Parkes and Powell.]

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.JJ.) } July 18.

CHAMBERLAIN'S WHARF (LIMITED) V. W. M. SMITH
AND OTHERS.*

Trade Union—Illegality—Expulsion of member
—Refusal of Court to enforce agreement between members—Trade Union Act, 1871, sec. 4.

This was an appeal by the defendants, who are the members of the committee of an association called the Tea Clearing-house, against an injunction granted by Mr. Justice Kekewich on the 6th inst. restraining the defendants, until the trial of the action or further order, from acting upon a resolution, passed by the committee on June 25 last, expelling the plaintiffs from membership of the association on the ground that they had committed a breach of the rules.

The objects of the association are (*inter alia*) "to give facilities to the wholesale trade in tea for the lodgment and transmission of warrants, delivery orders, &c., and other orders to the various docks and warehouses from a central office." "To provide a central clearing-house or office, where all such warrants and orders may be lodged, instead of at the various docks and warehouses." The persons entitled to become members of the association are dock companies carrying on the business of warehousing tea in bond and tea warehouse keepers carrying on that business, who should undertake in writing to abide by and observe the rules and by-laws of the clearing-house for the time being in force. By rule 11 every member is bound to charge on teas the respective rates, &c., specified in the schedule to the rules, and is not to be at liberty to depart therefrom in any way, subject to the allowance of a discount not exceeding 10 per cent. No other discount, no money gratuities, and no advantages, direct or indirect, are to be offered or allowed by any member to any merchant, broker, or other person in connexion with any matter or thing in any wise relating to the Tea Clearing-house agreement. By rule 14, no member is to be entitled to warehouse or deposit tea with, or employ in connexion with tea, any dock company or tea warehouse keeper who is not a member of the clearing-house, or to purchase or sample any tea from the warehouse of any non-member. By rule 15, any member breaking or failing to observe any of the rules is to be liable to expulsion by resolution of the committee. The plaintiffs alleged that the resolution expelling them had been

passed without their having had a fair opportunity of being heard, and this was the view taken by Mr. Justice Kekewich. The main objection taken by the defendants (and with this objection the learned Judge declined to deal fully upon an interlocutory application) was that the association is really a "trade union" within the meaning of the Trade Union Acts, 34 and 35 Vict., cap. 31 (1871), sections 3, 4, and 39 and 40 Vict., cap. 22 (1876), section 16, and that, the rules being in restraint of trade, the association is illegal, not in the sense that it is criminal, but in the sense that the Court could not assist any member by enforcing in any way the contract of membership. It was also objected that it was not shown that the association had any property which could give the Court jurisdiction. By section 3 of the Act of 1871, "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." And by section 4, "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely—(1) Any agreement between members of a trade union, as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed." And by section 16 of the Act of 1876 the term "trade union" is defined as meaning "any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act (*i.e.*, the Act of 1871) had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

Mr. Warrington, Q.C., and Mr. Christopher James were for the defendants; Mr. Renshaw, Q.C., and Mr. Stewart-Smith were for the plaintiffs.

The COURT allowed the appeal.

The MASTER of the ROLLS said that the main question was one of considerable importance. The real question for determination was whether, having regard to the rules of the association and the provisions of the Trade Union Acts of 1871 and 1876, the action could be maintained. It was necessary to see what the real object and scope of the association was. The essence of it as shown by rule 11 was that all the members agreed to charge for services rendered to teas certain rates fixed by the association, subject to a discount not exceeding 10 per cent., and that no other discount, no money gratuities, and no advantages, direct or indirect, should be offered or allowed by any member to any merchant, broker, or other person in connexion with any matter or thing in anywise relating to the Tea Clearing-house agreement. Rule 14 was also very important. And rule 15 provided for the expulsion of any member who failed to observe any of the rules. Was this an agreement in respect of which the jurisdiction of the Court was limited by section 4 of the Trade Union Act of 1871, and were the plaintiffs attempting to do that which was forbidden by the Act? Was the plaintiffs' proceeding one which the Court could not entertain? For many purposes trade unions were now perfectly lawful associations. But there was a specific section (section 4) in the Act of 1871 dealing with the question how far the Court should interfere to enforce agreements between the members of trade unions. There might have been some doubt as to what constituted a trade union, but section 16 of the Act of 1876 made this clear, and this association came within the definition. His Lordship was at first troubled by the

*Reported by W. L. CARELL, Esq., Barrister-at-Law.

difficulty whether this proceeding taken by the plaintiffs to restrain the committee from expelling them was a proceeding for "directly enforcing" the agreement between the members which came within section 4 (1). But his Lordship thought that it was. The complaint against the plaintiffs was that they had offered some financial advantages contrary to the rules. The result of a decision in favour of the plaintiffs would be that the association would be ordered to retain them as members for the purpose of enforcing the regulations. It was as members that the plaintiffs claimed the aid of the Court; they sought to maintain their position as members. In substance they were seeking to enforce the agreement between the members. The Court could not decide in favour of the plaintiffs without in effect differing from the principle of the decision of the late Sir George Jessel in "*Rigby v. Connol*" (14 Ch.D., 482), and the later decision of the Court of Appeal in "*Swaine v. Wilson*" (24 Q.B.D., 252) did not purport to be a decision to the contrary. In that case Lord Lindley pointed out that the real objects of the society were outside the Trade Union Acts. His Lordship came to the conclusion that the agreement in the present case was one which the Court had no power to enforce. This was a fatal objection and it rendered it unnecessary to consider the other points.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS concurred.

[Solicitors—Druces and Attlee; Rollit and Sons.]

Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.J.J.) } 1900.
July 18.

MILBURN AND CO. V. JAMAICA FRUIT IMPORTING AND TRADING CO. (LIMITED).*

Ship—Charter-party—Bills of lading—Captain to sign bills of lading without prejudice to charter-party—Bills of lading without negligence clause—Indemnity.

Decision of Mathew, J. (15 *The Times* L.R., 512), affirmed (Vaughan Williams, L.J., dissenting).

"The Carron Park" (15 P.D., 203) approved.

This was an appeal from a judgment of Mr. Justice Mathew at the trial of an action without a jury, reported in 15 *The Times* L.R., 512; 4 Com. Cas., 331. The plaintiffs were the owners of the steamship Port Victor, which they chartered to the defendants by a charter-party dated October 9, 1896, for the term of 36 calendar months at the rate of £1,025 per month. The plaintiffs claimed to be indemnified under the terms of the charter-party against the consequences of the master having signed, by the instructions of the defendants, certain bills of lading for Government stores containing no negligence clause, by reason whereof the plaintiffs, as they alleged, had been prevented from recovering from the Government contribution in respect of a general average loss. Clause 10 of the charter-party was as follows:—"The captain shall sign bills of lading at any rate of freight the charterers or their agents may choose, without prejudice to the stipulations of this charter-party, and the charterers hereby agree to indemnify the owners from any consequences that may arise from the captain following the charterers' instructions and signing bills of lading. The captain to attend daily when in port at charterers' or their agents' office. The owners shall not, under any circumstances, be liable for condition of

fruit or other cargo, and the charterers hereby indemnify the owners against any claim arising under any bill of lading." Clause 22 contained the following provisions:—"The act of God . . . negligence, default, or error in judgment of the pilot, master, officers, engineers, refrigerating engineers, mariners, or other servants of the shipowners or charterers always mutually excepted. . . . In the event of breakdown of the steamer or accident, all port charges, pilotages, and other expenses thereby occasioned to be for owners' account." By Clause 25, "Average (if any) to be regulated according to York-Antwerp Rules, 1890." The Port Victor, in the course of a voyage from London to Jamaica, during the currency of the charter-party, by reason of the negligence of the master and mariners, came into collision with another vessel. In consequence of the collision the Port Victor was compelled to put back to the Port of London for the purpose of repair. Part of the cargo consisted of Government stores, which had been shipped under bills of lading which contained no negligence clause. The plaintiffs' case was that, if the bills of lading had contained a negligence clause, then, on the authority of "*The Carron Park*" (15 P.D., 203), the plaintiffs would have been entitled to claim from the Government a general average contribution in respect of the expenses of putting back to the Port of London; and that, as they had lost their right to such contribution in consequence of the master having signed bills of lading containing no negligence clause, they were entitled, in accordance with the terms of clause 10 of the charter-party, to be indemnified therefor by the defendants. Mr. Justice Mathew gave judgment for the plaintiffs. The defendants appealed.

Mr. Carver, Q.C., and Mr. T. E. Scrutton appeared for the defendants; Mr. Joseph Walton, Q.C., and Mr. R. H. Balloch for the plaintiffs.

The COURT, having taken time to consider, delivered judgment, dismissing the appeal, Lord Justice Vaughan Williams dissenting.

LORD JUSTICE A. L. SMITH read the following judgment:—"This is an action by the owners of the steamship Port Victor against the charterers thereof upon an indemnity clause contained in the charter-party, whereby the defendants agreed with the plaintiffs to indemnify them "from any consequences that may arise from the captain following the charterers' instructions and signing bills of lading." I agree with my brother Mathew that the scheme of the charter-party is that, while the ship was to be employed as a general ship, the owners were to be in the same position as if the goods put on board were the charterers' goods. By this charter-party it was provided that negligence or default of the master, officers, mariners, and other servants of the shipowners or charterers was to be always mutually excepted. The captain, following the directions of the charterers, signed bills of lading for certain Government stores shipped on board the Port Victor by the Government. In these bills of lading there was no exception as to negligence or default of master, officers, mariners, and other servants of the shipowners. During the voyage covered by the charter-party and bills of lading, by reason of the negligence of the master, the plaintiffs' ship came into collision with another vessel, and in consequence thereof it is not disputed that general average expenses were incurred in putting back to London, in payment of tug, pilot, and port dues, of wages and victualling the crew, and of other matters. The plaintiffs thereupon demanded contribution for these general average expenses from the shippers of the Government stores, which demand was refused upon the ground that those expenses had arisen owing to the negligence of the plaintiffs' master; and it is not denied that, if the general average expenses arose

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

owing to such negligence, as the bills of lading contained no exception as to this negligence, the cargo owners, that is, the shippers of the Government stores, would not be liable to make general average contribution to the plaintiffs. Lord Watson in "*Strang, Steel, and Co. v. Scott and Co.*" (14 App. Cas., 601) sums up the position as follows. He says:—"When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved. . . . In any question with them he is a wrongdoer. . . . He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act." The allegation of the plaintiffs, the shipowners, is that, if there had been inserted in the bills of lading an exception as to negligence of the master, which usually is the case, there would then as between themselves and the cargo owners have been no negligence or default of the master, for this would then have been excepted. Mr. Carver, for the defendants, on the other hand, asserts that the introduction of such an exception into the bills of lading would have made no difference whatever, for he says that general average is not the creature of contract. In this I agree, for the foundation of a general average claim is ordinarily not that of contract, but is founded upon a loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo in the time of peril, and which must be borne proportionately by all who are interested. See per Mr. Justice Lawrence in "*Birkley v. Presgrave*" (1 East, 220, at p. 228). Lord Esher, in "*Burton v. English*" (12 Q.B.D., 218, at p. 220) says that the right to contribution comes "from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole may be saved." But, although general average is not the creature of contract, that does not settle the question in the present case, for what the contract of carriage is becomes an important factor when considering, not whether a general average claim for contribution has arisen, but in considering, assuming that such a claim has arisen, whether it can be taken away by the cargo owner showing that, as between him and the shipowner, the latter, to use Lord Watson's words, has been a wrongdoer. To create the shipowner a wrongdoer as regards the cargo owner there must be the breach of some duty, and, if by agreement between the two it has been agreed that it shall be no breach of duty for the master to be guilty of negligence, in other words, that as between the two the negligence of the master shall be always excepted, it cannot be said that it is a breach of duty towards the cargo owner for the master to be guilty of that which the cargo owner and shipowner have agreed shall be no breach of duty at all. This appeal raises the question whether "*The Carron Park*" (15 P.D., 203), decided by Sir James Hannen in the year 1890, is good law. That very learned Judge says:—"The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it." Having cited Lord Watson's judgment in "*Strang, Steel, and Co. v. Scott and Co.*," Sir James Hannen proceeds:—"Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract that the shipowner shall not be responsible for the negligence of his servants in the events which have happened." This decision of Sir

James Hannen has been acted upon in practice in this country ever since it was given, and we are asked now to overrule it. It was expressly approved of by Mr. Justice Barnes in "*The Mary Thomas*" ([1894] P., 108, at p. 117), and my brother Mathew does not doubt its accuracy in his judgment now appealed from; and, in my opinion, it correctly followed out the decision in the Privy Council delivered by Lord Watson in "*Strang, Steel, and Co. v. Scott and Co.*" I believe "*The Carron Park*" is in accord with the law of England relating to general average in this country. It is said that "*The Carron Park*" is not in accord with what has been said in "*Schmidt v. Royal Mail Steamship Company*" (45 L.J., Q.B., 646) and "*Crooks v. Allan*" (5 Q.B.D., 38) cited by Lord Justice Bowen in "*Burton v. English*" (12 Q.B.D., at p. 222)—viz., "the office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average." When read it will be seen that these cases do not deal with the question whether, where a general average expenditure has been incurred, the right to contribute thereto can be taken away by showing that the party incurring the expenditure was a wrongdoer as regards the person called upon to contribute. Whether he be such a wrongdoer must, as it seems to me, depend upon the contract which existed between the parties. This is not, as before stated, a case in which the question is whether a general average claim has arisen, for that in this case is not disputed, but the question is whether the shipowner has been a wrongdoer to the cargo owner. The shipowner says to the cargo owner, a general average loss has occurred to which you must contribute, and you cannot show that I have been guilty of negligence so as to absolve you from contributing thereto, for by express contract between us negligence is excepted. That the contract may at times be looked to appears from what Mr. Justice Willes said in "*Johnson v. Chapman*" (19 C.B., N.S., 563, at p. 583), when the question arose whether the owner of a deck cargo was entitled to claim general average in respect of such cargo jettisoned, and it was held that he was; for, said Mr. Justice Willes, "when you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average." Lord Watson, as will be seen, deals with the effect an exception as to negligence in a bill of lading may have upon a general average claim in "*Strang, Steel, and Co. v. Scott and Co.*" In the present case it is clear that the plaintiffs have been unable to obtain a general average contribution from the shippers of the Government stores by reason of no clause excepting negligence having been inserted in the bills of lading, and in my judgment the charterers are therefore liable to the plaintiffs under the indemnity clause in the charter now sued on, by reason of bills of lading having been signed without the exception of negligence being contained therein. As to the second point—viz., as to the effect of the clause at the end of paragraph 22 of the charter-party, I have nothing to add to what my brother Mathew has said thereon, except to say that I agree with him. In my judgment, for the reasons above, the appeal must be dismissed, and with costs.

LORD JUSTICE VAUGHAN WILLIAMS, in the course of an elaborate written judgment, in which he dissented from the conclusion arrived at by the other members of the Court, said that the question was whether it was a consequence of the captain's signing the bills of lading, which in fact he did sign, that the shipowners had lost a right of general average contribution which they would otherwise have had against the owners of part of the cargo shipped. The peril in respect of which the

expenses were incurred by the ship was a peril incurred by the negligence of the officers and crew of the ship. Now it was clear law that the rule of contribution had no application in cases where the danger which led to the sacrifice was brought about by the fault of the person claiming contribution, and if the right of contribution was thus excluded it could not be said that the fact that the ship could make no claim for contribution was the consequence of the captain following the instructions of the charterers and signing the bills of lading, and the case would not fall within the scope of the contract of indemnity in this charter-party. In such circumstances, in the absence of some special contract, the right to contribution would never arise, and it would not be true to say that the exclusion of the right of contribution was due to anything but the negligence of the shipowners' servant. But it was said that if the bill of lading had been in a different form from that in which it in fact was, and had contained, as undoubtedly was very usual, an exception of negligence of the master and crew, the right to contribution would have arisen: "The Carron Park" (15 P.D., 207) was relied on as an authority that such an exception in the contract of carriage would have this effect, and it seemed so to decide. His Lordship referred to "The Carron Park," and said that the judgment of Lord Watson in "Strang, Steel, and Co. v. Scott and Co." did not justify the decision in "The Carron Park." In his Lordship's opinion that decision was not right in principle. In his opinion the exceptions in the contract of carriage had nothing to do with the liability of the shipowner under the law of general average. The liability to contribute in no sense resulted from the contract of carriage, but existed wholly independently of the contract of carriage, by virtue of the equitable doctrine of the Rhodian law which, as part of the law maritime, had been incorporated in the municipal law of England. The rule of the Rhodian law excluding the person through whose fault the peril arose from benefits of general average contribution was based upon an obligation outside the contract of carriage. The shipowner could not claim contribution, because the peril had been caused by his fault, and the fact remained that it was caused by his fault notwithstanding the fact that it might be a form of the charter-party that the charterer should relieve him from responsibility so far as related to the contract of carriage for that fault of which he had been guilty. In his judgment the only way in which a shipowner could be placed in a position to recover general average contribution in a case where the peril had arisen from the negligence of the master or crew was a case where the master and crew had ceased, by the terms of the charter-party or otherwise, to be the servants or agents of the shipowner. In his opinion "The Carron Park" was wrongly decided. The law of general average contribution could not be applied in favour of a claimant through whose fault, whether personal or by his agents, the maritime peril was in fact brought about. Moreover, even if by special contract the right of contribution could be enforced against a party to the contract by the other party, even though his fault or negligence, his omission or his act of commission, had brought about the peril, he did not think that such a special contract was to be found in the exception to the charter-party, or would arise from the introduction of such an exception into the bill of lading. In his opinion the judgment of Mr. Justice Mathew ought to be reversed.

LORD JUSTICE ROMER read a judgment agreeing with the conclusion arrived at by Lord Justice A. L. Smith.

[Solicitors—Thomas Cooper and Co., for the plaintiffs; Parker, Garrett, and Holman, for the defendants.]

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.J.J.) } July 20.

THE RHYMNEY RAILWAY COMPANY V. THE BRECON AND MERTHYR TYDVIL JUNCTION RAILWAY COMPANY.*

Railway Company—Agreement between two companies to pool traffic—Stipulation not to seek any new line—Breach not entitling other company to treat agreement at an end.

Decision of North, J. (*ante*, p. 119), reversed.

This was an appeal by the defendants from a decision of Mr. Justice North's (reported *ante*, p. 119). The facts are fully stated in the judgment of the Court.

Mr. Baggallay, Q.C., Mr. E. C. Macnaghten, Q.C., and Mr. C. H. Sargent were for the defendants. Mr. Cripps, Q.C., Mr. Ernest Moon, Mr. Harold Bompas, and Mr. G. S. Robertson were for the plaintiffs.

The appeal was heard on July 3 and 4.

The MASTER of the ROLLS delivered the judgment of the Court allowing the appeal. He said,—This is an appeal from Mr. Justice North, who has decided in favour of the plaintiffs, the Rhymney Railway Company, in an action whereby the plaintiffs seek to obtain a declaration that an agreement of the year 1864 made between themselves and the defendants, the Brecon and Merthyr Tydvil Junction Railway Company, should be treated as determined. The defendants, by their defence, allege that the agreement is still binding and ask that an account may be taken under one of its clauses. The facts are partially stated in the judgment of Mr. Justice North, but it will be necessary to restate them in some detail in order that the grounds of our judgment may be clearly understood. Prior to the year 1864, the plaintiffs, the Rhymney Railway Company, were in possession of a line of railway running from the neighbourhood of Rhymney, on the west side of the Rhymney Valley, to Caerphilly, with a branch to the west to join the Taff Vale at the Walnut Tree Junction. The defendants, the Brecon Company, were in possession of a line of railway running also from the neighbourhood of Rhymney down the east side of the Rhymney Valley to Newport by way of Machen with a branch from Machen to Caerphilly, and also of a line running northwards from a point called Deri through Dowlais to Brecon and Merthyr. The plaintiff company had a branch from Bargoed to join the defendant company's line at Deri. This was substantially the position of the two companies in the year 1864. In the Session of that year both companies were in Parliament desiring to construct certain railways, and particularly a railway from Caerphilly to Cardiff; the Brecon company also proposing to construct a line from a point on their then existing line due north of Caerphilly to Caerphilly. Under these circumstances the heads of the agreement of 1864 were made out and confirmed by section 23 of the Rhymney Railway Act, 1864. The main provisions of that agreement may be summarized as follows:—Clauses 1, 2, 3, and 4 contemplated the construction of various lines by the Brecon and Rhymney Railway Companies respectively to the north of Rhymney, and a line from a point on the Brecon Company's line to Caerphilly. None of these lines have been constructed. Clauses 5 and 6 provided that the defendants, the Brecon Railway Company, should withdraw their scheme for constructing a line from Caerphilly to Cardiff, and that the plaintiffs should give the defendants running powers for through traffic from the terminus of the defendants' Caerphilly branch to the plaintiff company's station at Adam-street, Cardiff. Certain restrictions were imposed upon the user of these running powers.

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

By Clause 7 an alteration was made in the position of a junction between the defendants' line and the line of the plaintiffs, and the defendants were given running powers over the substituted junction and portion of the line of the Rhymney Company to Bargoed to a point to which they had already running powers communicating by way of Deri with their own line. By Clause 10 the plaintiffs gave the defendants running powers over their line between the end of the defendants' Caerphilly branch and Walnut Tree Junction subject to certain restrictions as to the traffic for which these running powers should be used. Clause 11 was in the following terms :—"After the opening of the Caerphilly and Cardiff line, the receipts arising from the traffic carried on between the New Tredegar works and Cardiff shall as between New Tredegar and Caerphilly be divided in equal proportions between the two companies after the deduction of 30 per cent. for working expenses, the mileage proportion between Caerphilly and Cardiff to belong exclusively to the Rhymney Company, the Brecon Company being allowed working expenses on the portion carried by them." Clause 17, on which the plaintiffs found their claim, is as follows :—"Except as herein mentioned neither company shall either directly or indirectly seek any new line from one side of the valley to the other to take away the traffic of either company." In pursuance of the agreement embodied in the heads of agreement the defendants withdrew their Bill for making an independent line from Caerphilly to Cardiff, the line of the plaintiffs was constructed, and the new junction near Bargoed station referred to in Clause 7 was also carried out. The works referred to in Clauses 1, 2, and 4 were never constructed. At the time of the making of this agreement the connexion across the valley between the plaintiffs' railway and the New Tredegar works already existed. Both parties appear to have acted on the agreement down to the year 1898, when the circumstances giving rise to this action arose. Some further communications were made from the Rhymney line on the western side of the valley to some new collieries opened up on the eastern, but it was agreed that these lines crossing the valley were constructed independently by landowners, and the case was conducted throughout on the basis that from 1864 down to 1898 both parties had abstained from any breach of the agreement. In the year 1896 the Barry Railway Company, which had about the year 1885 established docks and connecting railways running north from Barry, a port a few miles to the westward of Cardiff, obtained powers to construct a railway to join the line of the plaintiffs at Penrhos, and in the Session of 1898 the Barry Company were again in Parliament proposing to join the line of the defendants on the eastern side of the valley near Bedwas with another junction from the new projected line to the line of the Rhymney Company at Aber. The Bill was introduced in the House of Commons, but prior to its consideration before a Private Bill Committee in that House the heads of agreement were made between the defendants and the Barry Company which formed the foundation of the alleged breach by the defendants in respect of which the plaintiffs founded their right to treat the agreement of 1864 as at an end. These heads of agreement were dated April 26, 1898. Under them the defendants agreed to withdraw two railways which they were seeking power to construct for the purpose of making connexion between their own line and that of the plaintiffs in the neighbourhood of Caerphilly, and the Barry Company granted to the defendant company running powers over the Barry Company's proposed new line from its junction with the defendants' railway near Bedwas to its junction with the plaintiffs' railway near Aber. The agreement

contained certain terms as to how the traffic to Barry was to be carried which are not material for the purpose of the present question. The Barry Company's Bill, which was introduced in the House of Commons, was opposed in committee on preamble by the plaintiffs, their opposition being founded upon, among other grounds, the rights which they had obtained under the agreement of 1864. Upon the preamble being declared proved, the plaintiffs did not appear upon clauses in the House of Commons. The Chairman of the Committee, in their absence, inserted Clause 9 of the Barry Railway Act, 1898, apparently for the protection of the plaintiffs. The terms of the heads of agreement between the Brecon and the Barry Companies, dated April 26, were made known to the plaintiffs in the course of the passage of the Barry Company's Bill through the Committee of the House of Commons. Upon the Barry Company's Bill being, in the ordinary course, referred to a Committee of the House of Lords, the plaintiffs again opposed the preamble, and, upon the preamble being passed, proposed an amendment to Clause 9 of the Bill which would have enlarged its scope so as to have brought within its protective provisions traffic from other places besides the New Tredegar Works. We have referred to these proceedings in Parliament because they were made the ground of a contention raised by the defendants that the plaintiffs had so acted as to preclude them from now saying that they could treat the agreement as determined. In the month of July, 1898, the plaintiff company informed the defendant company that they considered that the agreement of 1864 had been broken, and would be treated by them as determined, and in November of the same year they gave formal notice in writing to the defendant company determining the said agreement. Upon the case coming before Mr. Justice North, he held that the action of the defendants in connexion with the proposed new line of the Barry Company in the Session of 1898 was not only a breach of Article 17, but was such a breach as entitled the plaintiffs to treat the agreement thenceforward as at an end. Before considering the main questions which arise in the action it would be well to dispose of the preliminary point which was raised by the defendants—viz., that the action of the plaintiffs during the passage of the Barry Company's Bill through Parliament was such as to preclude them from treating the agreement as determined. We are clearly of opinion that nothing was done by the plaintiff company to prevent them from raising the case which they brought before Mr. Justice North. The action which they took in Parliament was action against the Barry Company in order to protect their rights, and, on failing to obtain such protection as they considered sufficient, they were, in our opinion, clearly entitled to resort to any further remedies which were open to them as between themselves and the defendants. The main questions, however, which arise for decision are the following. It is contended on behalf of the defendants that their action in the year 1898 did not constitute a breach of the 17th clause of the agreement of 1864; and secondly, that, even if it was a breach, it was not such a breach as entitled the plaintiff company wholly to determine and put an end to their obligations under the agreement. Mr. Justice North has found that the action of the defendant company did amount to a breach of Clause 17 of the agreement, and in this judgment he was, in our opinion, right. It was contended on behalf of the defendants, in support of their argument on this point, that the agreement of 1864 was intended to be an agreement whereby the traffic on the east side of the valley was to be treated as traffic of the defendants, and the traffic on the west side as traffic of the plaintiffs. To a certain extent this may be the result of Clause 17 of

the agreement, but we are clearly of opinion that among the traffic which was intended to be protected in the interests of the plaintiffs was the already existing traffic from the new Tredegar pits to Cardiff by way of the plaintiffs' line, and that a scheme which proposed to take that traffic and divert it from Cardiff to another competing port by means of a line from one side of the valley to the other would be a new line to take away the traffic of the plaintiff company. There remains the question whether the breach of the agreement by the Brecon Company is such as entitles the Rhymney Company to treat the agreement as at an end, or whether their remedy is one for damages only. After the best consideration we can give to the matter, we are of opinion that the breach was not one entitling the plaintiffs to determine the agreement, but that they must seek their remedy in damages. It will be well to consider in the first instance what conduct on the part of one party to a contract justifies the other party in treating it as at an end. If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the other party may, in our opinion, treat the contract as at an end. See "*Withers v. Reynolds*" (2 B and Ad., 882); "*Hochster v. De La Tour*" (2 E. and B., 678). See the judgment of Lord Blackburn in the "*Mersey Steel and Iron Company v. Naylor*" (at page 442 of 9 App. Cas.). Short of such refusal, we think the true principle to be deduced from all the cases is that you must ascertain whether the action of the party who is breaking the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions. This part of the rule was laid down by Lord Blackburn in the same judgment (9 App. Cas., 443), where he says the rule of law is that where there is a contract between two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." It was contended by Mr. Cripps, on behalf of the plaintiffs, that, however little remained to be performed by the defendants, if it was to be gathered from the facts that they did not intend to fulfil their obligations to perform that part the plaintiff company were justified in treating the agreement as wholly determined. We think this goes too far. The result would be that, although all the main provisions of an agreement might have been performed, however trivial the breach was, the person complaining of the breach could treat it as going to the root of the contract. That this is not the true view of the law is, we think, to be deduced from another passage in the same judgment of Lord Blackburn, at p. 444, in which he says:—"I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract." The same view of the law was expressed by this Court in the case of "*Johnstone v. Milling*" (16 Q.B.D., 460). That was a case of the breach of one of the covenants of a lease, and in dealing with the principle to which we have referred Lord Justice Cotton said, at page 471:—"It must be taken, therefore, that the law is that when one party has done

an act which amounts to a wrongful renunciation of the contract, and the other has acted upon it as such, there is a cause of action in respect thereof, but, when the other has not done so, then both the parties, as well as he who has attempted to renounce the contract as he who asserts its existence, are entitled to the benefit of its provisions. The Divisional Court in the present case treated the statements made by the plaintiff as a renunciation of the contract within the doctrine I have mentioned. I cannot say I think they were right in so doing. But, assuming that they were, I can find no case which shows that the doctrine in question applies to the renunciation of one particular covenant or stipulation in a contract such as a lease, which contains many. And as at present advised I am not favourably impressed with the view that the doctrine would apply to the case of a lease where the tenant cannot, in consequence of the refusal by the landlord to perform a particular covenant, put an end to the entire contract. But, however that may be, we have first to arrive at the conclusion that there was a renunciation of the contract." It remains to apply these rules of law to the facts in the present case. It is not contended that there was an express refusal by the defendants to be bound by the provisions of the agreement. What is said is that their conduct amounts to a breach of Clause 17 entitling the plaintiffs to determine the contract. Now to apply the text laid down by Lord Blackburn it cannot be said that any breach of Clause 17 goes to the root of the whole agreement and defeats the substantial consideration for it. In our opinion the main object of the agreement of 1864, so far as the plaintiffs were concerned, was to get rid of the defendants' proposed competing line from Caerphilly to Cardiff, which by Clause 5 the defendants undertook to withdraw, and in consideration of which withdrawal the defendants obtained running powers both to Cardiff and to Walnut Tree Junction. A further provision, not in our opinion unimportant, was the grant of running powers to the Brecon Company under Clause 7. We think this view is further supported by the provisions of Article 11. If the defendants had obtained their own route from Caerphilly to Cardiff traffic might have been carried from the New Tredegar works to Cardiff wholly on the line of the defendants, in which event they would have secured the whole of the rate for themselves. The agreement provides that although such traffic will be carried to Cardiff entirely by the plaintiffs and never touch the defendant company's line at all, the defendants are to share in the receipts (after deducting working expenses) due to the portion of the transit from the New Tredegar pits to Caerphilly. In our opinion the provisions of the agreement show clearly that Clause 11 was part of the consideration paid by the plaintiffs for the abandonment by the defendants of their independent route from Caerphilly to Cardiff. If we could have found on the construction of the agreement that Clauses 11 and 17 depended the one upon the other—that is to say, that the consideration for Clause 17 was the granting of the share of the receipts under Clause 11—we should have been prepared to hold that a breach by the defendants of their obligation under Clause 17 justified the plaintiffs in refusing to fulfil their obligation under Clause 11. But looking at the whole agreement and its main provisions we think it would be wrong to hold that Clauses 11 and 17 are so mutually dependent, and, therefore, that the plaintiffs are justified in withholding payment under Clause 11 simply on the ground that there has been a breach of Clause 17. We may point out that the consequences of holding the agreement at an end might be very serious. The defendants' running powers from Caerphilly to Cardiff and Walnut Tree Junction would be gone, and although it is said

that they have not hitherto been largely used, still they may be of great value: but, in addition, the running powers over the portion of the plaintiffs' substituted line south of Bargood Station would also be gone, and this forms part of the route of the Brecon Company to their own line north of Deri. For the above reasons we are of opinion that the decision of Mr. Justice North, holding that the plaintiffs were right in putting an end to the agreement, cannot be supported, and that the defendants are entitled to have a declaration that Clause 11 is binding on the plaintiffs, and to have an account taken thereunder. A subordinate question was raised as to interest, which has not been argued before us, and if any difference arises it should, we think, be raised on the taking of the account. The plaintiffs are entitled to a declaration that the action of the defendant company did constitute a breach of the agreement, but until the line of the Brecon Company is opened they would not be entitled to recover any damages in respect of that breach. Each party to pay their own costs in the Court below, but the defendants are entitled to the costs of this appeal.

[Solicitors—Beale and Co. ; Bompas and Co.]

Court of Appeal (A. L. Smith, Vaughan) 1900.
Williams, and Romer, L.J.J.) } July 20.

BOSTOCK V. THE RAMSEY URBAN DISTRICT COUNCIL.*
Practice—Costs—Public Authorities Protection
Act, 1893.

Decision of Lord Russell of Killowen, C.J.
(*ante*, p. 96), affirmed.

This was an appeal from a decision of the Lord Chief Justice's on a question as to costs, argued after the trial of an action. The action was one of malicious prosecution. The plaintiff was the principal proprietor of a travelling circus. The defendants were the Urban District Council of Ramsey. The plaintiff's circus visited the town of Ramsey, and the plaintiff's representative placed his wagons or vehicles in a particular part of a public thoroughfare where, in the opinion of the local authority, they constituted an obstruction of the highway. The defendants preferred an indictment against the plaintiff at the assizes for obstructing the highway, but Mr. Justice Wills was of opinion that there was no evidence on which he could properly be indicted, and the jury returned a verdict of "Not guilty." The plaintiff then brought this action for malicious prosecution. At the trial the Lord Chief Justice was of opinion that the plaintiff had not made out that there was an absence of reasonable and probable cause on the part of the defendants, and he held that there was no evidence of malice, and he therefore directed judgment to be entered for the defendants (see *ante*, p. 18). Subsequently, the Lord Chief Justice, after hearing argument on the question whether he should deprive the successful defendants of their costs, came to the conclusion that the defendants had acted unreasonably in instituting the prosecution, and that that constituted good cause for depriving them of costs; and, secondly, that he had a discretion to deprive them of costs notwithstanding section 1 (b) of the Public Authorities Protection Act, 1893, which provides that where in an action against a public authority a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client. He accordingly ordered that the judgment should stand for the defendants without costs (see *ante*, p. 96). From this decision the defendants appealed.

Mr. Lawson Walton, Q.C., and Dr. J. W. Cooper appeared for the defendants; Mr. Blake Odgers, Q.C., and Mr. P. Rose-Innes for the plaintiff.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the facts showed that the indictment which the defendants had preferred against the plaintiff was an oppressive and puerile indictment. When the case came before Mr. Justice Wills that learned Judge held that there was no evidence on which the plaintiff could properly be convicted, and in his opinion no reasonable jury would have convicted the plaintiff under the circumstances. The plaintiff then brought this action for malicious prosecution, and the Lord Chief Justice, after carefully considering the matter, came to the conclusion that the plaintiff had failed to give any evidence of malice on the part of the defendants, and he also held that the plaintiff had not proved an absence of reasonable and probable cause for instituting the prosecution; he accordingly gave judgment for the defendants. But it was obvious that the Lord Chief Justice took the same view of the prosecution as he himself had just expressed, and he deprived the defendants of their costs of the action. Apparently, he felt himself bound to deprive them of costs, and on this ground, that they had by their conduct induced the plaintiff to believe that there was malice on their part and that there was an absence of reasonable and probable cause. On this two questions arose. The first was whether there was any evidence of "good cause" for depriving the defendants of costs within the meaning of Order 65, Rule 1, of the Rules of the Supreme Court, which provides that where any action is tried with a jury "the costs shall follow the event, unless the Judge by whom such action is tried, or the Court, shall for good cause otherwise order." It had been held in "Jones v. Curling" (13 Q.B.D., 262) and other cases that if there was any evidence of good cause, then it was for the Judge at the trial to exercise his discretion, and there was no appeal to this Court from the exercise of the Judge's discretion, and that the only jurisdiction of this Court in the matter was to consider whether there was any evidence of good cause. In his opinion, the point was whether there was any evidence that the conduct of the defendants in instituting the prosecution under the circumstances was such as to give rise to the plaintiff's believing that he would succeed in an action for malicious prosecution if he brought one. Of course conduct having nothing whatever to do with the action could not constitute "good cause." But it had been decided in this Court in "Harnett v. Vise" (5 Ex. D., 307) that the question was not confined to the conduct of the parties in the litigation itself. He thought that there was evidence in this case that the conduct of the defendants was such as to lead the plaintiff to think that he had a good cause of action against them. The second question was as to the true construction of section 1 (b) of the Public Authorities Protection Act, 1893. It seemed to him to be clear that the meaning of that section was that where in an action against a public authority a judgment was obtained by the defendants it should carry costs as between solicitor and client in cases in which the defendants were entitled to costs. It could not mean that however oppressive and unreasonable they had been, and no matter whether they were entitled to costs or not, they should nevertheless have their costs as between solicitor and client. He thought that the judgment of the Lord Chief Justice was right, and that the appeal must be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER delivered judgments to the same effect.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Court of Appeal (A. L. Smith, Vaughan } 1900.
Williams, and Romer, L.J.J.) } July 21.

TIMMINS V. THE LEEDS FORGE COMPANY (LIMITED).*

Master and Servant—Master's liability to servant—Workmen's Compensation Act, 1897—"Accident," what is.

This was an appeal from the decision of Judge Greenhow, sitting at the Leeds County Court, under the Workmen's Compensation Act, 1897. The applicant for compensation was a labourer in the employment of the Leeds Forge Company. The question was whether the injury to the workman was caused by an "accident." The appeal first came before the Court on February 3 last, when it was remitted to the County Court Judge to find the exact circumstances in which the injury occurred. The case now came on again. The evidence was shortly as follows:—The applicant's duty was to lift planks of timber. On January 26, 1899, he was engaged in shifting timber from one heap in the yard to another heap. He had been moving the timber the day before, and had no difficulty in moving it then. The timber consisted of pine deals 14ft. long, 11in. wide, and 3in. thick. On January 26 the planks were all frozen together, there having been a frost during the night. The applicant began work at 11 a.m. and had a difficulty in moving the planks from the beginning. At about 4 15 p.m. he bent down to lift a plank which was fast to some others with the frost, when he fell down in pain. The lower planks in the heap were more firmly fastened together on account of the rain and frost. He never had any difficulty before that occasion. The applicant was ruptured in consequence, and was injured. The County Court Judge found the above evidence to be true. It appeared that the applicant had been previously ruptured, but the County Court Judge found upon the evidence that he was practically cured of the old rupture, and was as good a man as he was before it, and was entitled to the same remedy as if this had been a rupture for the first time. The Judge also found that the rupture was, in fact, caused by the lifting of the timber and not by some other cause, and that it was, under all the circumstances of the case, an injury by accident arising out of and in the course of the employment, and that the employers were liable to pay compensation. He accordingly made an award in favour of the applicant.

Mr. BAIRSTOW (Mr. Cripps, Q.C., with him), for the employers, contended that there was no "accident" in this case. There was nothing fortuitous or unexpected. The workman knew that the planks were frozen together, as he had been working from 11 a.m. to 4 15 p.m., when the accident happened. The work was the man's ordinary work which was rendered heavier than usual by the frost. He referred to "*Hensley v. White*" (*ante*, p. 64; [1900] 1 Q.B., 481).

Mr. Tindal Atkinson, Q.C., and Mr. Compston, for the applicant, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the facts shortly were that the workman was engaged in moving piles of timber. There had been rain and frost the night before, and in consequence the planks got frozen together. The man found that he was able to move the timber. As he (the Lord Justice) read the evidence, the lower down the workman got in the stack of timber the harder the planks stuck together, owing to the rain and frost, and this was unknown to the workman. Accordingly when the workman tried to lift one of the lower planks

he ruptured himself, owing to the difficulty of lifting it, on account of its being frozen fast to the other planks. It was said that there was nothing fortuitous or unexpected in the case. In his opinion, there was evidence upon which the County Court Judge could find that the injury was caused by something fortuitous and unexpected by reason of the planks sticking together. The appeal, therefore, failed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

[Solicitors—Leslie Field, for Day and Yewdall, Leeds, for the appellants; Scott, Lawson, and Parker, for A. Willey, Leeds, for the respondent.]

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.J.J.) } July 28.

IN RE JOLLY—GATHERCOLE V. NORFOLK.*

Will—Hotchpot clause—Rent owing—Real Property Limitation Act, 1874, sec. 1.

Decision of North, J. ([1900] 1 Ch., 292), reversed.

This was an appeal against the decision of Mr. Justice North which was reported in *The Times* of December 15 last. The appeal was heard last week.

Mr. Vernon Smith, Q.C., and Mr. Poyser were for the appellant; Mr. Rolt was for the daughter of the testatrix; Mr. H. Terrell, Q.C., and Mr. T. B. Napier were for the trustees of the will.

The COURT allowed the appeal. The facts are stated in the judgment of the Master of the Rolls.

The MASTER of the ROLLS said,—The question is whether the trustees of the will of Anne Jolly, who made a will in the year 1891 and died in December, 1898, are entitled, in dividing her property between her four children, to deduct from the share of the son R. T. Jolly any amount in respect of rent due for a farm occupied by him since 1868. In 1868 the testatrix let the farm to her son at a rental of £80 a year. He paid the rent due up to the year 1881, and made no payment after that time. By her will made in 1891 Anne Jolly gave her property in trust for her four children, and declared (among other things) that all moneys owing to her at her death by any of her children for rent or otherwise should be brought into hotchpot, and that no child should be entitled to receive any share until such moneys so owing to the testatrix had been paid to her executors. Mr. Justice North has decided that the executors should deduct from the share of R. T. Jolly 12 years' rent of the farm for the period 1881 to 1893. I am unable to adopt this view. In the year 1893 R. T. Jolly obtained, by virtue of the Real Property Limitation Act, 1874, section 1, an absolute title to the property. It is, I think, inconsistent with his right so acquired that the rent which he ought to have paid should be deemed to be still owing. The effect of the Limitation Acts of 1833 and 1874 is, in my opinion, that, after the expiration of the statutory period of 20 and 12 years respectively, all rights which the reversioner would have had in respect of the land have come to an end, and I do not think that it would be consistent with that position that rent, the non-payment of which has given the occupier a title to the land, should still be deemed to be owing. I am therefore of opinion that this appeal should be allowed, and that the trustees are not entitled to deduct anything in respect of the arrears of rent.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS gave judgment to the same effect.

[Solicitors—Morris and Bristow; Field, Roscoe, and Co.]

Court of Appeal (Lord Alverstone, M.R.,) 1900.
Rigby and Collins, L.JJ.) July 23.

THE VALENTINE MEAT JUICE COMPANY V. THE
VALENTINE EXTRACT COMPANY.*

Trade Name—Imitation—Using own name—Passing off goods as another's.

Decision of Stirling, J. (*ante*, p. 33), reversed and injunction granted.

This was an appeal against the decision of Mr. Justice Stirling which is reported *ante*, p. 33. The plaintiffs, who are an American company and proprietors and manufacturers of the well-known extract called "Valentine's Meat Juice," sought by this action an injunction to restrain the defendant company from carrying on business as manufacturers or vendors of any preparation of extract of meat or meat juice under any name or title of which the name "Valentine" or "Valentine's" formed part, and to restrain the defendant C. R. Valentine from carrying on any such business under any such name or title without clearly distinguishing that business from the business of the plaintiffs.

The business of the plaintiffs was originally founded in 1871 by Mr. Mann T. Valentine, who had discovered a mode of preparing meat juice, and the business has always consisted and still consists entirely in the manufacture and sale of that preparation. In 1892, on the death of the founder, the business passed into the hands of the plaintiffs. They have no depot and employ no agent in England, although they make annual consignments to a few firms in this country to the extent of upwards of a quarter of a million bottles of their meat juice. Their preparation is mainly, but not exclusively, used by sick people and invalids. It is a liquid, and has always been sold in bottles of one size and of a distinctive shape, and under some designation of which the name "Valentine" formed part. In some cases it has been sold or referred to as "Valentine" simply. Until 1898 there was no other preparation of meat on the market connected with the name of Valentine. The defendant company was incorporated in this country in 1897 with a capital of £4,000 divided into 8,000 preferred shares of £1 each and 1,000 deferred shares of a like value, and having amongst its objects the carrying on of the business of meat extract or meat juice manufacturers and vendors. This company was promoted by the defendant Charles Richard Valentine, and he was its managing director. In 1895 he was in the employment as manager of the Colonial Consignment and Distributing Company, who are dealers in colonial produce, including, at one time, extract of meat manufactured according to Liebig's and other processes. Some time in 1895 the defendant Valentine conceived the idea of putting up solid extract of meat in the form of globules enclosed in a protecting cover, so that it could be carried about in small quantities and be made readily available as food by travellers and others. For this process he subsequently obtained a patent, which, in 1897, he sold to the defendant company for \$1,440, to be paid as to £500 in cash and the balance in deferred

shares. The memorandum of association was signed by seven clerks who were nominees of the defendant Valentine's, but the company was not, in the opinion of Mr. Justice Stirling, altogether what is ordinarily understood as a "one man company." The defendant Valentine left the service of the Colonial Consignment Company in June, 1898, and the defendant company then commenced the sale of meat globules. They were at first packed in boxes bearing labels describing them as "Valentine's Valtipe Meat Globules," the word "Valtine" being a registered trade mark which was acquired by the company on its formation from the defendant Valentine. Since the commencement of this action the description on the labels has been altered to "Valtine Meat Globules." The plaintiffs did not complain that the defendants had got up their goods so as to resemble the plaintiffs', but only that the defendants had made use of the name "Valentine" in such a way as to deceive the public into the belief that the goods sold by them were manufactured by the plaintiffs. Mr. Justice Stirling dismissed the action, but without costs. In his opinion there were features of suspicion in the case, but he came to the conclusion that want of good faith on the part of the defendants had not been established. The plaintiffs appealed.

Mr. Moulton, Q.C., Mr. Swinfen Eady, Q.C., and Mr. Sebastian were for the plaintiffs; Mr. Upjohn, Q.C., and Mr. A. Sims were for the defendants.

The COURT allowed the appeal.

The MASTER of the ROLLS said that no doubt the case was one of considerable importance. He would first express his view of the law applicable to the case. The law had been expressed in different language by different Judges, but there was no difference in principle. The principle could not be better stated than it was by the present Lord Chancellor in "Reddaway v. Banham" ([1896] A.C., at p. 204), where he said, "I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else." And in the same case the late Lord Herschell said (at p. 210):—"The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff." And Lord Macnaghten expressed himself to the same effect, though not in the same language. In the opinion of his Lordship (the Master of the Rolls) the only difficulty in the present case was in the application of these principles to the facts. A strenuous effort was made by Mr. Upjohn in his able argument to draw a distinction between a case in which the name, of the use of which the complaint was made, was the name of the person who was carrying on the business and a case in which it was not. In his Lordship's opinion there was no difference in principle. In either case the principle stated by Lord Halsbury must be applied. It was, no doubt, more difficult to apply the principle when the name of a person was used. The rule, as applicable to such a case, could not be better expressed than it was by Lord Justice Vaughan Williams in

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

"Jamieson v. Jamieson" (15 Pat. Off. Rep., at p. 193):—"A plaintiff never can complain of the user by the defendant of either the plaintiff's personal name or of any other name that he chooses to use for the purpose of denoting his goods, unless he first establishes that in the market his goods have come to be known by that name. It is not a question, as it has been sometimes suggested, of the right of the law to restrain a man from using his own name. The right and duty of the Court always is to restrain a man from using a name that has come to be recognized as the name of a particular trader's goods for his, the defendant's, goods so as to suggest that the defendant's goods are the plaintiff's goods and to pass them off as such." That was an exposition of the law dealing with the very point now raised, and it showed that, though in such a case it was more necessary than in any other for the plaintiff to establish clearly the fact that the name in question had come in the market to denote the plaintiff's goods, yet the principle was the same as in other cases. The plaintiff must establish that the name in question had acquired a "secondary" meaning as denoting his goods. There was no doubt as to the law which was to be applied. The question was whether the names "Valentine's Meat Juice," "Valentine's Extract," or "Valentine" alone had come to be used in the market as distinguishing the plaintiffs' preparation only. There could be no doubt that they had. The evidence was overwhelming. The plaintiffs had established that their goods had become known in the market by these names, and there was no reason why these names should not be protected as much as any fancy name. His Lordship did not wish to judge any man harshly, but he could not treat the defendant's action in the matter as thoroughly straightforward and honest. He came to the conclusion that the defendant C. R. Valentine was perfectly aware that the names "Valentine's Meat Juice" and "Valentine's Extract" were names of great reputation in the market, and that he adopted the name in question for the purpose of getting the benefit of the reputation so far as he could. The evidence showed that a number of persons had *bona fide* thought that the article put on the market by the defendants was Valentine's meat juice contained in capsules. The Court had only to consider what would be the effect of the notices put out by the defendants and, in his Lordship's opinion, the only natural conclusion was that which was drawn by those persons who wrote to the defendants asking for an explanation. It was said that the plaintiffs and the defendants were appealing to different markets. His Lordship drew the conclusion that the defendants were representing and intending to represent to the public that their article was a Valentine's extract of meat which had new qualities, and that they were not merely claiming the invention of a capsule. It was not suggested that C. R. Valentine had experimented on extract of meat or had produced extract of meat or had done anything but obtain the best extract of meat which he could procure. In his Lordship's opinion the term Valentine Extract could not be used in connexion with meat juice without representing the goods to be those of the plaintiffs. The plaintiffs were entitled to the relief which they asked, and, under the circumstances, his Lordship thought that the injunction should extend to the use of the word "Valtine."

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS delivered judgment to the same effect.

Mr. UPJOHN asked that the operation of the injunction might be suspended pending an appeal to the House of Lords.

The COURT refused to do this.

[Solicitors—Wilson, Bristows, and Carpmal; Cam-pion and Co.]

Court of Appeal (Lord Halsbury, L.C.,
A. L. Smith and Vaughan Williams,
L.JJ.) } 1900.
July 24.

BARON AND ANOTHER V. THE PORTSLADE-BY-SEA
URBAN DISTRICT COUNCIL.*

Local Government—Sewers—Failure of local authority to cleanse—Public Health Act, 1875, sec. 19.

There is nothing in the Public Health Act, 1875, which takes away the ordinary common law right of action where a local authority neglects to cleanse the sewers vested in them and damage is thereby caused to an individual.

This was an appeal from the judgment of Mr. Justice Mathew on further consideration after the trial of the action with a jury, at the Lewes Assizes; reported in 15 *The Times* L.R., 513. The plaintiffs were the occupiers of certain premises at Portslade, consisting of a dwelling house and land used for agricultural purposes. A sewer, which was made by a private individual and which carried the sewage from a brewery and some cottages, passed in an open cutting through the plaintiffs' land. This sewer became vested in the defendants under the Public Health Act, 1875. Formerly the defendants, by arrangement with the plaintiffs, paid for the cleansing of the sewer, but in 1898 a dispute arose between the plaintiffs and the defendants, with the result that the sewer was not cleansed. The plaintiffs complained that in consequence thereof large quantities of sewage and filth came upon their land so as to cause a nuisance. The defendants contended that the plaintiffs' only remedy for the defendants' neglect of the statutory duty, imposed by section 19 of the Public Health Act, 1875, of keeping the sewer properly cleansed, was by complaint to the Local Government Board under section 299 of the Public Health Act, 1875. The jury assessed the damages at £75. Mr. Justice Mathew held that the action would lie and gave judgment for the plaintiffs. The defendants appealed.

Mr. MACMORRAN, Q.C., and Mr. THORN DRURY, for the defendants, contended that the only remedy was by complaint to the Local Government Board under section 299 of the Public Health Act, 1875, and that no action would lie. They referred upon this point to "Robinson v. Workington Corporation" ([1897] 1 Q.B., 619); "Pasmore v. Oswaldtwistle Urban Council" ([1898] A.C., 387); "Bateman v. Poplar Board of Works" (37 Ch.D., 272); "Hammond v. St. Pancras Vestry" (L.R., 9 C.P., 316). They further contended that as the defendants had not made the sewer they were only guilty of nonfeasance, for which no action would lie. "Attorney-General v. Dorking Union" (20 Ch.D., 595); "Brown v. Dunstable Corporation" ([1899] 2 Ch., 378); "Dent v. Bournemouth Corporation" (66 L.J., Q.B., 395).

Mr. J. G. Witt, Q.C., and Mr. Sinclair-Cox, for the plaintiffs, were not called upon.

The COURT dismissed the appeal.

The LORD CHANCELLOR said that he did not in any way question the law laid down in any of the cases cited. They were all beside the present question. In the present case there was a sewer vested in the defendants. That sewer was formerly cleaned out at certain intervals, and no nuisance was created or

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

allowed to exist. The local authority seemed to have discontinued that ordinary and natural duty, and they thereby caused a nuisance to a private citizen with respect to his land. There was all the difference between the jurisdiction to call upon the local authority to make new sewers or a new system of drainage and the jurisdiction to compel the local authority to deal with the existing sewers in a proper and reasonable manner. There was no question here as to making new sewers. The plaintiffs' complaint was that the defendants, who had formerly dealt with this sewer in a proper and reasonable manner, had lately neglected to do so, and had thereby caused a nuisance and damage to the plaintiffs. His Lordship could not see why the obligations imposed on the defendants should not be enforced by action. The earlier part of s. 299 of the Public Health Act, 1875, had reference to new works. The only difficulty arose with regard to the later words of the section, but on looking at the context they evidently referred to a duty to be enforced of a kind similar to that dealt with in the former part of the section. The words did not mean that every time the local authority neglected to use proper diligence in the management of the existing sewers, the only remedy was by complaint to the Local Government Board. Where there was neglect by the local authority in the ordinary management of sewers and damage was thereby caused to a private citizen, there was nothing in the Act which took away the ordinary common law right of action. The judgment of the learned Judge was therefore right.

LORD JUSTICE A. L. SMITH said that none of the cases cited went anywhere near saying that where a local authority neglected the duty imposed upon them by s. 19 of the Public Health Act, 1875, of properly cleansing the sewers vested in them, and damage was thereby caused to an individual, the common law right of action was taken away, and that the only remedy the aggrieved person had was by complaint to the Local Government Board under s. 299.

LORD JUSTICE VAUGHAN WILLIAMS agreed.

[Solicitors—Rodgers and Gilbert, for the plaintiffs; Sawyer and Ellis, for Buckwell and Berkeley, Brighton, for the defendants.]

Court of Appeal (Lord Halsbury, L.C.,
A. L. Smith and Vaughan Williams, } 1900.
L.JJ.) } July 24.

WATSON V. H. BORNER AND CO. (LIMITED).*

Ship—Charter-party—Termination of voyage—
Delivery of cargo at named wharf—Lay days,
commencement of.

This was an appeal by the plaintiffs from the judgment of Mr. Justice Mathew, reported in *The Times* of August 5, 1899, and 4 Com. Cas., 335. The action was brought by the owners of the steamship Netley Abbey to recover a balance of freight upon a cargo of ore carried from Elba to Cardiff under a charter-party dated January 15, 1898, made between the plaintiffs and the defendants. The main question in the case was whether the defendants were entitled to deduct from the amount of freight payable on the cargo the sum of £100 5s. in respect of despatch money alleged to have been earned by them, or only £49 5s. The charter-party provided that the Netley Abbey should "proceed to Elba and there load a cargo of ore,

and being so loaded should proceed to Dowlais Wharf, Cardiff, and there deliver the same as customary according to the custom of the port, where and as directed by consignees, to whom notice is to be given of the vessel being ready to discharge." The cargo to be shipped at the rate of 200 tons per working day of 24 hours, and to be discharged on same conditions. Time for discharging to count "from 6 a.m. after ship is in every respect ready in berth and in free pratique, as per custom of port; written notice of such readiness being given to consignees during usual office hours. . . Demurrage, if any, at the rate of twenty shillings sterling per hour. Despatch money at the rate of half the demurrage." The Dowlais Wharf was a private wharf belonging to the Dowlais Iron Company, and was situated in the Roath Dock, Cardiff. The wharf was under the entire control of the Dowlais Company, who directed the order in which vessels were to load or discharge at their wharf. The cargo in question formed part of a large quantity of ore which had been sold by the defendants to the Dowlais Company under a contract made in 1897, by which the Dowlais Company were bound to take delivery ex ship in the Roath Dock, Cardiff. This contract provided that "the cargo should be discharged at the rate of not less than 300 tons per working day from time ship is ready to discharge, or buyers to pay demurrage as per charter-party." A bill of lading was signed for the cargo and was endorsed by the defendants and sent to the Dowlais Company, who discharged the vessel and paid freight on the cargo to the shipowners, the amount being settled in account with the defendants. At the Dowlais Wharf there were facilities for loading or discharging three vessels at a time. The Netley Abbey arrived in the Roath Dock on February 8, 1898, and notice of readiness to discharge was given to the Dowlais Company on that day. There were at that time three vessels at the Dowlais Wharf, one of which left early on the following day, and another vessel called the Onyx, which arrived in dock after the Netley Abbey, was, in order to suit the business arrangements of the Dowlais Company, put into her place to load. The Onyx was succeeded by another vessel, which also loaded cargo from the Dowlais Company. The Netley Abbey got into berth at 2 p.m. on February 14, and her discharge was completed at 6 a.m. on the 17th. The time allowed by the charter-party for unloading was 248½ hours. The defendants contended that loading time commenced at 6 a.m. on February 15, and that 200½ hours had been saved. The plaintiffs' case was that the Netley Abbey had been prevented from getting into berth on the 9th by the act of the Dowlais Company, who were the defendants' agents, and that in consequence, therefore, the defendants were not entitled to the despatch money claimed. Mr. Justice Mathew gave judgment for the defendants.

Mr. Rufus Isaacs, Q.C., and Mr. Montague Lush appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. R. H. Balloch, for the defendants, were not called upon.

The COURT dismissed the appeal.

The LORD CHANCELLOR said that, in his opinion, the judgment was right. The case was perfectly clear. The obligation was upon the shipowners to take their ship to Dowlais Wharf. They did not do so until February 14, and therefore the lay days did not commence to run until 6 a.m. on February 15.

The LORDS JUSTICES concurred.

[Solicitors—Botterell and Roche, for Vaughan and Roche, Cardiff, for the plaintiffs; Ince, Colt, and Ince, for the defendants.]

* Reported by W. F. BARRY, Esq., Barrister-at-Law.

Chan. Div. } 1900.
(Byrne, J.) } July 26.

RE TRENCHARD, DECEASED—WARD V. TRENCHARD.*

Settled Land Acts—Tenant for life—Settled Land Act, 1882.

A testator by his will gave his wife the use of his residence as long as she should desire it, his estate to pay all rates, taxes, and outgoings in respect thereof; held, that she had the powers of a tenant for life in respect thereof under the Settled Land Acts.

In this case the testator, who died in April, 1899, by his will, made in March, 1897, gave to his wife the use of his residence, Woodville, so long as she should desire to make it her permanent place of residence and should remain his widow, his estate to pay all rates, taxes, and outgoings in respect thereof and to keep the house and grounds in tenable repair. It appeared that the testator had for many years resided at Woodville, which was a freehold suburban house with about one-and-a-half acre of ground, and that the rates, taxes, and outgoings amounted to some £120 per annum. The testator's widow had permanently resided at Woodville since the testator's death, but now claimed to be entitled, as tenant for life within the definition contained in the Settled Land Act, 1882, section 58, subsection vi., to exercise her power of selling the house and receiving the income of the proceeds, and also, in the event of such a sale, to receive out of the testator's estate such a further sum in each year during her widowhood as should be equivalent to the rates, taxes, and outgoings of the house. It was, amongst other things, contended, on the other hand, that the testator's widow took no estate in the house, but merely a licence or privilege of occupation, and therefore that the provisions of the Settled Land Acts did not apply.

Mr. Levett, Q.C., and Mr. J. Bradford, Mr. Rowden, Q.C., and Mr. Ribton, Mr. Norton, Q.C., and Mr. Cozens-Hardy, and Mr. Clayton appeared for the parties.

MR. JUSTICE BYRNE said that the present case, but for the existence of certain decisions under the Settled Land Acts, would have presented considerable difficulties. In his judgment what was given by the testator to his widow was more than a mere licence to reside in the house. The will gave her an estate in the residence referred to, and that being so she had the powers of a tenant for life, within section 58, subsection vi., of the Act of 1882. The next point was whether the direction contained in the will as to the payment of the rates, taxes, and outgoings, so long as she should desire to make it her permanent place of residence, was such as would deprive the lady of all interest in the portion of the testator's estate properly applicable to such payment in the event of her selling the residence and therefore a prohibition or limitation, void within the meaning of section 51 of the Act, as preventing the tenant for life from exercising, or as inducing her to abstain from exercising, or as putting her into a position inconsistent with her exercising her powers under the Act, or as tending to bar that operation. He was of opinion that, so far as the direction in the will made it a condition that the benefit of the payments in question was to be dependent upon residence, it was void within section 51, and that the widow's interest in such sums continued during her widowhood independently of her residing in the house. "*Re Carne's Settled Estates*" ([1899] 1 Ch., 324) and "*Re Eastman's Settled Estates*" (68 *Law Journal Reports*, 122)

*Reported by R. B. SCHOMBERG, Esq., Barrister-at-Law.
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were authorities which, as a matter of fact, carried him over the greater portion of the ground in the present case, and he did not consider that "*Re Edwards' Settlement*" ([1897] 2 Ch., 412) was to a contrary effect. He therefore declared that the widow had the powers of a tenant for life under the Settled Land Acts, and also that the benefit of the provisions of the will as to the rates, taxes, and outgoings did not cease on the sale of the residence.

[Solicitors—Ward, Perks, and Mackay; Harston and Bennett; Percy Braby and Macdonald.]

Q.B. Div. (Mathew, Lawrance, Wright, } 1900.
Kennedy, and Darling, J.J.) } July 28.

THE QUEEN V. BUTTON.*

Criminal Law—False pretences—Remoteness—Conviction—Validity.

This was a case stated by the Recorder of Lincoln. At the quarter sessions held at Lincoln on July 3 last the defendant, Leonard Button, was convicted of attempting to obtain goods by false pretences. The following facts were proved at the trial:—On August 26, 1899, there were bicycle and athletic sports at Lincoln for which prizes were given. Among the various contests there were a 120 yards race and a 440 yards race, in respect of each of which a prize was given of the value of 10 guineas. Among the names sent in for these two contests was the name of C. Sims, Thames Ironworks A.C., and two written forms of entry were sent in to the secretary of the sports containing, as appears to be usual, a statement as to the last four races in which Sims had run, together with a statement that he had never won a race. These forms were not sent in by Sims, nor were they in his handwriting, and he knew nothing of them. They were, however, signed in his proper name and with his true address, and contained a correct account of his last performances. The forms were proved not to have been written by the defendant. The performances of Sims were very moderate, and as a matter of fact Sims was only a very moderate runner, and as a result the supposed Sims was given by the handicapper of the sports a start of 11 yards in the 120 yards race and a start of 33 yards in the 440 yards race. Sims was ill at Erith when the races were run and was not at Lincoln at all, and he was personated by the defendant, who was a fine performer and won both contests very easily. The suspicion of the handicapper having been aroused, he asked the defendant after the 120 yards race whether he really was Sims and whether the performances given in the entry form really were his and whether he had really never won a race. To these questions the defendant answered that he was Sims, that the performances were his own, and that he had never won a race. All these statements were untrue, and, in particular, he had won a race at Erith in his own name. The handicapper, who was called as a witness, stated that he should not have given the defendant such favourable starts if he had known his true name and performances. The Recorder, in summing up the case to the jury, said that if the defendant did what he did "for a lark" without any criminal intent and without intending to get the prizes they ought to find him not guilty, but that if he made the false representations wilfully, intentionally, and fraudulently with intent to obtain the prizes they ought to find him guilty.

The jury found a verdict of guilty, but the Recorder reserved a case for the consideration of the Court, the following being the questions to be

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

determined :—(1) Whether the Recorder summed up the case correctly to the jury ; and (2) whether the attempt to obtain the prizes was too remote from the pretence.

Mr. J. PERCIVAL HUGHES, for the defendant, contended that the false pretences made by the defendant were exhausted by his admission to the contest and the advantage given to him by the handicapper. The winning of the race was attributable to his own skill as a runner, see " R. v. Larnier " (14 Cox, C.C., 497), when the Common Serjeant held in a case similar to the present after consulting Mr. Justice Stephen that the false pretences were too remote. The defendant never applied for the prizes. That was an act necessary to fully constitute the offence. Until that was done the defendant had a *locus penitentiae*. Counsel also referred to " R. v. Eagleton " (6 Cox, C.C., 559).

Mr. Montague Shearman and Mr. T. Hollis Walker, for the Crown, were not called upon to argue.

MR. JUSTICE MATHEW said :—This conviction must be upheld. It is said that " R. v. Larnier " is an authority the other way. We must, however, consider that in that case the Common Serjeant had to direct the jury, and he directed them according to his impression as to what Mr. Justice Stephen thought. That case was differed from by Lord Justice Lindley. And I am clearly of opinion that Lord Justice Lindley was right. The questions are purely questions of fact. They are :—With what intention did the defendant enter for the races ? Was it to obtain the prizes ? And was that intention to obtain the prizes too remote ? No reasonable man could have any doubt as to the answer to these questions. The defendant represented himself to be a man who had not won a race. He was handicapped with that representation in view. But as a matter of fact he had won races. It was said that he did it " for a lark." The jury had an opportunity of expressing their opinion upon that point. It is said that his winning the race was due to his own prowess. But it was also due to the false pretences. It is also said that some other act on the part of the defendant was necessary, such as the application for the prizes, and that until that further act was done he could not be convicted, because the criminal intention involved in the false pretences had been exhausted by the entry for the races. That is an extremely subtle argument. In point of fact the defendant was found out before he applied for the prizes. If he had not been found out he would probably have applied for the prizes. Under the circumstances the jury found that the defendant made pretences which were false and which were not too remote. I am clearly of opinion that the conviction was good.

The other JUDGES concurred.

[Solicitors—G. Clinch, Gravesend ; A. L. Rayner.]

Q.B. Div. (Mathew, Lawrance, Wright, } 1900.
Kennedy, and Darling, JJ.) } July 28.

THE QUEEN V. STREETER.*

Criminal Law—Receiving stolen goods.

Held, that a person who received goods, stolen by a wife from her husband, knowing them to have been stolen, cannot be indicted under the Larceny Act, 1861, as a receiver of stolen goods.

This was a case stated by the Chairman of the West Sussex quarter sessions, and the question for the consideration of the Court was whether a person who received goods stolen by a wife from her husband know-

ing them to have been stolen could be indicted as a receiver of stolen goods.

The defendant, William Streeter, and Ellen Tickner were indicted at the midsummer quarter sessions, held on June 28 last, for larceny in a dwelling-house of household and other goods and £27 in money. There was also a count in this indictment for receiving the same. Ellen Tickner is a married woman, and until May last she lived with her husband at Stammerham, near Horsham. The defendant Streeter lodged with them. On April 21 the husband turned Streeter out of the house. On May 11 Ellen Tickner packed and sent by carrier to Horsham two boxes labelled " Streeter, passenger to Brighton," which the carrier handed to Streeter at Horsham Station. Ellen Tickner shortly afterwards left her husband's house, while he was at work, and joined Streeter at Southwater Station on the line to Brighton. They were subsequently living together as man and wife at Farnham. The husband, after his wife's disappearance, having missed the goods and money mentioned in the indictment, gave information to the police, and then Ellen Tickner and Streeter were arrested. At the time of the arrest the missing goods were found in the boxes which Ellen Tickner had sent to Streeter, and £27 in money was found in Streeter's box, the key of which was found in Ellen Tickner's purse. At the trial, at the close of the case for the prosecution, counsel for Streeter submitted that there was no evidence against his client on the count for larceny, and that on the second count, even if it were proved that Ellen Tickner committed a felony against her husband under the provisions of sections 12 and 16 of the Married Women's Property Act, 1882, by taking his goods, yet Streeter could not be indicted for receiving such goods knowing them to have been stolen, because that statute had not made such receiving a felony, and because under section 91 of the Larceny Act, 1861, only persons who received goods the stealing of which amounted to a felony either at common law or under the provisions of that Act could be indicted as receivers, and that as the stealing by a wife of goods belonging to her husband was not a larceny at common law or under the Larceny Act no receiver of such goods could be indicted for a felony. The Chairman left the case to the jury subject to a case for the opinion of this Court. The jury found Ellen Tickner guilty on the count for larceny, and Streeter not guilty on the count for larceny, but guilty on the count for receiving.

Mr. RAVEN, for the defendant, cited " R. v. Smith " (L.R., 1 C.C.R., 266) and " R. v. Kenny " (2 Q.B.D., 307).

Mr. GRAHAM CAMPBELL, for the Crown, contended that " R. v. Smith " was wrongly decided.

MR. JUSTICE MATHEW said,—" This case is concluded by " R. v. Smith." Formerly there were two cases of stealing in which indictments for larceny would not lie. One was where a married woman stole from her husband, and the other where a partner stole partnership goods. These two defects in the law were corrected by two separate enactments. The partner was made criminally responsible by the Larceny by Partners Act, 1867, and the wife was made similarly responsible by the Married Women's Property Act, 1882. We must now turn to section 91 of the Larceny Act, 1861, the enactment by which receiving stolen property knowing it to have been stolen was made indictable. The language of that enactment is perfectly clear. It provides as follows :—" Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, &c., . . . whereof shall amount to a felony either at common law or by virtue of this Act, knowing the same to have been stolen, taken, &c., . . . shall be guilty of felony."

* Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The important words are "either at common law or by virtue of this Act." "*R. v. Smith*" was the case of goods stolen by a partner, and it was held that an indictment for receiving such goods would not lie. Our decision must be the same in the present case—namely, that an indictment for receiving the money and goods stolen by the wife does not lie.

MR. JUSTICE WRIGHT said that in future cases there might be an indictment for receiving at common law.

The remainder of the JUDGES concurred.

[Solicitors—Biggs, Roche, Sawyer, and Co., for Brockwell and Berkeley, for the defendant; Preston, Stow, and Preston, for Rawlison and Butler.]

House of Lords (Lord Halsbury, L.C.,
Lords Ashbourne, Macnaghten, Morris,
and Brampton) 1900.
July 30.

THE SAXON STEAMSHIP COMPANY (LIMITED) V. THE
UNION STEAMSHIP COMPANY.*

Ship—Charter-party—Demurrage—Colliery
guarantee—Construction—"Colliery working
day," meaning of.

Decision of the Court of Appeal (15 *The Times*
L.R., 477) reversed.

Their Lordships gave judgment in this appeal which was argued before them on May 21 and 22 and is reported in 15 *The Times* L.R., 477; 4 Com. Cas., 29. It will be seen that the House has reversed the decision of the Court of Appeal and substantially restored—with a variation—the judgment of the Lord Chief Justice.

The appellants (plaintiffs) were the owners of the ship *Saxon* and brought their action against the respondents (defendants), who were charterers of the said ship by charter-party, dated January 25, 1898, to recover damages for breach of charter-party. It was admitted or proved that the facts and circumstances giving rise to the action were as follows:—Under the charter-party of January 25, 1898, the *Saxon* was to load a cargo of coal at Barry, subject to certain terms and conditions, of which the following are the material parts:—"Cargo, except any portion thereof required for stiffening, to be loaded in 12 clear working days, Sundays and holidays excepted, from the time true written notice is given, between 9 a.m. and 6 p.m., that all ballast or inward cargo is discharged and the stiffening coal (if any) is on board, and the ship is ready to receive her cargo. Stiffening coal, if required, is to be supplied at ship's expense, at the rate of 100 tons per clear working day, after 24 hours' notice is given of its being required and that the ship is ready to receive the same. The loading both of cargo proper and stiffening coal is subject to the conditions of the colliery guarantee in use at the said colliery. Any time lost through riots, strike, lock-out, or stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the said coal, or from any conditions or exceptions mentioned in the colliery guarantee, or by reason of accidents to mines or machinery, obstruction on the railway and in the docks, or by reason of floods, frosts, storms, or any cause beyond the control of the said colliery, not to be computed as part of the aforesaid loading, or the hereafter mentioned discharging time." "Demurrage at loading ports as per colliery guarantee, at port of discharge at the rate of 3d. per register ton per working day." The colliery guarantee, referred to in the charter-party, was dated January 28, 1898, and was addressed to the respondents. By its terms the *Saxon* was to be loaded with a cargo of coal in 12 days, subject to the following:—"The follow-

ing exceptions not to be computed as part of the aforesaid loading or stiffening time unless used, notwithstanding that during the time of any such exceptions coal may be shipped by us into any other vessel:—All holidays, whether public holidays or colliers' holidays, whereby work is suspended, either at the docks or at our colliery or collieries. Time from 5 p.m. on Saturday until 7 a.m. on Monday. Time occupied in shifting from hatch to hatch and in repairing. Any time lost through riots, strikes, lock-outs, dismissal of workmen, or from any dispute between masters and men causing a stoppage of our colliery or collieries, or of the trimmers, dock, railway, or other hands connected with the working, delivery, shipment, or trimming of the coal or on the railway or railways over which our traffic is usually conveyed to the loading dock or docks, or by reason of accidents to mines or machinery, causing stoppage of the same, or by obstructions or accidents at our colliery or collieries, or on the said railways or in the docks, or by reason of storms, floods, frosts, snow, or from any cause of whatsoever kind or nature. In case of partial holiday or partial stoppage of our colliery or collieries from any or either of the aforesaid causes, the lay days to be extended proportionately to the diminution of output arising from such partial holiday or stoppage. For the purpose of this guarantee, all holidays and full day stoppages at our collieries shall be deemed to commence at 5 p.m. the working day preceding, and to end at 7 a.m. the working day following such holiday or stoppage. In case the vessel, whether on demurrage or not, can complete loading the cargo by 5 p.m. on the day preceding any Sunday, holiday, or other stoppage of work, and such completion is prevented otherwise than by our act or default, time shall not count either for loading or demurrage until 7 a.m. on the day on which work is resumed." The colliery guarantee contained a scale of rates for demurrage (if any), the rate applicable to the *Saxon* being £13 per day. The colliery guarantee also provided that demurrage was to be "payable per colliery working day, or in proportion for any part of a day, which for purpose of computation shall be divisible into 24 parts." The *Saxon* arrived at Barry on March 8, and the lay days for loading, expired on March 31 at 2 p.m. Subsequently to the expiry of the lay days—viz., on April 9, a strike took place at the Ferndale Company's Collieries, which lasted a long time. The *Saxon* remained waiting for cargo, notice that the *Saxon* was on demurrage being given from time to time to the respondents and the colliery company, until by letter dated May 26, 1898, the respondents gave notice to the appellants' brokers that they could not load the ship. This notice was communicated to the owners of the *Saxon*, who thereupon took steps to obtain another charter-party. On June 13 the appellants got further employment for their vessel, and chartered her by a charter-party dated June 13 to Messrs. Hickie, Borman, and Co. Under that charter-party she was loaded without delay and sailed on June 17. The cargo loaded was 2,719 tons of coal, and the freight was 14s. per ton to Cape Town as against 18s. 6d. per ton to the same place under the respondents' charter-party, the freight in each case being subject to certain discounts and deductions. The claims put forward on behalf of the plaintiffs (appellants) were (1) for loss of freight. The amount claimed was £609 19s. 9d. and was made up of the difference of freight in the two charter-parties, taking all deductions into account and taking a full and complete cargo of coal at 2,719 tons, the quantity actually loaded under the second charter-party; and (2) for the detention of the *Saxon* by the respondents. The amount claimed was £785 8s. 4d., being demurrage at the colliery guarantee rate of £13 per day for the colliery working days from 2 p.m. on March 31 until June 17, when the loading under the second charter-party was

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

completed. The appellants' calculation was upon the basis of reckoning every day from March 31 to June 17 as a colliery working day, except such days as were Sundays or public holidays, or colliers' holidays, and therefore excluded the following days:—Sunday, April 3, Mabon's Day (colliers' monthly holiday), April 4, Good Friday, April 8, Sunday, April 10, Easter Monday, April 11, Sundays, April 17 and 24, Sunday, May 1, Mabon's Day, May 2, Sundays, May 8, 15, 22, and 29, Whit Monday, May 30, Sunday, June 5, Mabon's Day, June 6, and Sunday, June 12, upon the ground that demurrage was payable "per colliery working day," and that the days excluded for the above reasons from the demurrage computation, were all such days as were not "colliery working days." It was admitted that the lay days having expired on March 31, at 2 p.m., the respondents were in default and liable to pay demurrage until April 9, when the strike began, but the respondents contended that failure to load after April 9 was due to the strike, and that owing to the strike the days for which demurrage was claimed were not "colliery working days," inasmuch as no work was in fact done at the Ferndale Company's Collieries on the days in question, and that, therefore, no demurrage was payable for the detention after April 9. The respondents further contended that all the exceptions, which by the terms of the colliery guarantee were not to be computed as part of the loading or stiffening time, also applied, notwithstanding that the loading time had expired, and the vessel was on demurrage, and, therefore, claimed, in any event, to exclude the time from 5 p.m. to midnight on the day before a Sunday or holiday, and from midnight to 7 a.m. on a Monday or day after a holiday, in computing the demurrage time. The appellants, on the other hand, contended that such exceptions had no application, except for the purpose of computing the loading or stiffening time, and in any event the appellants contend that the £64 9s. 2d. allowed by the respondents to be due for demurrage up to April 9, must be increased by £18 19s., being the demurrage payable for the 35 hours deducted by the respondents in respect of the periods from 5 p.m. to midnight, and midnight to 7 a.m. as aforesaid. On November 18, 1898, the Lord Chief Justice delivered his judgment in favour of the appellants on both heads of their claim, but disallowing part of the amount claimed in each case. The claim for loss of freight, £609 19s. 9d., was allowed at £594 14s. 3d. The claim for demurrage was allowed at £694 8s. 4d., instead of £785 8s. 4d., the learned Lord Chief Justice holding that the appellants were right in their mode of computation of the demurrage, payable except as to the time from 5 p.m. to midnight on the day before a Sunday or holiday, and the time from midnight to 7 a.m. on the day after a Sunday or holiday, upon which he upheld the respondents' contention, and, therefore, deducted such amount from the appellants' claim for demurrage. The time so deducted was 168 hours, or seven days, which at £13 per day amounted to £91. A diary agreed by the parties, showing how the amount of £694 8s. 4d. for demurrage was arrived at, on the basis of the Lord Chief Justice's judgment, is printed in the appendix. Both parties appealed to the Court of Appeal. The Court of Appeal, consisting of Sir Nathaniel Lindley, Master of the Rolls, and Lords Justices A. L. Smith and Romer, on July 7, 1899, ordered the judgment entered for the plaintiffs, the present appellants, to be varied by reducing the sum of £694 8s. 4d. awarded thereby to them on their claim for demurrage to the sum of £64 9s. 2d., the amount admitted by the respondents to be due. The appellants claimed that the orders of the Court of Appeal should be reversed, and that the judgment of the Lord Chief Justice should be reversed in as far as the Lord Chief Justice disallowed £91, part of the appellants' claim for demurrage, and that judgment should be entered for the

appellants, with costs in this House and below, for £594 14s. 3d. and £785 8s. 4d.

Mr. Rufus Isaacs, Q.C., and Mr. D. C. Leck were for the appellants; Mr. Joseph Walton, Q.C., Mr. Carver, Q.C., and Mr. Bailhache for the respondents.

THE LORD CHANCELLOR.—The controversy between the parties in this case is reduced to very narrow limits, and may, I think, be treated as simply the question of what is the contract between them. The contract is to be found in the charter-party and the colliery guarantee, which, by incorporation and reference, forms part of the contract, and the sole question in the case appears to me to turn upon one phrase—viz., the phrase "colliery working day." If the construction which the Lord Chief Justice placed on that phrase at the trial meant ordinary working days under ordinary normal circumstances, then the demurrage which the appellants claim is clearly due under the contract. If, on the contrary, the period during which a strike in the coal trade prevailed there was no colliery working day, then the demurrage claimed was not due, and it seems to me that, apart from some evidence giving a technical meaning to the phrase, it is impossible to deny that though workmen were on strike and did not work that these were, as the Chief Justice held, colliery working days. I agree with the Chief Justice that the real question in the case is, What is a "colliery working day"? Does it mean only a day upon which the colliery is in fact working, or does it mean what are ordinary working days in normal times and in normal circumstances? In the first place, I think on the ordinary construction of language one would understand the words as the Chief Justice has understood them. A working day is I think in ordinary parlance to be understood as distinguished from a holiday—including in that term a Sunday or some fixed and usual day for rest and not for work, as a Sunday, Christmas Day, Good Friday, and the like. But, besides what I have described as the ordinary and natural meaning of the words, there is the additional circumstance that, if the parties had intended what it is now contended they meant, I see no reason why they should not have said in plain terms that by "colliery working days" they meant days on which the colliery was actually working in fact. I am unable to follow the view of the Court of Appeal; they appear to recognize what I have described as the ordinary and natural meaning of the words, and I quite agree that the ordinary and natural meaning of words may be altered or modified by their use in a particular neighbourhood or in relation to a particular subject-matter. They adopt the Chief Justice's exposition of the words generally, but they add to that exposition. You must give the qualification as to how these words would be understood in the neighbourhood of the place where the parties were contracting. This would be quite intelligible if there were any evidence that the words were so understood like the custom of a port, or any other evidence which practically makes the use of particular words technical in the neighbourhood or in relation to the particular subject-matter. But the difficulty I have is that there is no evidence from which any such technical meaning can be gathered, and it certainly lies upon those who wish to give a technical meaning to plain language to establish that the words sought to be modified have acquired the meaning they insist upon. The truth is that the respondents are endeavouring to establish that a strike, which in this case prevented the loading of the vessel, prevents the days upon which the colliers would be working under ordinary normal circumstances being colliery working days. It is, to my mind, very clear that at the time this contract was signed between the parties no such ideas had occurred to them, for in relation to another matter—which, however, does not touch the liability now in question—they expressly mention strikes, and I cannot conceive that, if the construction now sought to

be put upon this contract was in their minds, they should not in plain terms have expressed their meaning. I have spoken of the contract between the parties, and it is, of course, one contract, so far as the present question arises, although one contract is referred to and incorporated by reference instead of being a contract on one piece of paper. And, although some confusion arises from this circumstance, I am unable to see anything in the other parts of the contract which have relation to the question now in debate. If I am right in saying that the words in question ordinarily bear the meaning that I have attributed to them, I do not think it is possible in the state of the evidence before your Lordships to assume that there is anything in any other part of the contract which was intended to operate, or does, in fact, operate, to alter the construction which the words would generally bear. It follows from the facts proved that the delay in respect of which the demurrage is claimed was a delay during colliery working days, and the appellants are entitled to the amount they claim. For these reasons I move, your Lordships, that the judgment of the Lord Chief Justice be restored, and in that respect the judgment of the Court of Appeal reversed, with the usual consequences as to costs.

LORD MACNAGHTEN.—This is a case of demurrage. The respondents chartered the ship *Saxon* from the appellants to carry a cargo of steam coal from the Port of Barry to Cape Town. The cargo was to be provided by the owners of the *Ferndale Colliery*, who were at the time under contract to supply the respondents with a large quantity of coal. In accordance with a well-known practice the colliery owners gave the charterers a guarantee as to the loading and despatch of the vessel, and the charter-party was made in view of this guarantee. The charter-party provided for "demurrage at loading port as per colliery guarantee." According to the guarantee demurrage was to be at a certain scale (about which there is no question) and was expressed to be "payable per colliery working day." The main question is, What is the meaning of the expression "colliery working day"? Does it mean a day on which under ordinary normal circumstances the colliery would be working, or does it mean a day on which the colliery is actually at work? There is a further question as to the exclusion from the period of demurrage of certain hours of grace in extension of non-working days, which for some purposes certainly were to be reckoned from 5 p.m. on the day preceding to 7 a.m. on the day following. The vessel was not loaded in accordance with the charter-party. The lay days in which the loading ought to have been completed expired at 2 p.m. on March 31, 1898, and thereupon the period of demurrage began. There is no dispute as to the liability of the charterers for demurrage during the period between the expiration of the lay days and April 9 following. Then came the great South Wales coal strike, and after a time the charter-party was abandoned. The question is as to liability for demurrage during the time while the colliery was idle owing to the strike. The Lord Chief Justice and the late Master of the Rolls, who gave the judgment of the Court of Appeal, were both agreed that *prima facie* the expression "colliery working day" means "ordinary working days under ordinary normal circumstance." But the Court of Appeal, differing from the Chief Justice, was of opinion that this *prima facie* meaning was displaced by the language of the particular contract under consideration. It was common ground that the liability of the charterers to the ship and the liability of the colliery to the charterers were meant to be co-extensive. Taking first the colliery guarantee, the Master of the Rolls came to the conclusion that the clause as to demurrage in that document excluded days on which the colliery was not at work owing to any cause whatever other than the fault of the owners. Then turning to the

charter-party, his Lordship expressed the opinion that there was nothing to be found there repugnant to the construction which he had placed upon the demurrage clause in the colliery guarantee. The case is certainly not free from difficulty, but on the whole upon this point I prefer the conclusion at which the Lord Chief Justice arrived. The Master of the Rolls relies upon two clauses in the colliery guarantee, which for the sake of convenience of reference were numbered 6 and 7. He thinks that those clauses show that days on which the colliery was not actually worked were not to be treated as "colliery working days." I am not able to agree in this opinion. Clause 7, I think, has not much bearing upon the point. It provides for a very exceptional case when the vessel, "whether on demurrage or not," could complete loading by 5 p.m. on the day preceding "any Sunday, holiday, or other stoppage of work." The expression "working day" is not to be found in that clause at all. The preceding clause, numbered 6, is in these words:—"For the purpose of this guarantee all holidays and full day stoppages at the collieries shall be deemed to commence at 5 p.m. the working day preceding and to end at 7 a.m. the working day following such holiday or stoppage." The judgment of the Court of Appeal is, I think, really based on that clause alone. Now, in the first place, it seems to me, reading the whole instrument fairly, that in Clause 6 the parties had nothing in view beyond the period of lay days or loading time. In the next place, I cannot myself see anything to show that in Clause 6 the expression "working day" means a day on which work is actually done rather than a day which is an ordinary working day under ordinary normal circumstances. The clause is not very artistically drawn. But, whichever construction of the expression "working day" is adopted, the result is the same, and in either case there must be occasionally some overlapping of hours. I am rather disposed to think that the expression "working day" in that clause means an ordinary working day under normal circumstances, because I find in the very next clause, where a day on which work is actually done is evidently meant, the parties do not use the expression "working day." The language is changed. The expression used is "the day on which work is resumed." I may observe in passing that Clause 6 does not take account of Sundays. It only speaks of "holidays and full-day stoppages." Why are Sundays omitted? If you turn to Clause 4 you find that Sundays are already provided for by the exclusion of "time from 5 p.m. on Saturday until 7 a.m. on Monday." Now the application of Clause 4 is unquestionably confined to lay days or loading time. This circumstance, taken in connexion with the special reference to demurrage in Clause 7, seems to me to show that, apart from the special case provided for in Clause 7, the whole group of clauses in italics—that is, Clauses 4, 5, 6, and 7—are applicable only to lay days or loading time. There is a further indication tending to show that the charterers meant by the expression "working day" an ordinary working day under ordinary normal circumstances. It is to be found in the charter-party. That instrument provides that the cargo is to be loaded "in 12 clear working days, Sundays and holidays excepted." Now Sundays are not working days, nor are holidays. The provision therefore must, I think, be paraphrased thus—"the loading is to be done in 12 clear working days, but note that by working days we mean days exclusive of Sundays and holidays." I have criticized, perhaps too minutely, the language of these two documents—the charter-party and the colliery guarantee—following the line of argument adopted by the Master of the Rolls. I should, however, prefer to put my judgment on rather a broader ground. When once it is admitted, as it is on all sides, that the expression "colliery working day" *prima facie* means

an ordinary working day under ordinary normal circumstances, it is, I think, for those who say that it means something else to make out their case satisfactorily, and I do not think that the respondents have done so. It seems to me to follow, from the view which I find myself compelled to take on the main question, that in calculating the period of demurrage no account is to be taken of the conventional extension of Sundays and holidays, whether public holidays or colliery holidays. The extension was, I think, introduced for the purpose of reckoning the period of lay days or loading time. It has, as it seems to me, no application to the period of demurrage. I am therefore of the opinion that the appellants are right on both points, and that the appeal must be allowed with costs and the order of the Lord Chief Justice varied accordingly. The noble Lord added that Lord Ashbourne and Lord Morris concurred in the motion.

LORD BRAMPTON read a judgment to the same effect.

[Solicitors—Lowless and Co., for the appellant ; Riddell and Co., for the respondent.]

Court of Appeal (Lord Alverstone, M.R.,) 1900.
Rigby and Collins, L.J.J.) July 31.

IN RE HARRISON AND INGRAM.*

Bankruptcy—Void settlements—Payment of premiums on life policies—Death of bankrupt—Bankruptcy Act, 1883, sec. 47.

Decision of Wright, J. (*ante*, p. 370), reversed.

This was an appeal from the decision of Mr. Justice Wright (reported *ante*, p. 370), who decided that the trustee in bankruptcy of Mr. Cartmell Harrison was entitled, by virtue of the payment of certain premiums by the bankrupt, to a share of the policy moneys payable upon the death of the bankrupt. The question turned upon the meaning of "settlement" in section 47 of the Bankruptcy Act, 1883. Subsection 1 of that section provides that "any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void as against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof." Subsection 3 provides that "'settlement' shall for the purposes of this section include any conveyance or transfer of property." The material facts were as follows:—Prior to the year 1877 the bankrupt had insured his life by four policies of insurance for sums amounting in the aggregate to £9,000. In April, 1877, by a post-nuptial settlement he assigned the four policies to trustees upon trust to invest the proceeds, to pay the income to his wife for life and after her death to such of his children as he should appoint, or, failing appointment, in trust for his children who should attain 21 or marry in equal shares.

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

The settlement contained the usual hotchpot clause, but did not contain any covenant on the part of the bankrupt to pay the premiums. The bankrupt had two children, and upon the marriage of one with Mr. Barker in the year 1895 the bankrupt, by a deed, dated in July, 1895, appointed three-fifths of the money assured by the said policies to his daughter. A receiving order was made against Mr. Cartmell Harrison on November 17, 1899, and on November 27 the bankrupt died. All the premiums up to his death were paid by the bankrupt except one, which was paid in the month of November, 1899, by the trustees of the settlement, and one other in respect of which the days of grace were still running at the date of the death of the bankrupt and which was deducted from the amount paid over by the insurance company. The total amount received in respect of the said policies was £10,919. The total amount of premiums paid was £4,686. Mr. Justice Wright decided that, having regard to the provisions of section 47 of the Bankruptcy Act, the trustee in bankruptcy was entitled to such proportion of the policy moneys as a sum represented by two-fifths of the premiums paid from the year 1889 to the year 1895 by the bankrupt, *plus* all the premiums paid by him subsequent to the year 1895, bore to the total amount of premiums paid, upon the ground that these payments must be regarded as voluntary settlements under the 47th section. The trustees of the settlement appealed.

Mr. Herbert Reed, Q.C., and Mr. Leigh Clare were for the trustees of the settlement; Mr. Levett, Q.C., and Muir Mackenzie were for the trustee in bankruptcy.

The appeal was heard on July 20.

The MASTER of the ROLLS delivered the judgment of the Court allowing the appeal. After stating the facts as above, he said:—The case is by no means free from difficulty. A case may easily arise in which the moneys paid to effect a policy within 10 years of the date of the bankruptcy, which policy has been taken out and settled within that period, might be held to be a settlement within the 47th section. On the other hand, we think it is clear from the decided cases that if money paid by the bankrupt was, in fact, only money advanced to enable the premiums to be paid it would not of necessity constitute a settlement, because the payment had been made within the ten years. The question in this case is within which category these payments fall. We are of opinion that no part of the payments can be regarded as being settlements within the 47th section. The policies were settled as far back as 1877, the policies having already been in existence for some years, and the payments made by the bankrupt were payments made to the insurance company to prevent the lapsing of the policies. The view taken by the learned Judge seems to have been that each payment of premium secured a certain part of the money assured by the policy. We cannot take this view. The whole of the premiums were paid for the continuance of the policy and no proportionate part of the moneys payable under the policies is represented by the payment of any particular premium. Nor do we think the actual amounts paid for premiums can be regarded as settlements within the meaning of the 47th section. The amounts so paid were not intended to be earmarked or kept separate, nor, as we have said, can they now be said to be represented by any specific amount. We think the amounts must be treated as paid by the bankrupt to keep up the policy as between himself and the insurance company or as moneys paid to enable the trustees to keep the policy alive. For this reason we are of opinion that the trustee of the bankrupt is not entitled to any part of the moneys paid by the insurance company, and that this appeal should be allowed.

[Solicitors—Harrison and Powell; Black and Moss.]

Chan. Div. } 1900.
(Byrne, J.) } July 31.

WEIR V. VAN TROMP.*

Settlement—Voluntary settlement—Action for rectification dismissed.

This was an action for the rectification of a voluntary settlement made by the late Mr. Peter Stewart MacIver, at one time M.P. for Plymouth. The settlor had one child only, a son, who died many years ago, leaving an only son, Mr. Peter Stewart MacIver, the younger. The son's widow had married again. The settlement in question was made in 1891, and by it the settlor settled a large sum of money on his grandson and his issue, with an ultimate trust in default of issue for the person or persons who under the statutes for the distribution of the effects of intestates would have become entitled thereto at the death of the settlor if he had died possessed thereof intestate without leaving any widow. The settlor died shortly after the date of the settlement. His widow died in 1896. The grandson came of age in January, 1897, and died in August, 1898, a bachelor, and by his will made in June, 1898, gave, with the exception of a small legacy, the whole of his property to his mother, Mrs. Broadley, which included the whole of the funds comprised in the settlement, these in the events which had occurred having passed to his executors, he being the sole next-of-kin at the settlor's death. The plaintiff, who was a niece of the settlor, sought to have the settlement rectified by adding to the ultimate trust the words "or any child, grandchild, or other lineal issue," or otherwise, so that the settlor's collateral next-of-kin might take under the ultimate trust, and produced evidence and called witnesses to show that such an alteration would be in conformity with the intention and instructions of the settlor when the settlement was made.

Mr. Swinfen Eady, Q.C., Mr. Rowden, Q.C., and Mr. Sheldon appeared for the plaintiff: Mr. Warming-ton, Q.C., and Mr. W. C. Druce and Mr. Levett, Q.C., and Mr. C. E. Bovill for the defendants.

MR. JUSTICE BYRNE said that, although a voluntary settlement might be reformed at the instance of the settlor in a proper case, the Court would not interfere to reform a voluntary settlement as against the settlor. But it was laid down by Lord Romilly in "Lister v. Hodgson" (L.R., 6 Eq. 30, p. 34) that there was this distinction to be taken. If a man executed a voluntary deed in his lifetime declaring certain trusts and happened to die, and it was afterwards proved from the instructions or otherwise that beyond all doubt the deed was not prepared in the exact manner which he intended, "the deed might be reformed or those particular provisions necessary to carry his intention into effect might be introduced"; and in "Thompson v. Whitmore" (1 J. and H., 268) Vice-Chancellor Sir Page Wood at p. 273 clearly recognized the right of a volunteer to have the error rectified. He was therefore bound to examine the evidence adduced by the plaintiff, to see whether or not she had made out a case for rectification. Nor need she be a person named in the settlement, for she was a person claiming under the settlement, as in fact intended, if she proved her case. His Lordship then proceeded to examine the evidence at length, and said that, so far as the documentary evidence went, he did not find any sufficient evidence of an intention contrary to that actually expressed by the deed. When he came fairly to consider the oral evidence, he thought it was established that the settlor did not intend his son's wife or his own widow to take any benefit under the settlement, but he was not satisfied that the settlor wished to

exclude any person from taking under the ultimate trust who by law would be entitled as his own next-of-kin under the statute, and he was not satisfied that even, if it had been pointed out to him that the result would be to make the trust fund part of his grandson's estate, so that if he attained 21 he could dispose of it by will, he would have been discontented with such a result. Although having regard to the decisions he had referred to he had not felt justified in declining to consider the evidence, yet he ought not to act upon any but the clearest and most certain demonstration of error and of actual intention, and it was not immaterial to observe that he had not been referred to any reported case where judgment had been given in favour of reforming a voluntary settlement at the instance of a volunteer. He thought that the action failed, and must be dismissed with costs.

Chan. Div. } 1900.
(Cozens-Hardy, J.) } July 31.

IN RE WHITAKER—WHITAKER V. PALMER.*

Administration—Insolvent estate—Voluntary debts—Bankruptcy rules—Judicature Act, 1875, sec. 10.

In the administration of insolvent estates in the High Court voluntary debts rank with other debts.

His Lordship gave judgment in this matter reserved from the 18th inst. The case, it will be seen, is of some importance on the question of how far the rules of bankruptcy are imported by the Judicature Act, 1875, into the administration of insolvent estates in the High Court. The claimants were trustees of a voluntary settlement made by the testator in the action in favour of a lunatic son. The question was whether they were entitled to be paid *pari passu* with the creditors for value.

MR. JUSTICE COZENS-HARDY said:—This summons raises the question whether in the administration of an estate which is insufficient for the payment in full of all debts voluntary debts ought to be postponed to debts for valuable consideration. It is beyond doubt that prior to the Judicature Act the rules applied by the Court of Chancery in administering an insolvent estate differed in many respects from those applied by the Court of Bankruptcy. In particular, secured creditors were entitled to a dividend on the full amount of their debts, and voluntary bonds were postponed to other debts, whereas in the Court of Bankruptcy secured creditors only proved for the balance after valuing their securities and all creditors, including judgment creditors, were paid rateably. Section 10 of the Judicature Act, 1875, altered the law to some extent. So far as material, it is as follows:—"In the administration by the Court of the assets of any person who may die after the commencement of this Act and whose estate may prove to be insufficient for the payment in full of his debts and liabilities and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and

*Reported by E. B. SHERBRO, Esq., Barrister-at-Law.

*Reported by D. FITCATEN, Esq., Barrister-at-Law.

receive dividends out of the estate of any such deceased person or out of the assets of any such company may come in under the decree or order for the administration of such estate or under the winding up of such company and make such claim against the same as they may respectively be entitled to by virtue of this Act." This section has given rise to much discussion. It has, however, been finally decided that the section does not in all respects assimilate the administration in the Chancery Division to the administration in bankruptcy. It does not augment or enlarge the assets to be administered. For this purpose the rules of bankruptcy have no application. The precise extent to which the section alters the mode in which the assets are to be divided has to be considered. There are observations in some of the earlier cases to the effect that the object of the section was only to put an end to that which is known as the rule in "Mason v. Bogg," the rule by virtue of which secured creditors proved without valuing their securities. In "*Re Maggi*" (20 Ch.D., 545), Mr. Justice Fry had to consider whether a creditor, who had recovered judgment against the executors as such, was entitled to be paid in priority to other creditors, and he held that the section did not take away the priority of the judgment creditor. After reading one passage from the judgment in that case, his Lordship continued.—And after referring to the conflict of authorities, he says:—"I think the weight of authority is in favour of my conclusion, that section 32 is not introduced into the administration of the estates of deceased persons. I am confirmed in my conclusion by the decision of the Court of Appeal in '*Lee v. Nuttall*' that an executor's right of retainer is not affected by section 10. If the effect of that section had been to introduce the rule that, with the exceptions mentioned in section 32 of the Bankruptcy Act, all debts are to be paid *pari passu*, it is difficult to see how the priority given to an executor by means of his right of retainer could remain." If there had been no subsequent decision, I should, without hesitation, have accepted Mr. Justice Fry's view, but the true effect of section 10 has since been considered by the Court of Appeal and by Mr. Justice Stirling. In "*Re Leng*" ([1895] 1 Ch., 652), the question was whether the claim of a widow for money lent by her to her husband for the purposes of his trade was to be postponed to the claims of his other creditors. Section 3 of the Married Woman's Property Act, 1882, enacts that it shall be so postponed in case of the husband's bankruptcy, and the Court of Appeal held that it must be equally postponed in the administration of the husband's insolvent estate. The late Master of the Rolls, while recognising "*Re Maggi*," seems to treat it as an exception to the general rule. Lord Justice Smith seems to me to have expressed in no doubtful language his dissent from "*Re Maggi*." He says at page 661:—"As regards swelling the assets to be distributed, it appears to me that the cases have decided that the law of bankruptcy does not apply, but as regards the distributing of the assets—i.e., as regards the proofs to be allowed, I find no case binding me to hold that the rules of bankruptcy do not apply. It is true that in 1882 Lord Justice (then Mr. Justice) Fry, in the case of "*In re Maggi*," held that the bankruptcy rule that all debts shall be paid *pari passu* (section 32 of the Bankruptcy Act, 1869) was not imported into the administration of insolvent estates, and that a judgment creditor took priority over creditors, and he placed what he termed the narrower construction upon section 10 of the Judicature Act, 1875, and he held that it was confined to cases in which the rights of a class of secured creditors were conflicting with a class of unsecured creditors and had no application to the rights *inter se* of the members of those classes. "This is not a decision upon the conjoint operation of the two

statutes which we have now to consider, and I therefore do not inquire if the learned Judge's construction of section 10 is not too narrow, and, moreover, the case does not bind me." The result seems to be that, although in a Court of first instance the priority of judgment debts may still have to be acknowledged as an exception, the general principle is that the bankruptcy rules ought to apply in dividing the assets of an insolvent estate. In the subsequent case of "*In re Heywood*" ([1897] 2 Ch., 593), Mr. Justice Stirling held that the priority as to rates and wages conferred by the preferential payments in Bankruptcy Act, 1888, applies to the administration of insolvent estates in the Chancery Division. In this state of the authorities I think that I am bound to hold that voluntary debts must rank with other debts precisely as they would in bankruptcy, and that the old rule of the Court of Chancery by which such debts were postponed must be regarded as abrogated by section 10 of the Judicature Act, 1875.

Mr. Vernon Smith, Q.C., and Mr. S. B. L. Druce were for the claimants; Mr. Eve, Q.C., and Mr. Edward Ford for the creditors for value; and Mr. Capron for the personal representative of the testator.

[Solicitors—Gamlen, Burdett, and Gamlen; Risdale and Son; Belfrage and Co.]

Q.B. Div. (Kennedy and }
Darling, JJ.) }

1900.
July 31.

THE GUARDIANS OF ST. SAVIOUR'S UNION V.
BURBRIDGE.*

Poor Law—Maintenance—Person in *delirium tremens*—Neglect to maintain himself—Vagrants Act (5 Geo. IV., c. 83, sec. 3)—Construction.

This was a case stated by Mr. A. A. Hopkins, a metropolitan police magistrate, in the following circumstances:—On November 25, 1899, it came to the knowledge of the relieving officer of the St. Saviour's Union that one Frank David Burbridge was suffering from *delirium tremens*, and that he was then at his own residence in a state dangerous to himself and to those about him. This knowledge was conveyed to the relieving officer by the certificate of Burbridge's medical attendant. Upon the receipt of the certificate and on the same day the relieving officer attended at Burbridge's residence and removed him to the workhouse infirmary of the St. Saviour's Union, giving an order for his admission, in which he was described as a lunatic. After his admission to the infirmary Burbridge was seen by the medical officer of the workhouse, and was found to be suffering from *delirium tremens*, and, thereupon, an order was obtained from a justice of the peace for the County of London, acting under the Lunacy Acts, detaining Burbridge as a prisoner in the workhouse. Burbridge was so detained in the workhouse until November 29, upon which day, the attack of *delirium tremens* having passed off, he was discharged upon his own application and upon an order for his discharge being granted by the above-mentioned justice. The case found that under the above circumstances Burbridge became and was chargeable to the union for the period of five days. A summons was taken out by the guardians, which was heard by the learned police magistrate on January 21 last, under the Vagrants Act (5 Geo. IV., c. 83, section 3) charging Burbridge that, being able, wholly able, by work to maintain himself he wilfully neglected and refused so to do, by which neglect he became chargeable to the union. At the hearing the following facts were proved

*Reported by C. G. WILBRHAM, Esq., Barrister-at-Law.

or admitted:—At the time of his admission to the infirmary and for the first three days of his detention therein Burbridge was quite unable to maintain himself, and at no time during his detention would he have been allowed to leave the workhouse, except upon an order for his discharge being given by the justice. Burbridge was a person generally well able to maintain himself and was, as a fact, well-to-do and in such a position that the guardians might reasonably apply to him for the cost of his maintenance or sue him in respect thereof. No application had been made by the guardians to Burbridge to pay the cost of his maintenance, and he had not refused to do so, and he protested before the learned magistrate that he would willingly have paid upon application. Upon these facts, the learned magistrate refused to convict Burbridge as an idle and disorderly person under the Act, and dismissed the summons. The contention of the guardians was that the magistrate had no discretion, but ought, on the facts proved, to have convicted Burbridge. The question for the opinion of the Court was whether the magistrate had such discretion.

Mr. J. A. JOHNSTON, who appeared for the St. Saviour's Union, said that in order to substantiate the offence with which the respondent was charged it was only necessary to show, first, that he was chargeable to the parish—this was found as a fact by the learned magistrate; and, secondly, that he became so chargeable by reason of his wilfully refusing or neglecting to maintain himself. In determining that question the magistrate must not look at the period while the respondent was chargeable, but at the time when by drinking he caused himself to become incapacitated. The learned magistrate, having found that the respondent was generally well able to maintain himself, was bound to convict. The fact that the respondent had not refused to pay for his maintenance was immaterial, as the "refusal" referred to in the Act was a refusal to maintain himself, not a refusal to pay for his maintenance.

The respondent was not represented, but Mr. H. Sutton appeared on behalf of the Home Office as *amicus curiæ*.

MR. JUSTICE KENNEDY.—We were told upon a former occasion that there was some difference of opinion among magistrates as to the treatment of these cases.

Mr. SUTTON said that he was not aware of any difference of opinion, but it was true that one of the magistrates, in the case of persons constantly suffering from *delirium tremens*, had dealt with them under the Vagrancy Act.

MR. JUSTICE KENNEDY said that the magistrate was quite right. In a case of this kind it was necessary to look at the facts. Burbridge, at the time when he was taken to the infirmary, was very ill, and was suffering from *delirium tremens*. He was described in the case as suffering from that disease while at his own residence to such an extent that he was a subject of danger to himself and to those about him, and he had to bear these facts in mind while looking at the section under which the magistrate was asked to convict him. That section provided that, "Every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become . . . chargeable to any parish, township, or place . . . shall be deemed to be an idle and disorderly person. . . ." Burbridge was, in fact, not merely drunk, but he had become by his own voluntary act for a time diseased and incapable of maintaining himself. It was impossible to suppose that the Act intended to punish people who by a voluntary act

had brought on a disease. The question for the magistrate was—Could this man be convicted of the offence of wilfully refusing or neglecting to maintain himself? The magistrate would have been quite wrong if he had convicted a man of that offence because he was suffering from a disease, however that disease might have been caused.

MR. JUSTICE DARLING said that it appeared that the respondent Burbridge was a man who by drinking had brought on *delirium tremens* and who at his own residence was dangerous to himself and to those about him, and that he was for that reason taken to an infirmary. The magistrate had to ascertain whether, under those circumstances, he became an idle and disorderly person. The section under which he was summoned began by saying, "being able to maintain himself." At the moment when the respondent was suffering from *delirium tremens* he was not able to maintain himself. Therefore he was not within the statute unless it could be said that he was within it if he brought on the *delirium tremens* by his own voluntary act. The statute could not have intended that. If it had it would have said so. It was no more unusual for people to get drunk at the time when that Act was passed than now. *Delirium tremens* was not a modern complaint. The statute could well have said that a person who made himself so drunk as to contract *delirium tremens* was an idle and disorderly person. Section 16 said that begging under a licence from a justice of the peace was not an offence, but that a person who begged without such a licence was an idle and disorderly person. It would have been so easy to provide for Burbridge and people of his kind in this section. If the argument urged on behalf of the appellants was right, if, that is to say, a person who wilfully took something which afterwards caused him to be incapable of maintaining himself was guilty of an offence under the Vagrants Act, then a person would be equally guilty who, knowing that smoking tobacco would ultimately bring on a complaint which would prevent him from maintaining himself, continued to smoke and became in consequence incapable of maintaining himself. The two cases were indistinguishable. Coupling the absurdity which that instance involved with the want of appropriate words in the Act, his Lordship was of opinion that the learned magistrate was right in the conclusion to which he came.

[Solicitors—For St. Saviour's Union, Heward C. Jones; The Solicitor to the Treasury.]

Q.B. Div. }
(Mathew, J.) }

1900.
July 31.

MORRIS AND MORRIS V. THE OCEANIC STEAM NAVIGATION COMPANY (LIMITED).*

Ship—Bill of lading—Exceptions—Damage to goods—Unseaworthy ship.

The plaintiffs' claim in this action was in respect of damage caused by water to a consignment of cigars while in course of transit from New York to Liverpool in the Teutonic, a steamer of the White Star Line owned by the defendants. The cigars came from Havana, and were transhipped at New York and placed on the Teutonic to be forwarded to London. The White Star bill of lading under which the goods were shipped at New York contained the following clauses:—That the carrier should not be liable for loss or damage occasioned by any latent defect in hull, machinery, or appurtenances, or unseaworthiness of the ship, even existing at time of shipment, or sailing on the voyage, provided the owners

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

had exercised due diligence to make the vessel seaworthy; that the shipment was subject to all the terms and provisions of, and all the exemptions from liability contained in, the Harter Act; "it is also mutually agreed that the value of each package receipted for as above does not exceed the sum of \$100, unless otherwise stated herein, on which basis the rate of freight is adjusted, and that the ship and carrier shall not be liable for articles specified in section 4,281 of the United States Revised Statutes, unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading." The cigars in question were described in the bill of lading as of value unknown.

Mr. Lawson Walton, Q.C., and Mr. A. L. Morris appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. Horridge (Mr. Pickford, Q.C., with them), for the defendants.

MR. JUSTICE MATHEW, in delivering judgment, having referred to the terms of the bill of lading, said that the cigars were loaded on the Teutonic in a compartment called No. 2. This compartment had originally been intended for steerage passengers, but had been converted into a hold for goods and provided with a hatchway. While the Teutonic was at New York there was a very severe frost, and the consequence was that two pipes, one for fresh water and the other for salt, connected with a lavatory and passing from the deck through compartment No. 2, became frozen. Any leakage from these pipes would necessarily damage the goods loaded in compartment No. 2. When the plaintiffs' cigars were shipped an inspection of the pipes was made by those in charge of the ship and no defect was discovered, but it would have been very easy to have found out whether or not the pipes had burst. The frost was likely to be followed by the usual consequences, and the leakage would not be discoverable till the thaw came, but there would have been no difficulty in cutting off the water from the pipes. The vessel sailed on February 23, the pipes still being frozen. On March 2 fresh water was discovered passing through the bulkhead of No. 2 compartment, indicating leakage, but the amount of water was small. On March 3, when the next sounding took place, 12ft. of water was discovered in the well, and it was manifest that the salt water pipe had burst. The consequence was that a large number of the plaintiffs' cigars were irretrievably damaged. It was argued for the plaintiffs that the defendants were not exonerated from the obligation to provide a ship fit for the purpose of carrying the cigars, and the case of "The Carib Prince" (170 U.S., 655) was relied on. Looking at the language of section 3 of the Harter Act, it seemed that if due diligence was used to make a vessel seaworthy the owner was exonerated from all perils in the course of the voyage; but the Supreme Court of New York held in "The Carib Prince" that section 3 was governed by sections 1 and 2, and that it was not enough for the owner to use due diligence, but that he was bound to provide a seaworthy ship. That decision was, of course, entitled to the utmost respect, but it was not necessary to deal with the present case on that footing, because here the bill of lading contained an express provision that the shipowner was to use due diligence to make the vessel seaworthy. The question, therefore, was one of fact—did the defendants use due diligence to make the vessel seaworthy? There was no question but that the ship was unseaworthy when she sailed, because the pipes were in such a condition that damage to the cargo was inevitable. His Lordship further came to the conclusion that due diligence had not been used to make the vessel seaworthy. From the effect of frost on the pipes it was manifest what would follow. It was equally clear, therefore, to a reasonable mind that proper pre-

cautions should have been taken to ascertain whether the pipes were in a condition consistent with the safety of the cargo. It was contended for the defendants that, assuming the ship was unseaworthy, what was dealt with by the bill of lading was negligent unseaworthiness, and that this was not such unseaworthiness, because it might have been remedied if due care had been taken on the voyage, the absence of due care on the voyage being within the exceptions; and that the *causa proxima* was the want of diligence during the voyage of those on board, and not the unseaworthiness. His Lordship was unable to adopt that view of the law. Reliance was placed on the well-known cases of "Steel v. State Line Company" (3 App. Cas., 72) and "Hedley v. Pinkney Steamship Company" ([1894] A.C., 222), and the analogy of an open port was pressed. There was, however, no such analogy. Although a port might be open, if it was possible to close it, the owner was entitled to rely upon the care of those in charge, and the ship was properly equipped and not unseaworthy; but if the port could not be closed after the cargo had been taken on board, then the ship would be unseaworthy. The latter case supplied the true analogy to the present case. The defendants also relied on Clause 1 of the bill of lading as limiting their liability to a part only of the damage. (His Lordship read the clause set out above.) It was argued for the plaintiffs that the meaning of the clause was that there must be a declaration of value of above \$100 in order that the freight might be properly adjusted, and that the only consequence of not stating the value was that the rate of freight must be readjusted on the higher valuation. His Lordship did not think that that was the object or meaning of the clause, and he felt compelled to come to the conclusion that the clause was intended to limit the liability of the defendants in the event of a breach of their duty to use diligence to make the vessel seaworthy. There would be, therefore, judgment for the plaintiffs, but the amount recoverable would have to be ascertained according to the principle laid down by his Lordship.

[Solicitors—Hollams, Sons, Coward, and Hawksley; Rowcliffes, Rawle, and Co., for Hill, Dickinson, Dickinson, and Hill, Liverpool.]

Court of Appeal (Lord Halebury, L.C.,
A. L. Smith and Vaughan Williams, }
L.J.J.) 1900.
Aug. 1.

GODMAN V. MOSES.*

Practice—Appeal—County Court—Judicature Act, 1894.

In appeals from County Courts where the Divisional Court refuses leave to appeal from its decision, leave may be granted by the Court of Appeal.

This was an appeal from the judgment of a Divisional Court, Mr. Justice Darling and Mr. Justice Channell, on an appeal from a County Court. The County Court Judge gave judgment for the plaintiff. The Divisional Court dismissed the appeal brought by the defendant, and refused to grant him leave to appeal to the Court of Appeal. The defendant applied *ex parte* to the Court of Appeal for leave to appeal, and the Court of Appeal granted him leave. On the appeal now coming on to be heard the plaintiff took the preliminary objection that no appeal lay. It was contended on his behalf that by section 45 of the Judicature Act, 1873, no appeal lay from a decision of a Divisional Court on an appeal from a County Court except by leave of the

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

Divisional Court; and that that enactment was not repealed by section 1, subsection 5, of the Judicature Act, 1894. Section 45 of the Judicature Act, 1873, enacts as follows:—"All appeals from petty or quarter sessions, from a County Court, or from any other inferior Court . . . may be heard and determined by Divisional Courts of the said High Court of Justice. . . . The determination of such appeals respectively by such Divisional Courts shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard." By section 1, subsection 5, of the Judicature Act, 1894, "In all cases where there is a right of appeal to the High Court from any Court or person, the appeal shall be heard and determined by a Divisional Court constituted as may be prescribed by rules of Court; and the determination thereof by the Divisional Court shall be final, unless leave to appeal is given by that Court or by the Court of Appeal." It was argued that the Act of 1894 was not intended to extend the right of appeal at all. On the part of the defendant reference was made to the case of *Holland v. Girling*, mentioned in the *Solicitors' Journal*, Vol. 43, p. 600, in which it appeared that the Court of Appeal had held that they could give leave to appeal from a judgment of a Divisional Court affirming a decision of a County Court Judge and refusing leave to appeal.

Mr. R. M. Bray, Q.C., and Mr. Hohler appeared for the plaintiff; Mr. Gore-Browne for the defendant.

The LORD CHANCELLOR said it appeared that this Court had already decided that they had jurisdiction to give leave to appeal in a case like the present. The preliminary objection must therefore be overruled.

The COURT proceeded to hear the appeal on its merits.

Chan. Div. } 1900.
(Wright, J.) } Aug. 1.

IN RE SUNLIGHT INCANDESCENT GAS LAMP COMPANY
(LIMITED).*

Company—Winding up—Directors—Misfeasance
summons—Discretion of the Court as to re-
payment of moneys—Companies (Winding-Up)
Act, 1890, sec. 10.

This was a summons taken out by the liquidator of the above company under section 10 of the Companies (Winding-Up) Act, 1890, for a declaration that Messrs. John Henry Hill Duncan and Oliver Wethered, two of the directors of the company, were jointly and severally liable and accountable for (1) a sum of £420 paid out of the assets of the company to Duncan as an underwriting premium upon a policy of insurance, dated May 28, 1896, to secure the company against the reversal of a judgment given in the Queen's Bench Division in an action of the "Sunlight Incandescent Gas Lamp Company (Limited)" v. the Incandescent Gas Light Company (Limited); and (2) a sum of £210 paid out of the assets of the company to Wethered as a like premium, Duncan and Wethered having been at the time of such payment directors of the company and as such said to be liable to account to the company for any profit made by them upon any transaction with the company, and that Duncan and Wethered might be ordered to repay the two sums of £420 and £210 with interest. The circumstances under which the policy of insurance was effected sufficiently appear from the judgment of Mr. Justice Wright.

Mr. Theobald, Q.C., and Mr. A. C. Clauson were for

the liquidator; and Mr. C. E. E. Jenkins, Q.C., and Mr. Coldridge for Mr. Duncan; Mr. Rowden, Q.C., and Mr. Carrington for Mr. Wethered; and Mr. P. M. Francke for shareholders opposing the application.

MR. JUSTICE WRIGHT delivered judgment to the following effect:—In this case a syndicate was formed for the purpose of testing an invention in gas lighting, and, if the invention was found safe, of selling it at a large profit. Litigation took place between the syndicate and the Incandescent Company. The syndicate succeeded in the first stage of the litigation and an appeal was threatened by the other company. The syndicate had no money to carry on the appeal and it therefore appeared to some of the directors that they might secure the syndicate against the threatened appeal by insuring the result at Lloyd's. Mr. Duncan, one of the directors of the syndicate, was particularly active in the matter. He himself underwrote part of the risk, as did also Mr. Wethered, another director. Mr. Duncan's motives appear to have been mixed—first to promote the interests of the syndicate, and, secondly, to benefit himself. He thought the risk was small and that the premium was good. He never in a formal way disclosed to the syndicate as a whole what had been done. A short time afterwards the Incandescent Company, having discovered that the syndicate had obtained the sineuws of war, gave notice to the syndicate that it abandoned the appeal, and thereupon the underwriters became entitled to the premiums. The question is whether the syndicate is entitled to have the premiums handed back to it as profits made by the directors in their conduct of the affairs of the company. On the one hand there are several circumstances against the directors. No authority was given by the syndicate to the directors to enter into the transactions, nor was there any formal notice or resolution or assent of the syndicate to the directors taking the premiums. There was no full disclosure, formal or otherwise, and the shareholders were not told how much the directors stood to win. But everything was done in good faith and in the interests of the syndicate. Every director was aware of and fully concurred in what was done. The matter was disclosed generally, except the amount of the profits, to a general meeting. Upon the evidence I come to the conclusion that all knew of the insurance. Finally, all the shareholders have, with three exceptions, repudiated the present proceedings and have intimated that they do not desire to have the money repaid. The exceptions are Mr. Morris, his son, and another shareholder who has transferred his shares. Under these circumstances, if there had been any unsatisfied creditors and the present proceeding had been by action instead of summons, there might be no answer to the claim. But the question arises upon a summons taken out under section 10 of the Companies (Winding-Up) Act, 1890. That section is carefully worded. The words are:—"The Court may, on the application of the official receiver or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the Court thinks just." It seems to me that that section gives a wide discretion to the Court, and I think that the discretion ought to be exercised in this case by not making an order for payment, having regard to the fact that most of the shareholders do not want the money and would return it, if

*Reported by F. EVANS, Esq., Barrister-at-Law.

paid to them, to these directors, and that the other shareholders knew of what had been done. I think, therefore, that there ought to be no order in the present case. I cannot, however, give these directors their costs, because they ought, in my judgment, to have made a more full and detailed disclosure. The liquidator will be entitled to take his costs out of the assets.

[Solicitors—Linklater, Addison, Brown, and Jones ; Maddisons ; H. C. Godfray.]

Court of Appeal (A. L. Smith, Vaughan) 1900.
Williams, and Romer, L.J.J. } Aug. 2.
LYLE SHIPPING COMPANY (LIMITED) V. CORPORATION
OF CARDIFF.*

Shipping—Charter-party—Demurrage—Construction of charter-party—Ship to be discharged “with all despatch as customary”—Insufficient supply of railway trucks.
Decision of Bigham, J. (*ante*, p. 66), affirmed.

This was an appeal by the plaintiffs from the judgment of Mr. Justice Bigham at the trial of the action without a jury (reported *ante*, p. 66 ; 5 Com. Cas., 87). The action was brought to recover damages for the detention of the plaintiffs' ship *Cape Wrath* during the discharge of a cargo of jarrah wood at Cardiff. The defendants were sued as the endorser of the bills of lading, who had taken delivery of the cargo. The defendants, by a contract dated May 30, 1899, had bought a large quantity of jarrah wood from Churchill and Sim (who were made third parties in the action, but as to whom no question arose in the Court of Appeal), of which quantity the *Cape Wrath's* cargo was an instalment. The charter-party, which was incorporated in the bills of lading, contained the following clause :—“The ship to be discharged with all despatch as customary, weather permitting.” There was, in fact, considerable delay in the discharge at Cardiff owing to an insufficient supply of railway wagons alongside the ship. The ship arrived at Cardiff on October 2, 1899. The discharge began in the East Bute Dock on October 3 and was not completed until November 23, occupying 45 working days. The plaintiffs claimed that the discharge should have been at the rate of 150 tons per working day, upon which basis it would have occupied 22 or 23 working days. The East Bute Dock was the property of the Cardiff Railway Company, which did the work of discharging. All railway companies had access for their wagons to the dock. It was impossible to discharge the cargo on to the quay or otherwise than into wagons. The defendants, in accordance with the usual practice, made an arrangement with the Great Western Railway Company for the supply of wagons to convey the cargo from the ship's side to the corporation depot. There was great pressure of work at Cardiff during that month, and in consequence there was great difficulty in procuring wagons. The delay in the discharge was due to the difficulty of procuring wagons, and was not due to the acts or default of the defendants personally. Mr. Justice Bigham held that the obligation upon the defendants was to do their best both to procure and to make use of the wagons, and that they had fulfilled that obligation. He accordingly gave judgment for the defendants. The plaintiffs appealed, contending that the defendants were not excused by the difficulty in obtaining wagons, that being a risk undertaken by the defendants.

Mr. Joseph Walton, Q.C., and Mr. D. C. Leck appeared for the plaintiffs ; Mr. Rufus Isaacs, Q.C., and Mr. Bailhache appeared for the defendants.

The COURT, having taken time to consider, delivered judgment dismissing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment :—“This is an action by shipowners against the receivers of cargo under a bill of lading for demurrage or damages for detention—it matters not which it is called—of the plaintiffs' ship at Cardiff, which was the port of discharge, the allegation being that the ship was detained by the defendants in unloading for 45 instead of 23 working days, and the plaintiffs claim for this the sum of £382. The real question is, What is the contract the plaintiffs have with the defendants as to the discharge by them of the plaintiffs' ship? By the terms of the charter-party, which were incorporated into the bills of lading, by which terms the defendants are bound, the cargo was “to be discharged with all despatch as customary.” It will be noticed that the plaintiffs have taken no contract from the defendants, as they might have done if they had desired to do so, that the cargo should be discharged in any fixed period of time, in which case beyond question the obligation to discharge undertaken by the cargo-owners would have been absolute, and no matter what unforeseen circumstances might have arisen or how diligent they might have been in their endeavours to discharge the ship within the contracted time, if they did not do so they would have broken their contract and must have paid damages to the shipowners for the breach. But this is not the contract which the plaintiffs have taken from the defendants, for the only contract, as before stated, is that the cargo should be “discharged with all despatch as customary.” I think it is important to state at the outset the findings of my brother Bigham, for, considering the arguments addressed to us on behalf of the appellant shipowners, the findings are very important in this case. The learned Judge finds that the rule or custom of the port of Cardiff, as applicable to the plaintiffs' ship, was that the cargo was to be delivered into wagons (railway wagons) and in no other way ; that the appliances customarily used at the port of Cardiff were the wagons of certain specified railway companies and no others ; that the defendants were not personally guilty of any negligence at all in taking discharge of the cargo, and that they did their best to get the appliances which were available at the port at the time, and which were customarily used for the purpose of discharging vessels ; that when the plaintiffs' ship arrived there was a great stress of work, and difficulties had to be contended with, and that it was a record month, and that the defendants did their best to deal with the difficulties, and took delivery of the cargo as quickly as it was practicable for them to do. The findings were really not contested before us, and there is evidence to support them. Now, these being the facts as found by the learned Judge, the question arises, Have the plaintiffs proved that the defendants have broken their contract with the plaintiffs that the cargo should be discharged with all despatch as customary? That the plaintiffs have no absolute contract with the defendants that the latter will discharge the plaintiffs' ship in any given time is clear, nor have they, in my judgment, an absolute contract that the defendants will have railway wagons down upon the quay ready to take delivery of the cargo at Cardiff, which is the only way delivery can there be taken, for, as Lord Blackburn says in the House of Lords in “*Postlethwaite v. Freeland*” (5 App. Cas., 599, at p. 620), “If the obtaining lighters or other customary appliances for the discharge of a ship on its arrival was, like the procuring a cargo for loading the ship, a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification,

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

to provide those appliances. . . . But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the undertaking to supply a cargo." This appears to me to meet the last suggestion made in the reply of Mr. Joseph Walton that there was an absolute duty on the goods-owner to prepare himself to take the cargo. In my judgment the duty is not absolute, but to do his best. Now, the contract which the plaintiffs have in this case with the defendants for the discharge of the cargo, as will be seen from the latest authority upon the subject in the House of Lords—no fixed time being stipulated for the discharge—is that the plaintiffs will discharge the cargo within a reasonable time under existing circumstances, or, in other words, with all due diligence having regard to all the existing circumstances, and in my opinion there is no limit as to what are existing circumstances, as argued by Mr. Joseph Walton—namely, the limit of the user of the port appliances. The case to which I allude is that of "*Hick v. Raymond and Reid*," in the House of Lords ([1893] A.C., 22), and when what is therein laid down is understood it will be seen that the defendants' contract is what I have said it is. In "*Hick v. Raymond and Reid*" the terms of the contract were that the cargo was to be delivered at the port of London, and that it was to be applied for within 24 hours of the ship's arrival, but no time was specified within which the discharge of the cargo was to be completed. It was held by the House of Lords in a considered judgment that when a bill of lading is silent as to the time within which the consignee is to discharge the cargo his obligation is to discharge it within a reasonable time and that he performs his obligation if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming those circumstances, so far as they involve delay, are not caused or contributed to by him. Lord Herschell, then Lord Chancellor, in his judgment in that case, in clear and unambiguous language states the law applicable to a bill of lading which contains no fixed time for unloading. I am myself inclined to think that it matters not in this case whether the words "as customary" are in the contract or not, for if not they would be implied. The Lord Chancellor (Lord Herschell) said (at p. 28) that the bills of lading in that case contained no stipulation that the discharge should be effected in a particular number of days, "and therefore in accordance with ordinary and well-known principles the obligation of the respondents was that they should take discharge of the cargo within a reasonable time. The question is, Has the appellant (the shipowner) proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in determining whether more than a reasonable time was occupied." Lord Herschell then states the rival contentions of the shipowner and cargo-owner, the shipowner contending that the cargo-owner was liable if the discharge of the vessel was delayed beyond the time required to discharge her under ordinary circumstances, the cargo-owner, on the other hand, contending that he was not liable if he only occupied the necessary time under existing circumstances. Lord Herschell then continued—and here is the principle to be applied to the present case—"the only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee." It will be seen, Lord Herschell says, that reasonable time should

depend on the circumstances which actually exist. What circumstances? Why, all the circumstances which have relation to the discharge of the cargo. The judgment of Lord Watson, though shorter, in no way differs from that of the Lord Chancellor, and Lord Ashbourne's judgment is valuable for bringing together prior decisions, especially that of Mr. Justice Blackburn in "*Ford v. Cotesworth*" (L.R., 4 Q.B., 127), in which that learned Judge held that reasonable time must be a reasonable time under the circumstances, and the judgment of Lord Selborne, when Lord Chancellor, in "*Postlethwaite v. Freeland*" (5 App. Cas., at p. 608), which was delivered some 12 years before Lord Herschell delivered his judgment in "*Hick v. Raymond and Reid*" above referred to. Lord Selborne said the same as Lord Herschell subsequently said, though in different language. He said, "There is no doubt that the duty of providing, and making proper use of, sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charter-party, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there be no fixed time the law implies an agreement on his part to discharge the cargo within a reasonable time—that is, as was said by Mr. Justice Blackburn in '*Ford v. Cotesworth*,' 'a reasonable time under the circumstances.' Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence ought, I think, to be taken into consideration." These judgments of two Lord Chancellors in the House of Lords on the point I have now to consider, coupled with the facts found by the learned Judge in this case, to my mind are amply sufficient to show that the judgment of Mr. Justice Bigham is correct, and cover all the points taken by Mr. Joseph Walton in argument. It appears to me simply waste of time to discuss in detail other authorities cited in argument, such as "*Good and Co. v. Isaacs*" ([1892] 2 Q.B., 555); "*Castlegate Steamship Co. v. Dempsey*" ([1892] 1 Q.B., 854); and "*Wyllie v. Harrison*" (18 Court Sess. Cas., 4th series, 92), which are all consistent with the judgments in "*Postlethwaite v. Freeland*" and in "*Hick v. Raymond and Reid*," and with the exception of "*Wright v. New Zealand Shipping Co.*" (4 Ex.D., 165), decided in 1879, before "*Postlethwaite v. Freeland*" in the House of Lords, there is not a single case in this country in the plaintiffs' favour. As regards the case of "*Wright v. New Zealand Shipping Co.*," in my judgment it is not now law, dissented from and discussed as it has been on different occasions, and especially by Lord Blackburn in "*Postlethwaite v. Freeland*" (5 App. Cas., at pp. 616, 617), and inconsistent, as it is, with the two cases in the House of Lords. If, however, the case of "*Wright v. New Zealand Shipping Co.*" is to be upheld upon the ground suggested by Lord Herschell in "*Hick v. Raymond and Reid*" ([1893] A.C., at p. 32)—viz., that it was not shown in that case that the cargo-owner could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier, and so have avoided the delay which took place—then,

if that be the ground of the decision, the case is not hostile to the defendants, for the findings in this case are that they had taken all reasonable precautions and exertions and done their best as regards the discharge of the cargo, and the case has therefore no application to the present. In my opinion the present case upon the facts found is amply covered by the highest authority, and all Mr. Joseph Walton's points are equally covered. This appeal must be dismissed with costs.

LORD JUSTICE VAUGHAN WILLIAMS read a judgment expressing his concurrence.

Lord Justice Romer's judgment was read by LORD JUSTICE A. L. SMITH, agreeing with the above.

[Solicitors—Lowless and Co., for plaintiffs; Riddell, Yalzey, and Smith, for Wheatley, Cardiff.]

Chan. Div. } 1900.
(Stirling, J.) } Aug. 2.

GIBBON V. THE VESTRY OF PADDINGTON.*

Metropolis—Streets—Widening streets—Compulsory purchase—Michael Angelo Taylor Act (57 Geo. III., c. xxix.).

A vestry can take part of a house under secs. 80, 82, of Michael Angelo Taylor's Act to widen a street but only if the part can be taken without destroying the identity of the house as a house.

The question in this case was whether the defendant vestry were entitled, under the powers of an Act of Parliament called Michael Angelo Taylor's Act, to take, for the purposes of street improvement, a portion of certain houses belonging to the plaintiff without taking the whole.

The plaintiff claimed an injunction to restrain the defendants from proceeding, under a certain notice to treat served by them upon him, to take such parts of four houses in Moscow-road, in the parish of Paddington, as were therein mentioned. The notice to treat recited an adjudication by the defendants that the hereditaments in question obstructed and prevented the widening of Moscow-road, and that the possession, occupation, and purchase of such hereditaments and premises would be necessary for effecting the said improvement. It then stated that the defendants required to purchase and take the hereditaments, and were willing to treat with the plaintiff for the purchase of them and as to the sum to be paid or compensation to be made to the plaintiff for any injury or damage that might affect the plaintiff or be sustained by him by reason of the said improvement. The hereditaments referred to in the notice were the front portions of four houses, being Nos. 1 to 4, Moscow-road, and the effect of taking them would be to remove the front walls of the houses, together with a strip of the property about 4 ft. in width. The houses were small and of considerable age. They extended some distance back from the road, being about 14 ft. deep and having gardens or yards at the rear. The front portions of the houses consisted of shops, and there were parlours and other rooms at the back. It appeared that the premises were all unlet. Three of the houses were in such condition that they might at some slight expense be made fit to be let and occupied as shops; the fourth was not in such good condition, and a portion of this house had been thrown into No. 5, which also belonged to the plaintiff and had been rebuilt by him. There was evidence, however, that No. 4 was still capable of being put in repair and let. It also

appeared that there had been some negotiation between the plaintiff and the vestry, and terms had been proposed by the plaintiff upon which he was willing to sell a portion of the property. Those terms were not accepted, and the negotiations having failed the plaintiff fell back upon his strict rights and brought this action to compel the vestry to take the whole of the property. He contended that the defendants were not entitled to take possession of the front portion of the houses only and pull down the same so as to leave him in the ownership of only the rear portions of the houses in a dismantled condition and wholly unfit for such occupation or use as they had heretofore enjoyed. He also urged that the premises in their present condition were barely large enough for business purposes, and if they were further diminished by cutting off the whole frontage as proposed the shops and houses would be practically unfit for business or any other purpose. The defendants on the other hand contended that the parts of the houses required by them could be taken down without seriously affecting the stability of the rest of the premises, and they denied that if necessary alterations were made the rear portion of the houses would be rendered entirely unfit for use and occupation. They relied upon the Act of Parliament as giving them power to proceed under the notice to treat. The case first came on upon motion for an injunction, but for the plaintiff it was argued that a local authority proceeding under this Act could only take a portion of a house where it did not involve structural alterations of too radical a character, such as would be necessary in this case.

Mr. Jenkins, Q.C., and Mr. F. H. Colt were for the plaintiff; and Mr. Butcher, Q.C., and Mr. C. E. Allan for the defendants.

MR. JUSTICE STIRLING, in giving judgment, said that the question was one of considerable difficulty and only partially covered by authority. It had been touched upon in many cases, but had only been really dealt with in one. The Act differed from the Lands Clauses Consolidation Act, 1845, inasmuch as it contained no provision similar to that in the later Act whereby the promoters of an undertaking were bound to take the whole of a property if the owner were unwilling to sell a portion of it. It was provided by section 80 of Michael Angelo Taylor's Act (57 Geo. III., c. xxix.) that "It shall and may be lawful to and for the commissioners or trustees, or other persons having the control of the pavements of any parochial or other district, from time to time and at all times hereafter, to . . . widen any of the streets . . . within any parochial or other district; . . . and if any houses, walls, buildings, lands, tenements, and hereditaments, or any part thereof, shall be adjudged by the said commissioners or trustees or other persons as aforesaid to project into, obstruct or prevent them from so . . . widening the said streets . . . and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements, or hereditaments will be necessary for that purpose, it shall and may be lawful to and for the said commissioners, &c., and they shall have full power and authority to treat, contract, and agree . . . with the several owner or owners, occupier or occupiers, of all such houses, walls, buildings, lands, and hereditaments . . . for the purposes aforesaid, and to pay for the same such sum and sums of money as shall be agreed upon by the said commissioners, &c., and the owner or owners, occupier or occupiers thereof . . . and to pull down, use, sell, or dispose of such houses, walls, and buildings, and the materials thereof, and lay the sites thereof, and also all such other lands, tenements, and hereditaments, or so much thereof as they the said commissioners, &c., shall think proper into the said street."

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

It was to be observed, said his Lordship, that in the first portion of that section the Act spoke of "houses, &c., or any part thereof," but in the remainder of that section and in section 82, which dealt with the case of owners who refused to treat or agree, the words "or any part thereof" did not occur. That being so, the question arose as to whether a local authority could compulsorily take a part of a house. That question had been considered in "Gordon v. the Vestry of St. Mary Abbott's, Kensington" ([1894] 2 Q.B., 742). It was decided in that case that where the authority having control of the streets in a metropolitan district *bona fide* adjudged that part of a house or building obstructs or prevents the widening of a street, subsections 80 and 82 of 57 Geo. III., c. xxix., give such authority power, under some circumstances, to purchase and take compulsorily such part from the owner, and he cannot require them to take the whole house or building, though he be able and willing to sell and convey the whole to them. There the case came before the Court, as in the present instance, upon an interlocutory application for an injunction, and the Court decided that there was jurisdiction to take part of a house under certain circumstances. The reasons were given by both the learned Judges who heard that case, and a few words from the judgment would show the view which they took. Mr. Justice Collins said:—"The construction which has been put upon section 80 in several cases is this. In the first part of the section there are the words 'houses, walls, buildings, or any part thereof,' and the section contemplates that the adjudication made by the Commissioners, both as to the fact of obstruction and as to the necessity of purchase, may be limited to a part. That is arrived at by construing the subsequent words, 'such houses, walls, buildings, lands, &c.,' as embracing the 'houses, walls, buildings, lands, &c., or any part thereof,' previously mentioned. Following that out, section 81 deals simply with the case of persons incapacitated to treat, but the subject-matter is the same as in section 80. Section 82, which gives the compulsory powers, deals with the case of persons unable by absence or unwilling to treat; but the subject-matter is again simply referred to as 'such houses, buildings, lands, &c.,' thus carrying on through the three sections the initial definition of that which the Commissioners may consider and deal with—namely, 'houses, buildings, lands, &c., or any part thereof.' I think, therefore, that it cannot be successfully argued to-day that the construction which has been put upon section 80 does not apply to section 82, because section 80 has hitherto been considered apart from section 82. Section 80 seems to me to be the foundation of the whole code. The Courts have decided that the words 'or any part thereof' are by implication carried on into the words 'such houses, buildings, lands, &c.' in the other part of the section, and I am of opinion that they are so carried on in section 82."

The Court, having arrived at that conclusion, refused to grant an injunction; but they proceeded to express the view which they entertained of the state of the law in a way which his Lordship (Mr. Justice Stirling) was not at liberty to disregard. It was suggested that the logical result of that construction of the Act was that the local authority being at liberty to take part of a house was bound under section 82 to give proper compensation, including, first, the value of the part taken, secondly, the sums necessary to be expended by the owner in order to repair the damage done to the house; and, thirdly, the diminution in value of the portion left. That was not the view of the learned Judges because they expressed the limitation which they put upon the construction. Mr. Justice Cave said (at p. 749):—

"You may divide a piece of land, and make of it two pieces of land, and each is land for

all purposes, but you cannot divide a house and make of it two houses; you get something which is not a house. If you take half of a building occupied as a tavern, you do not take a tavern and leave a tavern; you take part of a whole thing and leave the other part of that whole thing for the previous owner of the whole. So far as I can see the Act does not contemplate that that shall be done; it does not contemplate that part of a house may be taken in the sense that the owner shall be left with something which is not a house, which cannot be used for the purpose for which the house was used before, and which is essentially different in its character and condition from what the house was before. If that were the case made out here I should be clearly of opinion that the Act of Parliament did not enable a portion of the house in that sense to be taken, and that the whole house must be taken by the vestry."

So also Mr. Justice Collins said:—"It is not enough to oust the jurisdiction of the vestry to say simply that the structure sought to be removed cannot be taken and removed without altering the appearance of the premises and involving alterations thereto, and that the taking of the land will diminish the value of the Town-hall Tavern to the plaintiff. Those facts are not, in my opinion, sufficient to destroy the right of the vestry to give the notice. There must, however, I think, be the distinction in point of fact which has already been pointed out between land and a house. Land is by its nature capable of being divided; a house is *prima facie* a unit incapable of division; but there are cases in which it would be impossible to say that a portion of a house might not be cut off without destroying the identity of the house itself. If a particular part of a house can be pointed to which the vestry, *bona fide*, find is the only part which obstructs the improvement, and that part is separable from the house, so that it can be removed without destroying the house as a house, then I should say that there is nothing to prevent the vestry from compulsorily taking that part only. If, on the other hand, the thing, in respect of which they form their judgment that it obstructs and is necessary to be removed, is so indissolubly linked with the whole fabric of the house that, in the opinion of the jury, it cannot be removed without practically destroying the identity of the house as a house, then I think the vestry are not entitled to say that 'part thereof' only obstructs, or that 'part thereof' only is necessary to be removed for the purpose of the improvement. Under those circumstances I am of opinion that the vestry could not stop short of taking the whole." It was his duty, said Mr. Justice Stirling, to give effect to that expression of the law, and the result was that a limitation must be placed upon the word "part." If the local authority desired to take a part of a house, the portion taken must be something which could fairly be called a part. For instance, a perch, a conservatory, or a cellar might be taken; but if, on the other hand, it was desired to take a substantial portion so that the use of the house would be substantially interfered with and the house would no longer be occupied as the kind of building it was before, then the whole must be taken. Applying that to the present case, his Lordship thought that the plaintiff was entitled to insist upon the vestry taking the whole of the houses in question. But it was contended that the plaintiff had lost his right to do so by reason of what had passed between him and the vestry. No doubt there had been negotiations, and the plaintiff had, perhaps, contemplated pulling the houses down and rebuilding them, as it was said a prudent person would do. But upon the evidence it seemed to his Lordship that the plaintiff had been willing to sell a portion upon terms which were not acceded

to, and he desired to fall back upon his legal rights. As to his intention to rebuild, no doubt he had contemplated it, but an owner was at liberty to deal with his property at whatever time he thought fit, and the vestry were not entitled to compel him to anticipate that time. The plaintiff was entitled in this case to compel the vestry to take the whole of the houses and there must be an injunction in the terms asked for. His Lordship's sympathy was with the vestry and the rate-payers, because the vestry were in a very difficult position having regard to the state of the law, but in the view which he took of the law the costs of the application must follow the event.

[Solicitors—J. E. Moore; J. H. Hortin.]

Arches Court } 1900.
(Sir Arthur Charles) } Aug. 2.

EX PARTE THE RECTOR AND CHURCHWARDENS AND CORPORATION OF BIDEFORD.*

Ecclesiastical Law—Faculty—Disused consecrated burial-ground—Public highway.

Held, that the Court had jurisdiction to grant a faculty to permit a portion of a disused consecrated burial-ground to be thrown into the adjoining public highway.

This was an appeal from a judgment of Chancellor Diddin in the Consistory Court of Exeter.

Mr. Grazebrook appeared for the appellants.

The arguments were heard by the Court on the 25th ult., when judgment was reserved.

THE DEAN OF ARCHES now said:—This is an appeal from the refusal by the Chancellor of the diocese of Exeter to issue a citation on the petition of the rector and churchwardens of the parish of Bideford, and of the mayor, aldermen, and burgesses of the town for a faculty to permit a portion of a disused consecrated burial-ground to be thrown into the adjoining public highway. The learned Judge was of opinion that he had no jurisdiction to grant a faculty for the proposed purpose, and on that ground refused the citation. It appears from the petition the allegations in which for the purpose of this appeal must be assumed to be accurate that the corporation are desirous of effecting a much-needed improvement by widening a street in the town of Bideford, called Honeston-street, and with that object desire to add to the highway a portion of the old consecrated burial-ground, containing about 337 square feet. The plan annexed to the petition and an enlarged plan produced at the hearing show exactly what is proposed to be done. There can be no doubt that the street along the boundary of the burial-ground is at present inconveniently narrow—it is only 16ft. wide—and that it is quite inadequate for the traffic which passes along it. The street, it may be observed, is the main approach from the rectory, and from the whole of one side of the town to the market-place and church, and immediately opposite the burial-ground stands the national school. The alteration, if made, would therefore be not only for the general convenience and safety of the public, but particularly of the rector and many of his parishioners, as well as of all persons who use the school. The burial-ground was closed by Order in Council dated May 16, 1893, the last interment having taken place in it in August, 1884. In the piece of land in question there are five graves and two headstones, and the petitioners have obtained the assent of the representatives of those interred in three. The representatives of those interred in the remaining two

cannot be found, but in all these cases the petitioners, should a faculty be granted, undertake decently and reverently to remove the remains to another portion of the ground, and in the case of the headstones to re-erect them in a suitable position to be approved by the rector and churchwardens. The corporation are prepared to pay for the accommodation asked for the sum of £42 to be applied by the rector and churchwardens in repairing the burial-ground walls and putting the ground itself in order and further to erect a new and sufficient boundary wall of the same height as the present wall. In the petition this sum of £42 is spoken of as "purchase-money" of the land itself, but what is really desired is not a faculty for an actual sale of the land, but a faculty for the use of the land as a part of the adjoining highway, the ownership of the soil remaining unaffected. The parish vestry has unanimously passed resolutions in support of this application. Under these circumstances the vestry, the rector and churchwardens, and the corporation being all assenting parties, and the alteration proposed being undoubtedly for the convenience of parishioners and the public, the case appeared to the learned Judge of the Court below to be one in which, if it were within the power of the Court, the faculty should be granted, or at all events a citation should be issued. But he was of opinion that he had no jurisdiction. "It has long been decided," he says, "by the Queen's Bench and by the Court of Arches that there is no jurisdiction in the Ecclesiastical Court to authorize consecrated ground to be applied to secular uses—'Reg. v. Twiss' (L.R., 4 Q.B., 407); 'Harper v. Forbes' (5 Jur., N.S., 275). I considered the question fully in a Rochester case a few years ago, '*In re Plumstead Burial Board*' ([1895] P., 225). Nothing has happened since to change my view. There is, however, a later case, '*Re St. Nicholas, Leicester*,' in the diocese of Peterborough, where the decision was the other way, and there are several cases in the diocese of London in which an opposite view to mine has been acted upon. Under these circumstances I cannot but feel great diffidence in re-stating my opinion, and were it not that the matter concerns my jurisdiction and seems to me to have been definitely decided by authorities which bind me, I should feel even more hesitation. It is time this very important point were carried to the Court of Arches, and I hope this will be done in the present case." There is unquestionably a great diversity of practice in the dioceses of this province as to the grant of faculties of this description; whilst on the one hand the learned Judge of the Court below has refused to grant them upon two occasions, the first in the diocese of Rochester and now in the diocese of Exeter, they have been granted in various forms and with various limitations by Dr. Tristram, the Chancellor of London and of Chichester, and by the Chancellors of Worcester, Lincoln, Llandaff, and Peterborough. In London, in particular, since 1872, they have been repeatedly granted, and a history of the origin of the practice will be found in the judgment of the Chancellor in the case of "*St. Botolph, Aldgate*" ([1892] P., 161). The same learned Judge, sitting as Chancellor of Chichester, in "*In re St. Andrew's, Hove*" ([1895] P., 228, h.), gives his reasons at length for holding that in the case of a churchyard closed for burials an ecclesiastical Court has a discretionary power to make an order of the kind now asked for; and in the Leicester case ([1899] P., 19) all the authorities for and against the exercise of such a power are very fully considered by the Chancellor of the diocese of Peterborough. I believe I am correct in stating that with the exception of the two cases to which the learned Judge of the Court below referred all the reported decisions on this subject are decisions of Consistorial

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

Courts. But those two stand on a different footing, being decisions of the Court of Queen's Bench and the Arches Court respectively. The learned Judge founded his judgment upon them and if they do in fact decide the point now under consideration they no doubt bind him as indeed they would also bind this Court. It is necessary therefore to examine them carefully and I will proceed to do so, taking them in order of their date. "*Harper v. Fortes*" (5 Jur., N.S., 275) was decided in this Court by Dr. Lushington in 1859. It was then proved that the churchwardens of a parish at Reigate, with the approval of the vicar, rural dean, and Bishop, but without a faculty, had permitted a part of the parish churchyard to be taken into the public road, and a suit was instituted against them by a parishioner praying for their canonical correction and also asking for an order that the churchyard should be restored. At the hearing the churchwardens did not deny that there had been a violation of the law nor did they apply for a confirmatory faculty. The suit, therefore, was practically undefended, and the observations of the Judge at the outset of the hearing were certainly not necessary to the decision. Nothing, as the learned Judge in the Plumstead case ([1895] P., at p. 238) points out, can be more emphatic than Dr. Lushington's statement of the law, a statement which repeated in substance observations he had made when Chancellor of London in "*Re St. John's, Walbrook*" (2 Rob., 515); but so far as the decision is concerned it leaves me free to consider whether the general proposition laid down is applicable to the facts with which I now have to deal—whether in other words it can be applied without qualification to consecrated ground when the purpose for which the ground was originally consecrated can no longer be lawfully carried out. In 1869 "*Reg. v. Twiss*" (L.R., 4 Q.B., 407) came before the Court of Queen's Bench. In that case the guardians of the poor of a parish in the diocese of London applied to the Consistorial Court for a faculty—a confirmatory faculty—authorizing the erection on a consecrated burial-ground of a chapel for the inmates of a workhouse and of certain other workhouse buildings. Before sentence a stranger to the parish applied for a prohibition on the ground that the Ecclesiastical Court had no jurisdiction to grant such a faculty. The application was refused for two reasons, first because it was not clear that the faculty when granted would authorize more than the erection of the chapel, which would be a purely ecclesiastical purpose, and, secondly, because the applicant was a stranger to the parish; and the Chief Justice (Cockburn) in the course of his judgment, whilst expressing approval of the doctrine or proposition enunciated by Dr. Lushington, distinctly states that the application before the Court would be disposed of "on narrower grounds." There is nothing, therefore, in the decision itself binding on this Court, although the utmost respect is of course due to the *dicta* of the learned Judges as to the general law regulating the power of the Ecclesiastical Courts to make orders with reference to the use of consecrated ground. It may be observed that the language of Dr. Lushington and the Chief Justice would, if strictly construed, render it impossible lawfully to grant a faculty for secular even though combined with ecclesiastical uses. Yet such faculties have been repeatedly granted by the Ecclesiastical Courts without objection. It seems to me, therefore, that whilst the *dicta* in deference to which the learned Judge of the Court below acted no doubt accurately express, in general terms, the law of the subject, they must be read with some sort of qualification, and I say so with the less hesitation because my eminent predecessor does not appear to have himself acted upon them in their entirety. Thus I find that within two months of this decision in the Walbrook

case ([1852] 2 Rob., 515) he granted, in "*Campbell v. Paddington Parishioners*" ([1852] 2 Rob., 558), a faculty for the erection of a vestry on ground which had been consecrated for a burial-ground, but which had never been used, and was not intended to be ever used, for interments. He points out, it is true, in explanation of his decision, that a vestry room is employed for ecclesiastical as well as secular uses, but he did not limit the grant of the faculty to the former. On the contrary, the application being for a faculty for a new and suitable building for vestry or other parochial purposes, he granted it for both. I may note in passing that the case of "*St. George's, Hanover-square, v. Steuart*" (Stra., 1,126), referred to in the Paddington case as illustrating the position that no faculty can be granted for the use of consecrated ground for any secular purpose whatever, does not appear to warrant quite so general a proposition. There the parish was cited to appear and show cause why a faculty should not be granted for a charity school on part of the churchyard, and eventually a prohibition was granted, but it is not clear upon what ground the Court proceeded. As far as can be gathered from the very brief report I think the Chancellor of Peterborough is probably correct in his view that there was some "special and accidental impediment" to the grant of a faculty, "such, perhaps, as interference with some common law right" ([1899] P., 27). There still remains one case to which reference should be made, because it is a decision of this Court. Sir W. Wynne is stated by Dr. Lushington to have refused a faculty to convert a part of the churchyard at Ewell into a public road. But no report exists of the circumstances of the case, and it is, at any rate, beyond question that at the time of the decision the churchyard must still have been available for the purposes for which it had been consecrated. Now, in the present case the faculty is asked for in respect of ground which can no longer be lawfully used for burials. It remains, nevertheless, under the jurisdiction of the ordinary, and now there are also many statutory restrictions upon the mode in which it may be used. For example, it can no longer be built upon, either temporarily or permanently (47 and 48 Vict., c. 72, section 3; 50 and 51 Vict., c. 32, section 4). The care of it is vested in the churchwardens where there is no burial board, and they are bound to maintain it in order and do the necessary repairs of the walls and fences (18 and 19 Vict., c. 125, section 18) and their expenses are to be repaid out of the poor-rate. It has become in fact simply an open space kept up by the parishioners but not available for use for its former ecclesiastical purpose. If it still remained open the ordinary would undoubtedly have power to grant a faculty for a footpath to be made within it for the public convenience ("*Walter v. Mountague*," 1 Curt., 253), and regarding the question as one of jurisdiction as opposed to discretion I can see no difference between a faculty for a path across a churchyard and for a path along one side of it. These paths so long as interments were lawful would also subserve the ecclesiastical purpose of burial, but I see no reason why the jurisdiction should not remain, although the ecclesiastical purpose can no longer be carried out. And in this case, as no question can arise as to the curtailment of the parishioners' rights of burial space for the future, I see no objection to authorizing the removal of the present boundary wall so as to allow the proposed path to be thrown into the public way. But if this be done means must be taken to preserve a record of the exact measurement of the piece of land thus added to the road, for it will still remain a part of the burial ground subject to ecclesiastical jurisdiction and to the statutes as to the mode in which burial grounds may be lawfully used.

In the result, therefore I am of opinion that this appeal must be allowed. I think that the discretion which the learned Judge of the Court below was asked to exercise was within the limits of the Court's jurisdiction, and if it be matter of discretion there is no dispute that the faculty is one which ought to be granted. The proper course will, I think, be to follow the procedure adopted by Sir Robert Phillimore in "*Re Bettison*" (L.R., 4 A. and E., 294); to retain the cause and direct a faculty to issue to the rector and churchwardens authorizing the setting back of the present wall and the rebuilding it in the new position indicated on the plan annexed to the petition, upon the terms to which the petitioners have expressed their willingness to submit. The faculty must be subject to a proviso that the remains to be removed shall be re-interred in another portion of the ground to be selected by the rector and churchwardens.

[Solicitors—Pearl and Sons, agents for Hole and Peard, Bideford, for the appellants.]

Chan. Div. } 1900.
(Kekewich, J.) } Aug. 3.

IN RE TREASURE—WILD V. STANHAM.*

Revenue—Estate duty—Apportionment—Will—General power of appointment—Residuary estate—Finance Act, 1894, s. 9, subs. 1.

Where a married woman by her will exercised a general power of appointment over a fund, and also made a residuary bequest, the estate duty payable on her death in respect of the appointed fund must be borne by that fund.

Where, however, the testatrix bequeathed the residue to the residuary legatee "after paying my funeral and testamentary expenses and debts"; held, that the estate duty was a testamentary expense, and must be borne by the residue.

This was an originating summons taken out by the executors of the will of the late Mrs. Sarah Hatt Treasure to determine the question whether the estate duty payable on the death of the testatrix in respect of property appointed by her will under the power of appointment vested in her by the will of her father, Mr. James Wild, deceased, ought to be borne and paid by and out of the property so appointed, or whether the same ought to be borne and paid by and out of the residuary estate of the testatrix.

It appeared that Mrs. Treasure had a power of appointment under the will of her father over one-third of his property. By her will made February 26, 1894, Mrs. Treasure appointed the plaintiffs her executors and trustees, and directed and appointed with regard to all the property or share or shares of property to which any power of appointments, whether general or special, vested in her under the will of her father, the said James Wild, extended, and by virtue of the same power that the same property or share or shares of property should be held upon trust for the plaintiff, James Anstey Wild, and the defendant, Mrs. Elizabeth Phillips Stanham, as tenants in common in equal shares, and the testatrix gave the residue of her real and personal estate to her trustees upon trust for sale and conversion and to divide the proceeds, "after paying my funeral and testamentary expenses and debts" to other persons. Mrs. Treasure died on May 6, 1899, and the will was proved by the plaintiffs. The summons was heard on July 27 and 28.

*Reported by F. E. ADY, Esq., Barrister-at-Law.

Mr. John Dixon appeared for the trustees and executors.

Mr. P. O. LAWRENCE, Q.C., and Mr. W. M. CANN, for the appointees, said that the property appointed went to the executors as such, and therefore the estate duty was payable out of the residuary estate. In any case there was a direction in the will to pay the testamentary expenses out of the residue, and testamentary expenses included estate duty. The whole of the estate must be treated as personality.

Mr. Warrington, Q.C., and Mr. W. A. Peck appeared for the residuary legatees.

MR. JUSTICE KEKEWICH, in a considered judgment, said:—The argument on behalf of those interested in the residuary estate, who desire to throw the burden of the estate duty on the appointed fund, was mainly directed to the construction of section 9, subsection 1, of the Finance Act, 1894, or, rather, to its application to the case in hand. In my opinion, the appointed fund did not pass to the executors as such. I have arrived at this opinion independently of the law as it stood before the date of the Finance Act, and to which I do not propose further to refer, but the arguments founded on that state of the law go to confirm it. The position of executors under a will exercising a general power of appointment must be treated as settled by "*In re Hoskin's Trusts*" (L.R., 6 Ch. Div., 281) and "*In re Philbrick's Trusts*" (34 L.J., Ch., 368), which was there referred to by Sir George Jessel, M.R., and, having regard to what was said by Lord Justice James in "*In re Hoskin's Trusts*," no distinction can be made between a power given to a married woman and one given to any other person. In "*In re Philbrick's Trusts*," Sir John Romilly explained that when a married woman made a will in exercise of a power and appointed executors, inasmuch as she could only make her will by virtue of the power, and could only have appointed the executors for the purpose of administering the appointed property, she must be considered to have appointed the property to the executors as trustees. Let me repeat that after what was said by Lord Justice James in "*In re Hoskin's Trusts*" this must be treated as applicable to a power exercised by any other person, and that notwithstanding that what was said by Sir John Romilly is in language and in substance not strictly applicable to such a case. It was argued that executors appointed by will exercising a general power could not be held responsible if they did not look after the administration of the fund, and it was unfortunately lost, because they are only bound to require payment of the fund to them if required for the purposes of the will. I do not wish to conclude the question of their responsibility, but there is certainly room for contending that this argument is not consistent with the doctrine laid down in the cases cited. Nevertheless it seems to me that the appointed fund does not pass to the executors as such, and "*In re Culverhouse: Cook v. Culverhouse*" ([1896] 2 Ch., 251) does not decide that it does. There the property in question was leasehold specifically bequeathed, and the judgment proceeded on the title of the executor as explained in the passage in Williams on Executors there cited. Where there is an appointed fund on the other hand the executors do not take it by virtue of their office, but because, to again quote Sir John Romilly's language, the donee of the power must be considered to have appointed the property to the executors as trustees. On this point therefore I am in favour of those who say that the estate duty must be charged on the appointed fund. On the other question, namely, whether the estate duty falls within the description of testamentary expenses, and must therefore be paid out of the residuary estate, I am in favour of those who say that it must be so paid. I must in this follow my own judgment in "*In re Clemow; Yeo v. Cle-*

mow" ([1900] 2 Ch., 182). It was attempted to distinguish that case on the ground that there the direction was to pay the testamentary expenses of another person. That is true, and the distinction is of importance with reference to one of the points argued and decided in that case, but as regards the point with which I am dealing here my judgment was based entirely on the reasoning that as payment of estate duty was essential to obtaining a grant of probate, that duty must be considered as much a testamentary expense as any other payment necessarily or properly incurred by the executors for that purpose.

[Solicitors—Wild and Wild; Crawford and Chester.]

Chan. Div. } 1900.
(Buckley, J.) } Aug. 3.

PELHAM CLINTON V. THE DUKE OF NEWCASTLE.*

Will—Construction—Estate in special tail—Rule in Shelley's case.

A testator devised certain estates to a younger son, Charles, with a provision that his eldest son might purchase and redeem those estates for certain sums of money, and the will continued:—"The proceeds to go with the limitations of this will—that is to say, to my son Charles if he marries a fit and worthy gentlewoman and his issue male, to such issue male and their male descendants, in failure of which" then over.

Held, that Charles took an estate in special tail, which he could disentail.

This was an action relating to the Shire Oaks Estate, the Workop Manor Estate, and the Nottingham Park Estate (otherwise the Nottingham Town Estate), dealt with by the fifth codicil to the will of Henry Pelham, fourth Duke of Newcastle, the question of law in dispute arising under the following circumstances:—The fourth duke, by his fifth codicil, dated August 14, 1846, to his will, dated January 31, 1814, willed and bequeathed to his son, Lord Charles Pelham Pelham Clinton, the estates referred to, and after providing that his eldest son, the Earl of Lincoln, might purchase and redeem those estates for certain sums of money the testator continued as follows:—"The proceeds to go with the limitations of this will—that is to say, to my son Charles if he marries a fit and worthy gentlewoman and his issue male, to such issue male and their male descendants, in failure of which" then over. At the date of that codicil Lord Charles was unmarried. On August 10, 1848, he married Elizabeth Grant. On January 12, 1851, the testator died. On December 14, 1894, Lord Charles died. The plaintiff in the present action was the eldest son of the marriage of Lord Charles with Elizabeth Grant. The action came before Mr. Justice Buckley under an order dated June 18, 1900, made upon the application of the defendant, Henry Pelham Archibald Douglas, Duke of Newcastle, and upon an admission by him of the marriage, and that Elizabeth Grant was a fit and worthy gentlewoman, and that the plaintiff was the eldest son of the marriage, and that Lord Charles died as above stated, for the determination of the point of law whether upon the true construction of the fifth codicil the same codicil conferred on Lord Charles a mere life estate or an estate in tail male, or in tail, or an estate in fee simple. The point was of great importance inasmuch as the estates were of great value, and in 1851 Lord Charles had executed what purported to be a disentailing assurance of all except the copyhold and customary estates, and under this and

certain conveyances and other instruments of title the properties, or the unsold portion thereof, had become, according to the defendant, vested in himself.

Mr. Swinfen Eady, Q.C., and Mr. Peterson were for the plaintiff; and Mr. Haldane, Q.C., Mr. Vaughan Hawkins, Mr. Ingle Joyce, and Mr. J. E. H. Benn for the defendant.

At the conclusion of the arguments his Lordship took time to consider his judgment.

MR. JUSTICE BUCKLEY, in delivering judgment, after stating the facts, said:—The plaintiff says that the fifth codicil conferred a mere life estate on Lord Charles. The defendant disputes that. First, as to some things which, I think, are plain. The form of the gift is in the first place to Charles in such terms as would, if there were nothing more, give him the fee simple, but the words which direct that the proceeds, if the Earl of Lincoln purchases, are "to go with the limitations of this will" make it plain that whether the estates are purchased or not the estates or their proceeds are to go on the limitations which are expressed with regard to the proceeds. Secondly, as regards these limitations, I think it is clear that the words are to be read as if a comma or the word "and" were inserted next after the word "Charles" so that the limitations will be "to my son Charles, and if he marries," &c., to such issue male. Thirdly, I think that the words "and has issue male" mean "and has issue male by a fit and worthy gentlewoman." And, fourthly, I think that the words "if he marries," &c., are not words of condition, but words limiting or defining the issue male whom the testator calls "such issue male." To express these last three points concisely, I think the meaning of the words is the same as if the testator had said, "to my son Charles, and such issue male as he may have by marriage with a fit and worthy gentlewoman, and their male descendants, in failure of which" then over. The contention which the plaintiff put forward was that the rule in Shelley's case has no application to these limitations, for that upon authorities to which he referred the rule is that if to the words of limitation of the inheritance there are super-added words of limitation which alter the course of descent the rule in Shelley's case does not apply, and that in such case the heirs take, not by descent, but as purchasers ("Hamilton v. West," 10 Ir. Eq.Rep., 75; "Dodds v. Dodds," 11 Ir. Ch.Rep., 374, and other cases of that kind). It was argued that in this case Charles cannot take an estate tail, for that the limitation is such as that not all but only a selected class of his issue male are to take. Thus, for instance, if Charles married a fit and worthy gentlewoman and had issue male, and then married a lady who did not satisfy those words, and again had issue male, the latter class of issue are not to take by virtue of the gift. The argument that this exception exists to the application of the rule in Shelley's case is, I think, well-founded, and, in fact, it was not disputed by the defendant. But the first answer given was that the rule in Shelley's case has nothing to do with this case; that the effect of these limitations is to give to Charles an estate in special tail. For that proposition reliance was placed upon "Page v. Hayward," which is reported in 2 Salkeld, 570, and more fully in Piggott on Recoveries, 176. (His Lordship referred at some length to that case, and proceeded.) This, therefore, appears to me to be a direct authority that a good estate in special tail may be created by words of limitation to the issue male of a marriage with a person of a certain name. In Challis on the Law of Real Property, 2nd ed., p. 268, "Page v. Hayward" is referred to as an authority for the proposition that "on a gift to a single donee in special tail the wife (or husband) assigned to the donee is not necessarily a specified individual, but may be one of a special class;

*Reported by F. EVANS, Esq., Barrister-at-Law.

for example, may be any person bearing a specified name." In *Preston on Estates*, vol. 2 of 1827, at p. 412 it is stated:—"An estate tail special in this particular ascertains the person by whom, or on whose body, the heirs inheritable to the entail shall be begotten; thus . . . 4thly, on the body of any person who is not his wife, and although she be the wife of another man, and whether the donee be a single or a married man; or on the body of a person of particular rank, as a person of the degree of peerage; or on the body of a person being a Protestant, &c., or a person who shall have a given portion, as £10,000." It seems to me that, without any recourse to the rule in *Shelley's case*, there is here created (subject to something which I must say upon the word "issue") a valid estate in special tail. As regards the word "issue," it has been said that a devise to A and his issue is the aptest way of describing an estate according to the statute (see per Lord Thurlow in "*Hockley v. Mawbey*," 1 Ves. jun., 142, 149). *Prima facie*, I think issue is a word of limitation equivalent to heirs of the body, and not a word of purchase. (His Lordship referred at some length to "*Roe dem. Dodson v. Grew*," 2 Wils., 322, and *Wilmot*, 272; "*Roddy v. Fitzgerald*," 6 H.L.C., 823; and "*Bernal v. Bernal*," 3 My. and Cr., 559, 581, and continued.) For these reasons it seems to me that, apart altogether from the rule in *Shelley's case*, Charles took an estate in special tail male. But, further, if the rule in *Shelley's case* has application, I first observe that there is here no gift in express terms to Charles of a life estate. The first gift in the will to him would, without more, give him the fee simple. The limitations stated with regard to the proceeds do not express his estate to be a life estate, and I apprehend that what I have to look at is to see whether the testator did not intend to make the estate travel through the defined class of issue male generally. If he did, then I can only give effect to that intention by giving to the ancestor an estate in tail; otherwise, as Lord Cairns said in "*Bowen v. Lewis*" (9 App. Cas., at p. 907), "the consequence is that the only other resource which you have is to give to the first taker in the series of issue an estate by purchase, in which case it will not go through the issue generally, but only through the descendants of that particular head of the issue." So here, if I were to hold that there is not an estate in special tail male in Charles, but that the first taker in the series of issue took by purchase, it would follow that only the descendants of that particular head of the issue would take, and the words "in failure of which" would not be satisfied. Upon the principle, therefore, of "*Jesson v. Wright*" (2 Bli., 1) and "*Van Grutten v. Foxwell*" ([1897] A.C., 658), I ought to say that the rule in *Shelley's case* is to be applied so as to give effect to the general intention of the testator that the whole class of issue male by a fit and worthy gentlewoman shall be exhausted before the gift over shall take effect. For these reasons I hold that, on the true construction of the fifth codicil, Lord Charles took not a mere life estate, but an estate in special tail male.

The action was dismissed.

[Solicitors—Blair and Girling; Richard Smith and Sons, agents for Marshall and Bate, East Retford.]

Judicial Committee of the Privy Council
(Lords Macnaghten and Lindley, and
Sir Richard Couch and Sir Henry Strong) 1900.
Aug. 4.

KING AND ANOTHER V. CHEYNE.*

Privy Council Appeals—New South Wales—Local government—Public roads other than main

roads—Special areas—Vermin-proof gates—Obstruction.

Notwithstanding section 428 of the Local Government Act, 1890 (New South Wales) owners of lands, whether adjoining owners or single owners, whether such lands are in special areas or not, may, with the consent of the shire council, place vermin-proof swing gates across roads other than main roads, under the provisions of the Vermin Destruction Act, 1890 (New South Wales).

This was an appeal from a judgment of the Supreme Court of Victoria of May 29, 1899, allowing an appeal from part of a judgment of Mr. Justice Hood.

Mr. Haldane, Q.C., and Mr. C. H. Sargent were counsel for the appellants.

The arguments were recently heard before a board composed of Lord Hobhouse, Lord Macnaghten, Lord Lindley, Sir Richard Couch, and Sir Henry Strong, when judgment was reserved.

LORD LINDLEY, in giving their Lordships' judgment, said the question raised in the appeal was whether the appellants were entitled to maintain unlocked swing rabbit-proof gates across a public road. The facts were as follows:—The appellants are owners of the Serpentine Estate in the shire of East London, Victoria. In 1896 they enclosed their lands with rabbit-proof wire fencing at their own expense. They obtained the permission in writing of the shire council to erect wire netting swing gates across some public roads which intersected the enclosed land and they put up such gates accordingly. All that was done under the authority of section 58 of the Vermin Destruction Act, 1890. None of the roads so interfered with are main roads; nor is the land enclosed part of any special area as defined by the Vermin Destruction Act, 1890. In 1898 the respondent and other inhabitants of the district in which the enclosed land lay applied for and obtained a rule *nisi* for a mandamus commanding the shire council to remove these gates on the ground that they were obstructions and illegal by virtue of section 428 of the Local Government Act, 1890. The order *nisi* was discharged by the Judge of First Instance (Mr. Justice Hood), but on appeal to the Full Court his decision was reversed and the order was made absolute. From that decision the appellants had obtained special leave to appeal to this board. The shire council took no part in this appeal. The respondent had not lodged any case nor had he appeared by counsel at their Lordships' bar to oppose the appeal. The only materials therefore before their Lordships were those furnished by the appellants and the colonial statutes. The judgments of Mr. Justice Hood and of the Court of Appeal were however before their Lordships. The case really turned on three colonial Acts of Parliament all passed on the same day. They were:—1. The Local Government Act, 1890; 2. The Vermin Destruction Act, 1890; 3. The Fences Act, 1890. They were all substantially re-enactments of previous Acts with amendments. By the Local Government Act, 1890 (No. 1,112), section 428, it was the duty of the council of every municipality, except as hereinafter or by any other Act of Parliament now or hereinafter to be in force provided, to open and keep open for public use and free from obstruction every surveyed and reserved road, street, or public highway required for public traffic and proclaimed by this or any other Act within the municipal district. Penalties were imposed on persons infringing that enactment. But there was a provision to the effect that unlocked swing gates not being injurious to the public might be put up across any road by the

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

adjoining owner with the licence of the Governor in Council on the application of the municipal council. That was the enactment on which the respondents relied and succeeded in their appeal in the colony. That section 428 no doubt threw upon the appellants the burden of showing that the swing gates which were in question had been lawfully erected and might be kept across public roads. But the exception at the beginning of the section was very material, especially having regard to the fact that the Legislature when they were passing the Local Government Act were actually passing another Act specially relating to the erection of rabbit-proof gates across roads. Before noticing that Act it would be convenient to refer shortly to the Fences Act, 1890. By that Act (No. 1,092) the occupiers of adjoining lands were required to separate them by a fence at their joint expense (section 5) and to keep the same in repair (section 16). Special provision was made for lands bounded by streams (section 6), for lands bounded by other lands not occupied (sections 10, 13), and for the erection, if desired, of live fences (*i.e.*, hedges) next roads (section 14). There was no other express provision relating to fences by the sides of roads, nor was there anything in this Act which authorizes the erection of any obstruction across a road. The Fences Act, 1890, was only important for the better understanding of the Vermin Destruction Act, 1890. That Act (1,153) was divided into two parts. The first part imposed the duty of destroying vermin, including rabbits (section 3), on the occupiers and owners of land (section 7), and that duty extended to half of all roads bounding their lands (section 14). The first part of the Act also contained elaborate provisions for enforcing the performance of that duty (see Part I., sections 3-44). Then came Part II., which contained a series of enactments to facilitate the erection of vermin-proof fencing (see sections 45-71). On a petition signed by the owner or owners of land desiring assistance shire councils might obtain loans for enclosing lands with such fencing (sections 45 *et seq.*). Such lands formed special areas (section 46). If advantageous the lands of two adjoining owners might be enclosed with one vermin-proof fence instead of being separated by a dividing fence (see section 49 (6) and section 57). The provisions specially applicable to the erection of gates across roads were sections 57, 58, and 59. These were as follows:—

“Section 57. Any two or more owners of adjoining properties, with the sanction of the shire council if within a special area, instead of having dividing fences between such lands may enclose the whole of such adjoining lands with a continuous wire netting or other rabbit-proof or vermin-proof fence, having, when enclosing any road, swing gates covered with wire netting. 58. Any owner of land intersected with roads, with the sanction of the shire council, instead of having dividing fences between such land may enclose at his own expense the whole of such land with a continuous wire netting or other rabbit-proof or vermin-proof fence, having, when enclosing any road, swing gates covered with wire netting. Nothing in this or the preceding or following section shall authorize the enclosing as therein provided of any main road. 59. In enclosing any two or more adjoining properties with one continuous fence under this part of this Act it shall be lawful, with the approval in writing of the shire council, to erect such fence across any public road if in the opinion of such council such is not required for public use, and if a swing gate with wire netting be erected wherever the fence crosses such road. If any person wilfully damages or destroys any such fence or swing gate erected across any such road or elsewhere, or leaves any such swing gate open, or breaks or injures any wire netting or other rabbit-proof or vermin-proof fence or portion thereof, he shall, on conviction, be

liable to be imprisoned for any period not exceeding six months and to pay a penalty not exceeding £50.” The whole question before their Lordships really turned on the true construction of section 58. Mr. Justice Hood thought that it plainly covered this case. But the Court of Appeal regarded section 58 as confined to lands within special areas. That conclusion was arrived at by considering the position of section 58 between sections 57 and 59, which the Court read as confined to lands in special areas. The Court also thought that the words “instead of having dividing fences between such land,” which occurred in section 58, could have no meaning unless there was some duty to have such fences and that duty could only be found imposed on the owners of lands in special areas. The Court referred to section 49 as imposing such duty on them. Their Lordships were unable to follow that reasoning. The sections were not skilfully drawn. It did not appear to their Lordships that section 57 was confined to adjoining lands in “special areas,” although if they were in such areas the sanction of the shire council must be obtained, not only because section 57 said so, but also because of section 59. The necessity for saying so in section 57 might perhaps be accounted for by the fact that section 57 related not only to the crossing of roads but to the dispensation from the duty of having dividing fences as required by the Fences Act, 1890. Section 59 had no reference to that duty, but was confined to putting gates across roads. The two sections were not co-extensive in their operation, but both might be read as applying to the owners of adjoining properties, whether within special areas or not. The words in section 58, “instead of having dividing fences between such land,” were very obscure. Between such land and what? The section did not say. If roads were meant then section 49 imposed no duty to have any vermin-proof dividing fences in special areas only. The dividing fences there spoken of were dividing fences between adjoining properties. Roads were not mentioned, although, perhaps, they might be included. Dividing fences were required, and were only required, by the Fences Act, 1890; but that Act applied to all lands and not only to lands in special areas. If dividing vermin-proof fences were required in special areas it must be because the shire council found them necessary as a rule and required them accordingly. That they could do whenever their consent was necessary, whether special areas were concerned or not. Having carefully considered the various statutes and sections bearing on that question their Lordships had come to the conclusion that the construction put by the full Court on sections 57, 58, and 59 of the Vermin Destruction Act, 1890, was narrower than was required either by the language of those sections or by the objects sought to be attained by them. It appeared to their Lordships that, notwithstanding section 428 of the Local Government Act, 1890, vermin-proof swing gates could be lawfully put across roads other than main roads under the provisions of the Vermin Destruction Act, 1890, by owners of lands whether adjoining owners or single owners with the consent of the shire council whether such lands were in special areas or not. Their Lordships thought it as well to add that in their opinion the Act did not impliedly or otherwise authorize adjoining owners of lands out of special areas to put vermin-proof swing gates across roads without the consent of the shire council. Their Lordships would therefore humbly advise her Majesty to allow the appeal and to reverse the order appealed from. As regarded the costs of the proceedings in the colony, the appellants were not parties to them. The respondent must pay the costs of this appeal.

[Solicitors—St. Earle, Sladen, and Wing, for the appellants.]

Court of Appeal (A. L. Smith } 1900.
and Vaughan Williams, L.J.J.) } Aug. 4.

REG. V. MAYOR, &C., OF EASTBOURNE.*

Local Government—Public Health Act, 1875—
Public Health (Buildings in Streets) Act, 1888
—*Mandamus*—Discretion of local authority.

The Court will not order a *mandamus* to issue to compel a local authority to approve plans which, in the honest opinion of the local authority, contravene an Act of Parliament.

"Smith v. Chorley Rural Council" (13 *The Times* L.R., 327; [1897] 1 Q.B., 678), followed.

This was an appeal from the decision of the Divisional Court (Mr. Justice Ridley and Mr. Justice Darling) discharging a rule nisi for a *mandamus* (reported in *The Times* of May 14). The rule nisi was obtained by John Arthur Wright, calling upon the corporation of Eastbourne, as the urban sanitary authority, to show cause why a writ of *mandamus* should not issue, directed to them, commanding them to approve and signify in writing their approval of the building line as shown on the plans sent by John Arthur Wright to the corporation for the construction by him of a block of buildings for the purpose of residential flats upon certain land adjoining the house called Mixbury-house, situated at Hartington-place, in the borough. The corporation passed a resolution that the plans for the erection of the flats should be approved as complying with the by-laws, but disapproved as regards the building line shown on the plans, on the ground that the flats were shown on the plans as intended to be erected or brought forward beyond the front main wall of Mixbury-house, being a house on one side of and in the same street as the proposed flats. This was, in fact, a disapproval of the plans on the ground that the proposed buildings would contravene section 3 of the Public Health (Buildings in Streets) Act, 1888 (51 and 52 Vict., c. 52), which provides that "it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street. . . ." The section provides a penalty for every day during which the offence is continued. The Divisional Court discharged the rule for a *mandamus*, holding that, according to the decision in "Smith v. Chorley Rural Council" ([1897] 1 Q.B., 678), the matter was within the discretion of the corporation, and the Court could not interfere by *mandamus* with the exercise of that discretion. The applicant for the *mandamus* appealed.

Mr. MACMORRAN, Q.C., and Mr. B. A. HALL, for the appellant, said that by a by-law made under section 157 of the Public Health Act, 1875, plans of new buildings were required to be deposited with the local authority, and section 158 gave power to the local authority to approve or disapprove of the plans. The local authority could only disapprove of deposited plans upon the ground that they infringed a by-law. The remedy for an infringement of the statute was by proceedings for penalties under the statute before a magistrate. They referred upon this point to "Robinson v. Barton-Eccles Local Board" (8 App. Cas., 798, at p. 802); "Reg. v. Tynemouth Rural Council" ([1896] 2 Q.B., 451). Secondly, if the local authority had power to consider whether the plans infringed the statute, this Court could, by means of a prerogative writ of *mandamus*, consider whether the local authority were right in saying that the proposed new building was in a street, and that it was

being brought forward beyond the front main wall of the building on either side. It would be most inconvenient that a builder's only course should be, first to erect the building, and then to have it determined by a magistrate whether the building infringed the statute. They referred to "Smith v. Chorley Rural Council" ([1897] 1 Q.B., 678).

Mr. C. A. Russell, Q.C., and Mr. Boxall, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that it was admitted that no by-law of the corporation had been infringed. When the plans were deposited, the corporation, in good faith, came to the conclusion that the proposed buildings would contravene section 3 of the Public Health (Buildings in Streets) Act, 1888. In his Lordship's opinion, a *mandamus* ought not to issue to command the local authority to approve plans which the latter honestly considered were in contravention of the statute. How could the Court call upon a local authority to approve plans which, at all events in the opinion of the local authority, were in the teeth of the Act of Parliament? The case came within what Lord Justice Chitty said in "Smith v. Chorley Rural Council," "They (the district council) had jurisdiction in the matter, which they honestly exercised, and it was part of the question before them whether the building of the new houses amounted to laying out a new street. It is apparent that the object of the action is that the High Court may review the decision arrived at by the district council and overrule it. In my opinion, such an action will not lie." For these reasons the appeal must be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Herbert Reeves and Co.; Sharpe, Parker, and Co., for H. W. Fovargue, Town Clerk, Eastbourne.]

Chan. Div. } 1900.
(Stirling, J.) } Aug. 4.

IN RE CHAYTOR.*

Settled Land Act, 1882—Tenant for life—Settlement—Waste—Open mine.

A tenant for life may work open mines although power so to do is not conferred by the settlement.

The question in this case was whether a tenant for life (who by the terms of the settlement was not made impeachable for waste) was to be so treated for the purposes of section 11 of the Settled Land Act, 1882, with respect to open mines which he was entitled to work for his own benefit. The question arose upon an originating summons taken out by Sir William Chaytor, who was tenant for life under the will of Mr. Henry Chaytor, deceased, dated June 16, 1897, of certain estates in the county of Durham which contained minerals. The summons first asked for a declaration that certain mines forming part of the settled estates agreed to be leased by Sir William Chaytor under an agreement dated March 30, 1899, were opened mines. This was a question of evidence, and his Lordship came to the conclusion that two of the mines, called the Busty and Brockwell seams, had been worked by the testator and were opened mines, while as to another, the Victoria seam, it was admitted that it had never been worked, and it could not therefore be treated as open. The next question was whether one-fourth part only of the rent to be reserved under the lease to be granted under the above-mentioned agreement ought to

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

be from time to time set aside as capital money arising under the Settled Land Acts. That question arose under section 11 of the Settled Land Act of 1882, which provides as follows:—"Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside as capital money arising under this Act, part of the rent as follows—viz., where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits." The question was whether as regards open mines the tenant for life was impeachable for waste within the Act.

Mr. Upjohn, Q.C., and Mr. Fisher Williams appeared for the tenant for life; and Mr. N. Pearson for the trustees.

MR. JUSTICE STIRLING, in delivering his considered judgment, said:—A tenant for life under a settlement may have a title to work mines for his own benefit by virtue of a power conferred on him by the settlement. A tenant for life may work open mines although power so to do is not conferred by the settlement; the title to do so is, however, derived from the intention of the settlor, inferred from the use made of the property previously to the settlement. This is well explained by Lord Justice Lindley in "*In re Ridge—Hellard v. Moody*" (31 Ch.D., at p. 508), where he said:—"As between a tenant for life and remainderman, money paid by a lessee as the price of land won, or carried away and sold by the lessee in the shape of minerals, stones, or bricks, is always treated as capital, and not as income, unless the settlor has expressed an intention to the contrary by making the tenant for life unimpeachable for waste, or by some other expression; or unless at the time of the settlement the mines and minerals let were open, in which case an intention to the contrary is inferred unless such inference is inconsistent with the language of the settlement." And in "*Dashwood v. Magniac*" ([1891] 3 Ch., at p. 360) Lord Justice Bowen said:—"Cases in which the usufructuary is allowed to treat minerals as annual fruits or produce of the soil are common to ancient and modern jurisprudence. The open mine is an instance, beginning in the Roman, but familiar already to the English law as far back as the reign of Edward III. It is important, however, to observe that the open mine does not constitute an arbitrary exception to real property law. It is merely an instance of the application of a well-known principle of construction in virtue of which grants of mineral land are given such force and effect as is reasonably necessary to carry out the obvious intentions of the grantor. The grantor was absolute master of his property, and could carve the lands which were the subject of his grant into such estates and interests as he pleased. It is, therefore, from his presumed will and intention that the result in the case of the open mine follows." A tenant for life, entitled to work mines, may, in my judgment, be properly described as not impeachable for waste in respect of the minerals got from such mines, whether the power arise from the terms of the settlement or from the circumstance that the mines are open. Now section 11 of the Settled Land Act, 1882, prescribes that when the tenant for life is impeachable for waste in respect of minerals three-fourth parts of the rent, and otherwise one-fourth part, shall be set aside as capital money under the Act. It is contended that in order that the tenant for life may not fall under the description of "impeachable for waste in respect of minerals" he must be expressly declared by the settlement to be unimpeachable for waste. That is not the language of the Act; but it is said to be the proper construction of it by reason of the

generality of the language "in respect of minerals," not "such minerals" or "the minerals." The word "minerals" cannot, however, mean any minerals whatsoever; some limitation must be put upon it; and the choice seems to be between minerals comprised in the settlement and minerals the subject of such a lease as is contemplated by section 11. The latter seems to me the more natural interpretation. It is said, however, that this construction gives no effect to the words in the early part of the section—"whether the minerals leased are already opened or in work or not." It is a sufficient answer, in my judgment, that those words serve to remove any doubt which in their absence might arise as to whether the section was meant to apply to opened mines. I think that, at all events, the language of the section admits of the two interpretations which I have mentioned. In considering which ought to be adopted regard may be paid to the consequences of adopting one or other of them. If the tenant for life must be made expressly unimpeachable for waste in order to obtain the benefit of section 11 then a distinction is drawn between an express authority and an implied authority to commit waste, for which I have been unable to discover any solid foundation. Moreover, under the provisions of the Settled Estates Act, 1877 (an Act which is still in force and to which tenants for life may have recourse) mining leases may be granted (though for a shorter term than under the Settled Land Act) upon the condition that only one-fourth of the rent is set aside as capital; and I am again unable to discover why such a difference should exist according as one Act is resorted to or the other. On the whole, I think that the preferable view is that the tenant for life in this case is under an obligation to set apart one-fourth and not three-quarters of the rent as capital money.

[Solicitors—Tarry, Sherlock, and King, agents for Trotter, Bruce, and Trotter, Bishop Auckland.]

Chan. Div. }
(Farwell, J.) }

1900.
Aug. 4.

IN RE LORD DE CLIFFORD'S ESTATE—LORD DE CLIFFORD
V. QUILTER.*

Judicial Trustees Act, 1896—Executors—Personal liability—Honest and reasonable conduct.

This was a summons which raised an important question concerning the liability of executors as affected by section 3 of the Judicial Trustees Act, 1896.

The summons was taken out on behalf of the Right Hon. Jack Southwell, Baron de Clifford, against Algernon Charles Fountaine and Arthur Francis Thomas Cooper, the executors of the late Lord de Clifford, for the payment into Court by them of a sum of £1,545 ls. 11d. found due from them by the Master's certificate dated March 23, 1900, and made in an action to administer their testator's estate. The late Lord de Clifford died on April 6, 1894, and his will was proved on May 15, 1894, by the above-named executors, power being reserved to Edward Frederick Quilter, but he subsequently renounced probate. An action for the administration of the testator's estate was commenced on April 14, 1894, and the ordinary administration decree was made on January 21, 1895. From the time of the commencement of their executorship—viz., since 1894, the executors of the will employed Messrs. Ingram, Harrison, and Ingram as their solicitors until November, 1899, when a receiving order was made against the firm. The administration of the testator's estate was much delayed on account of arrears of Irish rents which could

*Reported by W. H. PORTER, Esq., Barrister-at-Law.

not be got in, and the estate itself was also subject to considerable liabilities, including (*inter alia*) £2,500 for debts, £1,100 for payment of an annuity, and £600 for death duties. Messrs. Ingram, Harrison, and Ingram from time to time received moneys and made disbursements on behalf of the executors, and it was necessary for the firm to retain moneys in hand for the purposes of such disbursements. The executors had their own banking account, but all moneys received by the firm on behalf of the executors and which were not paid into the executors' account were received by them or paid by the executors to them on the express statement by Mr. Harrison, a member of the firm, that the money was required for payment of the debts and other liabilities. The payments so made by the executors to the firm included a sum of £208 11s. 9d. on October 28, 1895, and a sum of £367 1s. 7d. on February 10, 1896. The executors' first account, which included the last-mentioned items, was not brought in until January, 1898; other accounts were subsequently brought in, and by the order on further consideration of June 24, 1899, the executors were ordered to pay into Court the sum of £789 1s. 3d. At an interview in August, 1899, Mr. Harrison referred to various accounts, and informed the executors that all the moneys received by the firm on their behalf had been expended, and that in order that the £789 1s. 3d. might be paid into court it would be necessary for the executors to draw a cheque on their own account for the amount. The executors, relying on this statement, drew the cheque, and the amount was paid into Court. Up to the time of their bankruptcy Messrs. Ingram, Harrison, and Ingram had received in all the sum of £6,117 17s. 1d. on account of the executors, and had thereout paid or applied the sum of £5,685 10s. Of the sum of £1,545 1s. 11d. found due on the Master's certificate as above-mentioned, the executors had only £1,015 6s. 6d. in their names at their bank, leaving a balance of £529 15s. 5d. to be accounted for by them. It was doubtful whether anything but a very small dividend would be recovered from the estate of Messrs. Ingram, Harrison, and Ingram.

Mr. INGLE JOYCE appeared on behalf of the plaintiff, and submitted that as this was not a breach of trust, but simply a matter of common account, the executors could not claim the benefit of section 3 of the Judicial Trustees Act, 1896.

Mr. VAUGHAN-HAWKINS, on behalf of the executors, contended that as the estate was being wound up under the supervision of the Court the executors, who were merely laymen not versed in legal proceedings, were justified in leaving themselves in their solicitors' hands. He submitted that they were entitled to the full benefit of the Act, and he further relied on "*Bacon v. Bacon*" (5 Ves., 331); "*In re Kay*; *Mosley v. Kay*" ([1897] 2 Ch., 518), and "*In re Speight*; *Speight v. Gaunt*" (22 Ch.D., 727) in support of his contention.

MR. JUSTICE FARWELL.—The question raised is one of great difficulty. The Legislature has given to the Court a dispensing power under the Judicial Trustees Act, 1896, in cases where a breach of trust has been established—that is to say, that when once a breach of trust has been committed the Court has power if it thinks that the trustee "has acted honestly and reasonably, and ought fairly to be excused for the breach of trust," to relieve the trustee either wholly or partly from personal liability for the same. Now, relief against the stringency of the rules of the common law was an old head of equity with which the Courts of Chancery were familiar. Courts of equity have long been accustomed to relieve against forfeiture at common law. They regarded forfeiture as intended to be the means by which some particular Act was to be enforced, but they did not relieve against forfeiture unless they could give the person entitled to the forfeiture the full benefit of the

contract. In such cases the relief was based on some intelligible principle, but no such principle underlies the present case. It is a novel expedient to call in the Courts of equity to relieve, not against the stringency of the common law, but against their own principles. Equity has its rules against honest trustees, but the Legislature by this Act enables Courts of equity to relieve against their own rules. No such principles as were applied to relief against the common law rules are applicable to the present case, and there is no other principle to serve me as a guide. I have to find as a fact whether or not the trustees "acted honestly and reasonably and ought fairly to be excused," and I have to bear in mind that if I grant the trustees the relief which they ask I shall be doing so at the expense of the *cestui que trust*. The real difficulty is that, without any rule to guide me, I have to say what is fair and right as between beneficiaries who trust their money to trustees and trustees who act gratuitously. [His Lordship then reviewed the facts of the case as above set out, and continued as follows.] The executors employed Messrs. Ingram, Harrison, and Ingram as their solicitors. At that time this firm stood high in repute and one of the partners was a personal friend of Mr. Cooper's. From time to time large sums of money were received by the firm and applied in payment of duties, debts, and other disbursements payable in respect of the testator's estate. There are two questions which I have to determine. In the first place, were the payments by the executors to their solicitors in October, 1895, and February, 1896, of the balances of their Irish banking account amounting to £208 11s. 9d. and £367 1s. 7d. justified? The other question arises out of the following circumstances:—In August, 1899, the executors had an interview with Mr. Harrison, and after referring in their presence to his account books, he told them that the whole of the money with which his firm had been entrusted had been expended on behalf of the estate and nothing was left, and that they must draw a cheque on the other account, which they had in their own names, in order that the £789 1s. 3d. might be paid into Court. In the circumstances, were the executors justified in relying upon the statement of their solicitors? Now, with regard to the first question, there is no doubt that the executors did entrust to their solicitors very large sums of money, but the solicitors had down to that date properly discharged themselves in respect of all the sums previously received by them. In his affidavit Mr. Cooper says as follows:—"During the course of these proceedings we were compelled to rely on the advice and information given us by Mr. Harrison, a member of the said firm, and in reference to each of the items mentioned" in the executors' first account "we were in each case from time to time expressly informed by Mr. Harrison that the amounts so received by his firm on our behalf and retained by them were required and necessary to be so retained to be applied under the direction of the Court in satisfaction of the debts which were, and which we knew to be of considerable amount, owing by the late Lord de Clifford, and for disbursements, such as estate duties, and the payment of an annuity, for costs, and for the proper management of the Irish estates belonging to him. We believed the said firm to be of high standing and quite solvent and relied upon the statements to us by Mr. Harrison that the amount in each case retained in their hands was required to be expended and was being expended as aforesaid." Now, it has been found as a fact by the Master's certificate, that a balance of £1,545 1s. 11d. is due from the executors on their final account and they have been charged with the balance so found due. In my opinion, I cannot say that the executors acted unreasonably in relying upon the statement of their solicitors that the first sum of £208 11s. 9d. was required by the firm for the

purposes of discharging the liabilities of the testator's estate, and I should be acting with harshness if I did not apply the same principle to the other sum of £367 1s. 7d. which was paid by them in reliance upon a similar statement by their solicitors. They were truly told by their solicitors that these sums were wanted, and the sums were in fact applied for the payment of large sums for estate duties. Moreover, there was at the time an untaxed bill of costs due from the executors to the solicitors who had debited their clients with payments amounting to £614 6s. 7d. in respect of this bill, which has subsequently been taxed at £537 15s. 6d. In the circumstances, I do not see that the executors were guilty of unreasonable foolishness in handing over to their solicitors this total sum of £575 13s. 4d. when they were told that it was wanted for the purposes of the administration of the estate and when in fact some of it was employed for those purposes. I pass on now to consider the other question which I have to determine, and with regard to that I think *Mr. Vaughan-Hawkins* was right in relying upon "*Bacon v. Bacon*." These two executors went to their solicitors who told them that the whole of the money received by the firm had been worked off. Now, was that statement so unreasonable that the executors should have asked then and there for a full account from their solicitors? I think not. *Mr. Harrison* was not asking them to pay this money to him or his firm, but to pay it into Court. The executors could not on that occasion very well have said, "We will employ some one to look into your accounts and see whether they were satisfactory." That would not, in my opinion, have been reasonable. Taking into consideration the fact that the firm had been acting for the executors for the last five years, I do not think that the latter could have reasonably refused to do as they were asked. In "*Bacon v. Bacon*" it was held that an executor was not liable for sums remitted by him to his co-executor, who had been employed by the testator as his solicitor, upon the statement by the latter that he had exhausted all the funds in his hands in payment of the testator's debts. Where there are favourable circumstances, as in "*Bacon v. Bacon*," and where a man has acted with reasonable diligence, the Court does not hold him liable for loss incurred. For instance, a mortgagee, who parts with the title deeds upon a statement that the mortgagor wants them for a reasonable purpose, and who tries to get them back with reasonable celerity, does not lose his priority. In the circumstances, I have come to the conclusion that the executors have acted honestly and reasonably and ought fairly to be excused from personal liability. The objection raised by *Mr. Ingle-Joyce* that this was not a breach of trust, but a mere matter of common account and therefore did not fall within the Judicial Trustees Act, 1896, is, in my opinion, effectually disposed of by the case of "*In re Kay*," and by subsection 2 of section 1 of the Act, which says "The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act." I think each side must pay its own costs.

[Solicitors—Wing and Eadie, for the plaintiff; Cheston and Sons, for the defendants.]

Q.B. Div. } 1900.
(Wright, J.) } Aug. 4.

WARREN AND OTHERS V. BROWN.*

Prescription—Ancient lights—Ordinary limits.
The right to ancient lights acquired by statutory prescription is ordinarily limited to a

sufficient quantity of light for all ordinary purposes of inhabitancy or business.

This was an action for an injunction to restrain the defendant from darkening, injuring, or obstructing the lights of premises owned by the plaintiffs in Bakehouse-lane, Leicester, and for an order that the defendant should pull down a wall now in course of erection, and for further relief. The case was tried at Leicester Assizes, when judgment was reserved. The facts are set out in the judgment.

Mr. Hugo Young, Q.C., and *Mr. W. H. Stevenson* appeared for the plaintiffs; and *Mr. Stanger, Q.C.*, and *Mr. Neilson* for the defendant.

MR. JUSTICE WRIGHT.—This case raises a question of general importance in relation to ancient lights—namely, whether the right which is acquired by statutory prescription is a right to the continuance of substantially the whole quantity of light which has come to the windows during the 20 years, or is ordinarily limited to a sufficient quantity of light for all ordinary purposes of inhabitancy or business. It seems strange that such a question should be still open for discussion, but there is a considerable body of authority in favour of either proposition. The facts are these. The plaintiffs, as the owners and the tenant of a building in the town of Leicester, claim damages and an injunction in respect of the obstruction of the access of light to windows more than 20 years old. At the trial the claim was limited to two rooms, one on the ground floor and the other above the former, both facing to the south. For a length of about 17ft. in front of these rooms the defendant has raised his own building from a height of about 20½ft. to about 26ft., but has set it back about 2ft. or 3ft., so that the width of the street between the two buildings, which was about 17ft., is now about 19ft. Four out of five windows in each of the two rooms are opposite to that part of the defendant's building which I have mentioned. These windows are large and high. Those of them which are on the ground floor are, and for years have been, glazed with fluted glass for about half their height from the bottom. In addition to the front light both rooms receive much side light, especially from the east and east-south-east, from a wide street running north and south at a distance of about 50ft. to 70ft. Light is not in any direction cut off by very high buildings. To the south-east the defendant has taken down a high chimney stack, which to some extent used to intercept the light from that quarter. I find that the defendant has not obstructed or diminished to any material extent, if at all, the light coming to the upper of the two rooms in question. As regards the four windows on the ground floor, I find that the defendant has materially diminished the light which the plaintiffs enjoyed for those windows for 20 years past, but that abundant light remains for all ordinary purposes of inhabitancy or business. The room in its present state is better lighted than the ground floor rooms in many of the principal streets. The plaintiff *Baum* (the lessee of the premises), has during some years, but much less than 20 years, carried on in the premises, and particularly in the ground floor room in question, a manufacture of hosiery by means of machinery which requires a very exceptional quantity and quality of light for the continued and accurate adjustment of filaments to fine needles moving at speed in bundles of some hundreds. Before this manufacture was established at these premises a different industry (manufacture of boots and shoes) requiring good, but not special or extraordinary, light was carried on there. I find that the defendant has by the acts complained of diminished the light so that it is now materially insufficient during

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

some part of the day for the special requirements of the plaintiff Baum's industry. I find that the plaintiffs' premises have throughout the 20 years before action been suitable for such a manufacture as that now carried on by Baum, and that the kind of manufacture is and has long been common in the district, and has for 20 years past required more light than most other industries, but not until the last few years in so high a degree as at present, the older machines having been less delicate and complicated. I think that the light as it now exists would have been sufficient for any but the most recent kinds of machines. In my judgment no sufficient case for a mandatory injunction is made out in any view of the plaintiffs' rights. The inconvenience to which Baum was subjected can be, and to a great extent it has been, obviated by the removal of machines to the upper room, and in any case it can be remedied by some increased expenditure for gas. The question is whether the plaintiffs are entitled to damages. If they are, I assess the amount at £100 for the tenant and £200 for the reversioners. There are scarcely any authorities bearing on the question until 1865. It appears from Aldred's case (9 Rep., 57b) that the nature of the cause of action in the case for infringement of rights to light was not clearly settled. It is classed with actions for nuisance, and the pleading closes with "quod messagium horrida tenebratate obscuratum fuit"; but a prescription is alleged. In Luttrell's case (4 Rep., 86a) it is laid down that (as was afterwards established by "Yates v. Jack" (L.R., 1 Ch., 295), and other cases), "if a man has an old window to his hall and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house." In 1752, in "Fishmongers' Company v. East India Company" (1 Dickens, 163), Lord Hardwicke said:—"It is not sufficient to say it will alter the plaintiff's lights, for then no vacant piece of ground could be built on in the city; and here will be 17 ft. distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground." In "Martin v. Goble" (1 Camp., 320) a malt-house with ancient windows was occupied for seven years as a poor-house. McDonald, C.B., directed the jury that "the house was entitled to the degree of light necessary for a malt-house, not for a dwelling-house. The converting it from one into the other could not affect the rights of the owners of the adjoining ground. No man could by any acts of his suddenly impose a new restriction upon his neighbours." In "Attorney-General v. Nichol" ([1809] 16 Ves., 338), Lord Eldon (Lord Chancellor) says:—"There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an action upon the case; which, however, might be maintained in many cases which would not support an injunction." In "Beck v. Stacey" ([1826] 2 C. and P., 465) Chief Justice Best directed the jury that in order to ground an action there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) as beneficially as he had formerly done. In the 40 years after "Beck v. Stacey," there seem to have been few or no decisions bearing on the question; but in 1865 in "Clarke v. Clark" (L.R., 1 Ch., 16) the question was distinctly raised for the first time. Then Lord Cranworth refused an injunction in a case in which exceptionally good light had been materially diminished, saying that the plaintiff must show such an obstruction "as to interfere with the ordinary occupations of life." He proceeded

to draw a distinction between town and country, which has not been fully adopted in later cases. In "Durrell v. Pritchard" ([1865] L.R., 1 Ch., 244) and "Robson v. Whittingham" (L.R., 1 Ch., 442), Lords Justices Knight, Bruce, and Turner adopted the language of Lord Cranworth. In "Yates v. Jack" ([1866] L.R. 1 Ch., 295) Lord Cranworth established the rule which has ever since that case been recognized as settled, so far, at any rate, as ordinary purposes of inhabitation or business are concerned, that the owner of ancient lights is entitled to have them protected without reference to the particular purpose for which they were enjoyed during the 20 years; and he does not apparently draw any distinction between ordinary and extraordinary purposes. In the same year in "Dent v. Auction Mart Company" (L.R., 2 Eq., 238) Vice-Chancellor Wood established another rule that an injunction would not be granted in equity unless the case is a proper one for substantial damages at law. Having referred to "Martin v. Headon" (L.R., 2 Eq., 425) and "Calcraft v. Thompson" (15 W.R., 387) his Lordship proceeded:—"In 'Lanfranchi v. Mackenzie' (L.R., 4 Eq., 421) it was held by Vice-Chancellor Malins that where ancient windows had received an extraordinary amount of light during the 20 years and the plaintiff had used it for a purpose requiring extraordinary light (examination of silks) for only a portion of that period, he had no right to an injunction on the ground of an obstruction which left him enough light for all ordinary purposes, though not enough for extraordinary purposes. He thought, however, that if the plaintiff had been 'in the enjoyment of an extraordinary user for 20 years, that would establish the right against all persons who had reasonable knowledge of it.'" In 1871, in "Kelk v. Pearson" (L.R., 6 Ch., 809), Lord Justice James said:—"On the part of the plaintiff it was argued before us that this was an absolute right, that now, under the statute 2 and 3 William IV., c. 71, he had an absolute and indefeasible right by way of property to the whole amount of light and air which came through the windows into his house; and that he could maintain an action at law or a suit in equity upon that absolute legal right; and the only question as to the effect or extent of his right would be with regard to the discretion of this Court in considering whether it was a case for damages, or to be interfered with by way of injunction. Now, I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of the house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable." Lord Justice Mellish concurred, but dissented from that part of Lord Cranworth's judgment in "Clarke v. Clark" which suggested a possible difference between town and country. In 1873, in "Dickinson v. Harbottle" (28 L.T., 186), Vice-Chancellor Malins followed his own decision in "Lanfranchi v. Mackenzie." The question was again raised in the Court of Appeal in "City of London Brewery Company v. Tennant" (L.R., 9 Ch., 212) before Lord Selborne (Lord Chancellor) and Lords Justices James and Mellish. Lord Justice James said:—"In the case of 'Kelk v. Pearson' the Lord Justice and myself endeavoured to express what we thought to be the rule applicable to these cases, and I believe the Lord Chancellor entirely agrees with the mode in which

it is there expressed. We only repeated in different words what is to be found in many previous cases—that the extent of the right of an owner of ancient lights is to prevent his neighbour from building so as to obstruct the access of sufficient light and to such an extent as to render the house substantially less comfortable and enjoyable.” Lord Selborne (Lord Chancellor) said, “I agree with the judgment which Lord Justice James has delivered,” expressly adhering to the language in “*Kelk v. Pearson*,” and adding that the supposed rule as to 45deg. is no rule of law, but that if 45deg. of light is left that is some *prima-facie* evidence of the light not being obstructed to such an extent as to call for the interference of the Court. In “*Leech v. Schweder*” ([1874], L.R., 9 Ch., 463) Lords Justices James and Mellish held that there was no difference in extent and nature between the right acquired under the statute and a right acquired by “the disposition of the owner of two tenements,” and that “practically there is no difference with respect to light in the amount of damage which would entitle a person to maintain an action at law and that which would entitle him to file a bill in equity.” In “*Aynsley v. Glover*” ([1874] L.R., 18 Eq., 544; L.R., 10 Ch., 283), per Sir G. Jessel (Master of the Rolls), it was finally settled that the right to light for a room is not limited by the fact that before the obstruction the room was used for purposes requiring little of the light which came to it, and “*Back v. Stacey*,” as amended by Vice-Chancellor Wood, is approved; but the case does not seem to contain anything affecting the present question; nor are there any criticisms on “*Kelk v. Pearson*” or “*City of London Brewery Company v. Tennant*.” There are no subsequent reported decisions of the Court of Appeal which are in point, and the last-mentioned decision of that Court would, as I understand it, be decisive of the matter, subject only to review in the Court of Final Appeal. This view, however, seems not to have been universally adopted, a different view having been apparently taken by the Court of Appeal in Ireland, by the whole or a majority of a Divisional Court in England, and in two or three cases by my brother Kekewich. His Lordship then referred to “*Moore v. Hall*” ([1878] 3 Q.B.D., 178), in which Mr. Justice Mellor and Mr. Justice Manisty appear to have held that the plaintiff’s right is to have the light flow in the same quantity as through the period of prescription; to “*Mackay v. Scottish Widows’ Society*” ([1877] 11 Ir. R., Eq., 341), in which Lord Justice Christian laid it down that “the right is to an average *maximum* of the light which nature has been shedding on the window for 20 years before the defendant interrupted it”; and to “*Lazarus v. Artistic Photographic Company*” ([1897] 2 Ch., 214), in which Mr. Justice Kekewich held that the plaintiff was entitled to be protected in the enjoyment of extraordinary light for photographic purposes, although he had not been using it for those or other purposes requiring extraordinary light for the full period of 20 years. His Lordship proceeded:—In this state of the authorities I think I must take it that the law is laid down in “*City of London Brewery Company v. Tennant*,” agreeing as that case does with the criterion expressed by Lord Cranworth in “*Clarke v. Clark*,” and that the plaintiffs, having an abundance of light left for all ordinary purposes of inhabitation or business, are not entitled to relief on the ground that their extraordinary use has been interfered with. Unless, indeed, there is some such limitation of the right to light for ancient windows it is difficult, as Lord Hardwicke observed in effect in “*Fishmongers’ Company v. East India Company*,” to see how the ordinary extensions and improvements of towns could be carried on. If every house which has existed for 20 years is entitled to have all, or substantially all, the same light come to its windows as during the 20

years, no new houses could be built opposite to old ones unless at a distance which would impose on servient tenements an unreasonable burden, and might involve grave public inconveniences. Nor, if that were law, could there well be any presumption that so long as 45deg. of light, or some approximate angle, is left there is no actionable wrong. It is not necessary in the present case to consider the question raised in “*Laufanchi v. Mackenzie*,” whether a right to an extraordinary quantity of light for extraordinary purposes can be acquired by prescription.

Judgment was accordingly entered for the defendant with costs.

House of Lords (Lord Halsbury, L.C., } 1900.
Lords Davey, James of Hereford, }
Brampton, and Robertson) } Aug. 6.

WALTER V. LANE.*

Copyright — Newspaper — Reports of public speeches — “Author” — Copyright Act, 1842 (5 and 6 Vict., c. 45), secs. 2, 3, 18.

The copyright of *verbatim* shorthand reports of speeches can exist in the reporter as the “author” thereof and by assignment in the proprietor of the newspaper in which such reports appear.

Decision of the Court of Appeal (*ante*, p. 27) reversed.

Their Lordships gave judgment in this copyright appeal, in which the question was whether or not copyright can, under the Act of 1842, exist in respect of *verbatim* reports of speeches in the reporter and by assignment in the proprietor of the newspaper in which such reports appear. It will be seen that four of the noble and learned Lords have upheld the claim to copyright in such cases, Lord Robertson being the only dissentient. Thus the judgment of the Court of Appeal, reported *ante*, p. 27: L.R. [1899], 2 Ch., 749; 68 L.J., Ch., 760, has been reversed, and that of Mr. Justice North restored. Mr. Justice North granted an interim injunction restraining the defendant—respondent in the House of Lords—from infringing the appellants’ copyright. Before the Court of Appeal it was agreed that the motion should be treated as the trial of the action, and their Lordships have accordingly made the injunction perpetual. The arguments on the present appeal were reported in *The Times* of July 21 and 24, and on their conclusion judgment was reserved.

Mr. Joseph Walton, Q.C., Mr. Henry Terrell, Q.C., and Mr. MacSwiney were counsel for the appellants; Mr. Birrell, Q.C., and Mr. Scrutton for the respondent.

THE LORD CHANCELLOR.—My Lords, I should very much regret if I were compelled to come to the conclusion that the state of the law permitted one man to make profit out of and to appropriate to himself the labour, skill, and capital of another. And it is not denied that in this case the defendant seeks to appropriate to himself what has been produced by the skill, labour, and capital of others. In the view I take of this case, I think the law is strong enough to restrain what, to my mind, would be a grievous injustice. The law which I think restrains it is to be found in the Copyright Act; and that Act confers what it calls “copyright,” which means the right to multiply copies, on the authors of the books first published in this country. That the publication in question—namely, reports of Lord Rosebery’s speeches—are simply copies of what was first printed in *The Times* newspaper is not denied. And, further, it has not been, and cannot be, denied

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

that they were originally as in *The Times* a sheet or sheets of letterpress, and came within the definition of the Act as a book. The speeches, therefore, and the sheets of letterpress in which they were contained were books first published in this country, and I confess, upon looking at the definition and the right conferred, I am wholly unable to discover why they are not protected by the statute from being pirated by unauthorized persons. The sole ground, as I understand the judgment of the Court of Appeal, is that in their judgment the producer of a written speech, unless he is the original speaker, cannot be an author within the meaning of the Act. My Lords, it seems to me that this argument is based upon too narrow and misleading an interpretation of the word "author." In my view, the statute has not meant so to confine it, and I do not understand the explanation the Court of Appeal gives of the application of the word "author" to such publications as directories, Red-books, maps, &c. I observe the Court of Appeal uses the word "analogy" as applicable to such questions. To my mind, it is no analogy at all. If the maker of a directory, Red-book, or a map is an author, one has to analyse what in such cases is the distinction between the author as thus referred to and the author of a spoken speech. The language of the Court of Appeal is:—"Each man who himself makes a directory, &c., and publishes it is the author of what he publishes. The reporter of a speech is not." With great respect to the Court of Appeal, this is allegation, not argument. The judgment goes on to say that "the distinction is all-important," but it does not explain what the distinction is. For my own part, I am unable to discover it. A man goes along a street, collects the names, addresses, and occupations of each dweller therein. What is the original composition of which, according to the Court of Appeal, he is the author? The name of the street? The numbers of the street? The names of the dwellers in the several houses? What is the distinction which the Court of Appeal makes in giving copyright to the result of this labour and reducing it into writing? What is it that makes it an original composition? But further—Where do the words "original composition" come from? If the producer of such a book can be an author within the meaning of the Act, I am unable to understand why the labour of reproducing spoken words into writing or print, and first publishing it as a book, does not make the person who has so acted as much an author as the person who writes down the names and addresses of the persons who live in a particular street. I observe that the Court of Appeal introduces the words "original composition" as if those were the words of the statute; and, at another part of the judgment, it is said that—"The report and the speech reported are, no doubt, different things, but the printer or publisher of the report is not the 'author' of the speech reported, which is the only thing which gives any value or interest to the report." The sentence is a little difficult to construe, but, as I understand it, it means to convey that the thing to which the statute gives protection must be of some value or interest. Again, I am compelled to point out that such words are not to be found in the statute. The producer of this written composition is, to my mind, the person who is the author of the book within the meaning of the statute; and, as I have pointed out, the words "original composer" are not to be found in the statute; and, as I understand, the judgment of the Court of Appeal is entirely based on the thing protected being an original composition in the sense that the person who claims the protection of the statute must not have obtained his words or ideas from somebody else but must be himself an original author in the sense in which that word is generally used in respect of literary composition. I have been anxious to confine

my views at present simply to the words of the statute, because it appears to me that once this thing, in respect of which the controversy has arisen, comes within the language of the statute, it lies on those who deny the existence of the right to show why the protection of the statute does not apply. As I have pointed out, the judgment of the Court of Appeal rests solely on the use of the word "author," and I cannot help thinking that some confusion has been created between two very different things: one the proprietary right of every man in his own literary composition and the other the copyright—that is to say, the exclusive privilege of making copies created by the statute. If the question here were whether there was the right to publish at all a speech made by some one who did not himself publish it, questions like those determined in this House in "*Caird v. Sims*" (12 App. Cas., 326) might arise. Whether the speech was delivered so as to give it to all the world and to prevent the original author of it from restraining its publication, is a question with which your Lordships have here no concern. Lord Rosebery is not here complaining of the publication of it, nor claiming any proprietary right in the speeches as delivered. The question here is solely whether this book (to use the language of the statute), printed and published and existing as a book for the first time, can be copied by some one else than the producers of it (I avoid the use of the word "author"), by those who have neither produced it themselves, but have simply copied that which others have laboured to create by their own skill and expenditure. My Lords, I cannot help thinking that underlying the argument which has been addressed to us there is something of the contention which was boldly made nearly half a century ago in the case of "*McLean v. Moody*" in the Court of Session where—relying on the preamble—the advocate argued that the object of the statute of Victoria was to encourage literary merit; that the intellectual labour constituting authorship was alone thereby protected, and that there could be no authorship without an author. Lord Deas refused to accept such an argument, and expressed the opinion that the Act did not confine the privilege to cases in which there was a known author. But it appears to me that, although it may be true that a preamble may be a guide to the general objects of the statute, it undoubtedly can neither restrict nor limit express enactment. And though I think in these compositions there is literary merit and intellectual labour, yet the statute seems to me to require neither—nor originality in thought. It is admitted apparently by the Court of Appeal (and indeed insisted on as part of the reasons for their judgment) that the owner of an unpublished manuscript, although not the author of it, acquires copyright in it by first publishing it. And I observe that it is said Lord Rosebery had no copyright in his speech, and, although he could have acquired copyright in it by putting it into writing and printing and publishing it, he did not do so. Here again the implied proposition is that the only person who could gain copyright in his speech is the person who spoke it, and that the word "original" must, by construction, be read into the statute—that the true analogy is the "true and first inventor" of the Patent Laws. I think the analogy is a false one. I do not find the word "original" in the statute, or any word which imports it as a condition precedent or makes originality of thought or idea necessary to the right. But if the analogy were strictly pursued, I think it would not be favourable to the defendant. An importer of a foreign invention is, for the purpose of the Patent Laws, an inventor, and, as Lord Brougham said in "*In re Berry's Patent*" (7 Moore's P.C. Reports, 187), there were "two species of public benefactors—the one those who benefit

the public by their ingenuity, industry, and science and invention and personal capability; the other those who benefit the public without any ingenuity or invention of their own by the appropriation of the results of foreign inventions. Now, the latter is a benefit to the public incontestably, and therefore they render themselves entitled to be put upon somewhat if not entirely the same footing as inventors." (An interesting discussion of this question will be found on page 98 of Wallace and Williamson's Patent Law Cases, just published.) I might paraphrase Lord Brougham's language by asking whether those who preserve the memory of spoken words which are assumed to be of value to the public are not entitled to the analogous merit which Lord Brougham attributes to the importer of foreign inventions. My Lords, if I have not insisted upon the skill and accuracy of those who produce in writing or print spoken words, it is not because I think the less of those qualities, but because, as I have endeavoured to point out, neither the one nor the other is a condition precedent to the right created by the statute. That right, in my view, is given by the statute to the first producer of a book, whether that book be wise or foolish, accurate or inaccurate, of literary merit or of no merit whatever. I must notice one supposed difficulty in this view, very persistently urged at the bar. It is said that in the view I have suggested there would be as many copyrights as reporters. I do not see the difficulty. Each reporter is entitled to report, and each undoubtedly would have a copyright in his own published report. But where is the difficulty? Suppose a favourite view; a dozen artists take each independently his own representation of it; is there any reason why each should not have his own copyright?—or even a photograph, where each photograph is taken from the same point and, in the same state of the light, would be identical in all respects. There is, of course, no copyright in the view itself; but in the supposed picture or photograph there is. And in truth there is a confusion of thought between the difficulty of proof of the piracy and the existence of piracy. Here, as I have said before, no such difficulty arises, since it is admitted that the report of these speeches is not the result of independent labour but is taken from *The Times*. My Lords, I think the judgment of Mr. Justice North was right, and that the only answer sought to be given to it by the Court of Appeal was the restricted use of the word "author," with which I have endeavoured to deal. I therefore move your Lordships that the judgment of the Court of Appeal be reversed, with costs, and the judgment of Mr. Justice North restored.

LORD DAVEY.—My Lords, the question on this appeal is whether the proprietors of *The Times*, by assignment from their reporter, are entitled to copyright in the reports published in their newspaper of certain speeches delivered by Lord Rosebery on public occasions. Copyright is the right of multiplying copies of a published writing. There is no copyright in a speech although delivered on a public occasion, and, on the other hand, there is no copyright under the statute in a piece of writing until it has been published. There may, indeed, be a common law proprietary right in a speech or lecture. In "*Caird v. Sime*" (12 App. Cas., p. 326) Lord Watson said,—"The author of a lecture on moral philosophy or of any original composition retains a right of property in his work which entitles him to prevent its publication by others until it has with his consent been communicated to the public." It is not disputed in the present case that the thoughts and words of Lord Rosebery's speeches were communicated by him to the public, and no question is raised as to the existence of any right in the orator. This case raises only a question of statutory copyright in *The Times* report, and must be decided on the provisions of the

Copyright Act, 5 and 6 Vict., c. 45. Now what has the respondent done? He has admittedly copied and republished for his own profit certain sheets of letterpress forming parts of *The Times* newspaper. A sheet of letterpress is a book within the meaning of the Act; and, notwithstanding the decision of Vice-Chancellor Malins in "*Cox v. Land and Water Journal Company*" (L.R., 9 Eq., 324) I have no doubt that a newspaper is within the Act. In "*Walter v. Howe*" (17 Ch.D., 708) Sir George Jessel differed from the Vice-Chancellor, and his decision has since been followed. *Prima facie*, therefore, the respondent has infringed the appellants' copyright in their newspaper. His defence is that the appellants have no copyright in this portion of their published work because it was compiled from, or consisted only, of matters which were *publici juris*. They say that Lord Rosebery was the author of his speech and gave it to the world for any to reproduce who would, and that nobody, therefore, can claim to be the "author," within the meaning of the Act, of a report of his speech. The reporter, they say (with a pardonable jingle), is the reproducer and not the producer of the speech. That is true in a sense; and, if *The Times* were claiming a property in the speech itself and seeking to prevent anybody else from publishing any other report of it, the argument would be cogent. But the appellants' claim is of a more modest description. They seek only to prevent the respondent from multiplying copies of their own report of the speech and availing himself for his own profit of the skill, labour, and expense by means of which that report was produced and published. But for the fact that the Court of Appeal thought differently and one of your Lordships agrees with the learned Judges, I should say that there is no answer to this claim. In my opinion the reporter is the author of his own report. He it was who brought into existence in the form of a writing the piece of letterpress which the respondent has copied. I think also that he, and he alone, composed his report. The materials for his composition were his notes which were his own property aided to some extent by his memory and trained judgment. Owing to the perfection which the art of shorthand writing has attained in recent years, memory and judgment bear a less important part in the composition of a report of a speech than was formerly the case. But the question whether the composer has copyright in his report does not seem to me to depend on, or to vary inversely with, his skill in stenography. Nor, as it appears to me, does the fact that the subject-matter of the report had been made public property, or that no originality or literary skill was demanded for the composition of the report, have anything to do with the matter. Again, it is said that the lucidity of diction and perfection of expression which characterize the eminent person named made an exact reproduction of his words a comparatively easy and almost mechanical task. But is it argued that the reporter of the hesitating, half-completed utterances of an inferior speaker might have copyright though the reporter of Lord Rosebery may not? Or does the question of copyright in the report depend on the clearness of thought and speech of the orator? In my opinion, the question must be decided on general considerations, and not on any grounds which are personal either to the orator or to the reporter. Copyright has nothing to do with the originality or literary merits of the author or composer. It may exist in the information given by a street directory, "*Kelly v. Morris*" (L.R., 1 Eq., 697), or by a list of deeds of arrangement, "*Cate v. Devon and Exeter Constitutional Newspaper Company*" (40 Ch.D., 500), or in a list of advertisements, "*Lamb v. Evans*" ([1893] 1 Ch., 218). I think those cases right and the principle on which they proceed directly applicable to the present case. It was of course open to

any other reporter to compose his own report of Lord Rosebery's speech, and to any other newspaper or book to publish that report, but it is a sound principle that a man shall not avail himself of another's skill, labour, and expense by copying the written product thereof. To quote the language of Mr. Justice North in another case, "For the purposes of their own profit they desire to reap where they have not sown, and to take advantage of the labour and expenditure of the plaintiffs in procuring news, for the purpose of saving labour and expense to themselves." For these reasons I agree with my noble and learned friend in thinking that the judgment of the Court of Appeal should be reversed, and that of Mr. Justice North restored.

LORD JAMES of HERFORD.—My Lords, in this case the appellants as plaintiffs in the suit allege that they are entitled to the copyright in reports which appeared in *The Times* newspaper of certain speeches made by Lord Rosebery, and they seek to restrain the respondent, the defendant in the suit, from republishing such reports. The facts upon which the suit is founded are not in dispute. Lord Rosebery's speeches being of great interest to the public, reporters representing different journals attended meetings to be addressed by him, and took down the words uttered by him. It may be taken that all of the reporters did their best to report Lord Rosebery's words accurately. The reports of these speeches appearing in *The Times* newspaper seem to represent a high degree of such accuracy. The respondent has copied these reports *verbatim* and reproduced them. For the purposes of this case it is admitted that the interests of the proprietors of *The Times* newspaper and of the reporter may be regarded as one. The question therefore to be decided is whether there is any copyright in the reports of speeches made in public with the object that they should be published? The determination of this question depends upon the construction to be placed upon the provisions of the Copyright Act of 1842. It may be taken that the matter published in the columns of a newspaper is a book within section 2 of that Act, but the plaintiffs in the suit have to establish that the proprietors of *The Times* or the reporter are the authors of such book within the meaning of section 3. It is not alleged, and it cannot be said, that there is any authorship in the speech itself; that speech was created by the thought of Lord Rosebery, and published by him to the world when he spoke it. The plaintiffs do not claim copyright in the speech itself; but, as stated by Lord Lindley in the Court of Appeal, the report of the speech is something different from and beyond the speech; and the question to be solved is whether this difference represents a something of which any one can be regarded as "the author" within the meaning of the Copyright Act. Whilst the Act supplies no definition of the word "author," and whilst it may be difficult for any judicial authority to give a positive definition of that word, certain considerations controlling the meaning of it seem to be established. A mere copyist of written matter is not an author within the Act, but a translator from one language to another would be so. A person to whom words are dictated for the purpose of being written down is not an author. He is the mere agent or clerk of the person dictating, and requires to possess no art beyond that of knowing how to write. The person dictating takes a share in seeing that the person writing follows the dictation, and makes it his care to give time for the writing to be made. But an "author" may come into existence without producing any original matter of his own. Many instances of the claim to authorship without the production of original matter have been given at the Bar. The compilation of a street directory, the reports of proceedings in Courts of law, and the tables of the times of running of certain railway trains have been

held to bring the producers within the word "author," and yet in one sense no original matter can be found in such publications. Still there was a something apart from originality on the one hand and mere mechanical transcribing on the other, which entitled those who gave these works to the world to be regarded as their authors. Now what is it that a reporter does? Is he a mere scribe, does he produce original matter, or does he produce the something I have mentioned which entitles him to be regarded as an author within the Act? I think that from a general point of view a reporter's art represents more than mere transcribing or writing from dictation. To follow so as to take down the words of an ordinary, and certainly of a rapid, speaker is an art requiring considerable training, and does not come within the knowledge of ordinary persons. Even amongst professional reporters many different degrees of skill exist. Some reporters can take down the words of a speaker however rapidly he speaks, others less practised or proficient cannot, as the term is, "keep up with" the rapid speaker. Apart from the dealing with the rapidity of speech, there are some reporters whose ears and thoughts and hands never fail them, and who therefore produce reports of complete accuracy. On the other hand, reporters less skilled may be so deficient in this quality of accuracy as to produce reports which certainly tend to perturb the speakers whom they have endeavoured to report. Thus there seems to be a degree of skill in one class of reporters over the other. Again, one reporter may possess knowledge apart from stenography which may confer upon him the power of producing a report not within the capability of another of the same calling. Supposing a speech were delivered in a language little used, such as Persian or Turkish, only a reporter acquainted with such a language would be able to report it. Does the work resulting from such special knowledge mean nothing? The proprietor of a journal may have paid highly for obtaining a special report of this almost unreportable speech. May he not make a claim for protection against a rival journalist who seeks to make equal use of the report thus obtained? It may also be that the report has been obtained under circumstances of peculiar difficulty on the one hand, or of advantageous conditions on the other. Thus if a reporter attended a meeting of Anarchists intended to be secret and made public their speeches, or if in former times a man had secreted himself in one of the Houses of Parliament and took down the words of different speakers, may it not be contended that the reporters were doing something more than merely transcribing? After taking such matters as these into consideration, I have after some doubt come to the conclusion that a reporter of a speech under the conditions existing in this case is the meritorious producer of the something necessary to constitute him an author within the meaning of the Copyright Act of 1842, and that, therefore, the judgment of the Court of Appeal should be reversed.

LORD BRAMPTON.—My Lords, the only substantial question in this case is whether the reporters who furnished to *The Times* the manuscripts containing the reports of Lord Rosebery's five speeches as they were published in that journal were the "authors" of those manuscripts within the meaning of the Copyright Act, 1842 (5 and 6 Vict., c. 45). If they were, they were the authors of books within the interpretation clause, section 2, and as such they would have been entitled to the copyrights thereof under section 3, but for the fact that such copyrights have by assignments become vested in the appellants, the proprietors of *The Times*. The material facts which have led me to the opinion I am about to express are admitted, and may be very briefly stated. On the several occasions when the speeches were delivered reporters for *The Times* and other newspapers

attended by invitation to enable them to compose and write for publication in their respective journals descriptive articles of the occurrences, containing full and accurate reports of the speeches as they were delivered from the lips of the speakers. The reporters who represented *The Times*, with whom alone I have now to deal, were undoubtedly gentlemen of education, great ability, and long and varied experience in the duties of their vocation. They wrote the descriptive parts of their reports from personal observation. The speeches they took down in shorthand, word for word, transcribed them *verbatim* in longhand, carefully corrected and revised, and punctuated them, so that when they appeared in the columns of *The Times* they might, as perfectly as printed words could do, convey to the readers all that was to be seen or heard upon those occasions. From these reports all that appeared in *The Times* was first published to the world. It is obvious that the preparation of them involved considerable intellectual skill and brain labour, beyond the mere mechanical operation of writing. That the reports so published were "books" within the meaning of the Copyright Act is undisputed; the great contention throughout the case has been whether the reporters were the "authors" of them; for unless they were they could not acquire any copyright in them, the third section of the Act conferring property in the copyright of a book only upon its author and his assigns. Mr. Justice North, before whom the case was first heard, held that although the reporter had no property in the speeches he was entitled to copyright in his report of them. The Court of Appeal reversed his ruling, and in a considered judgment emphatically stated that mere reporters were clearly not authors of what they report, that the Act was passed to protect "authors" not reporters, that a mere publisher of another man's verbal utterances could not acquire a copyright as the author of such publication; and they held "that in order that the first publisher of any composition may acquire the copyright in it he must be the author of what he publishes, or he must derive his right to publish from the author by being the owner of his manuscript, or in some other way." I can find nothing in the Act which compels me to assent to this view. A speech and the report of it are two different things, and the author of the one and the author of the other are presumably two different persons. The author of a speech is the author of language orally uttered by himself. The author of a report of a speech is the author of a writing containing the substance, or the words, of that speech. The speech must precede the report of it. The oral speech is not a "book"; the written report is. The book is the subject of copyright under section 3 and the property in such copyright in a book is in its author. I am not concerned to-day in considering how and by what means the author of a speech can acquire the copyright and may preserve for himself the sole right to publish in print, or in writing, a report of it; for at no time has Lord Rosebery either by word or action indicated any desire or intention to do so. In making the speeches in question he published them freely and without placing any restraint upon those who heard him from making whatever use they could lawfully make of his words as they came from his mouth. Of course, if no reporters had been present, or if, though present, none had taken down his lordship's utterances, those utterances must have remained unrecorded and no question of copyright could have arisen, for there would have been no subject of copyright in existence; but let me suppose that, though unrecorded at the time, one of the hearers with a peculiarly retentive and accurate memory had some time afterwards from that unaided memory written a correct and

verbatim report of the speeches, would he not have been the author of that report, and might he not have claimed the copyright of it, the product of his own mental effort of memory? Or suppose the speaker had before delivering his speech composed and written out what he intended to say, and in speaking, refreshing his memory as to his intentions by that which he had written, had given oral utterance to every word of it, and then presented his manuscript to a friend, as a gift, with permission to publish it as he thought fit, could not that friend claim the copyright of such publication? What real difference is there between a manuscript so obtained and a book made by writing down on the spot the words then freely uttered and given by the speaker to any reporter present who chose to record them expressly for the purpose of publication in the journal he represented? Of course, a person who merely writes an article from the dictation and as the servant of another can claim no property in what he so writes, for that writing belongs to his employer; but that is not this case. I do not agree that the question of the authorship of a book depends upon the literary quality of it. If a person chooses (and many do) to compose and write a volume devoid of the faintest spark of literary or other merit I see no legal reason why he should not, if he desires, become the first publisher of it, and register his copyright, worthless and insignificant as it would be. The statute has prescribed no standard of merit in a book as a condition to entitle its author to become the proprietor of copyright in it; and, even if such standard were prescribed, I should think the merits of the book ought to be determined having regard to the contents of the book itself, without inquiring as to whether any of the component parts of it emanated from the brain of some person other than the author of the book. Of course, if an author of a book is unscrupulous enough to pirate and include in it the protected composition of another, no registration could give him property in that which he had stolen, or protect him against an action for his piracy. In this case the reporter, without encroaching upon the right of any one, has become the first publisher of "books" containing descriptive reports of the occurrences on the several occasions when Lord Rosebery's speeches were made. Nobody can say that such reports could be complete unless the speeches themselves were incorporated in them in some form or other; and if they were rightfully so incorporated it cannot, I think, be denied that in such report the speech, added to the descriptive passages, formed one book and one book only. True it is that the reporter was not the author of the speech, but he was the composer and author of the book. Without his brain and handiwork the book would never have had existence, and the words of Lord Rosebery would have remained unrecorded save in the memories of the comparatively few who were present on those occasions. In the descriptive passages of his report the language is his own; and although, as regards the speeches, he has given great value to his work by introducing *verbatim* the language of Lord Rosebery, he was strictly within his rights in so doing, and was clearly acting with the full sanction of his lordship, in order that, by its publication in *The Times*, the thousands of the readers of that journal might be truthfully and accurately informed of those intellectual and interesting utterances of Lord Rosebery which they had not been privileged to hear. I think, for the reasons I have given, that the proprietors of *The Times* have copyright in the articles and reports in question. I am therefore of opinion that the judgment of the Court of Appeal should be reversed, and the decision of Mr. Justice North restored, with costs.

LORD ROBERTSON.—My Lords, I am of the same

opinion as the Court of Appeal. The book published by the respondents, against which injunction is sought, consists of verbatim reports of certain speeches of Lord Rosebery's. Prefixed to each speech there is a short note, explaining the occasion of the speech; but those notes are not taken from *The Times*. All that is taken from *The Times* consists of the words spoken by Lord Rosebery, without addition or subtraction. Now, it is important to observe that the Court of Appeal have not decided, as an abstract proposition, that no report can be copyright of the reporter. There are reports and reports. Your Lordships remember how, in his reports of the Parliamentary debates, Dr. Johnson, according to his own avowal, "took care that the Whig dogs should not have the best of it," and so largely do they bear the impress of the so-called reporter that in some editions those Parliamentary debates are included in Johnson's works. Take another kind of report, not extinct in our own times. Some extempore speakers do not speak in sentences, but in fragments of sentences, and yet next morning there appears, constructed out of those *disiecta membra*, a coherent and grammatical discussion of the subject. I can conceive cases where in truth the intellectual and literary contribution of the reporter may be as substantial as that of the speaker. But I mention such cases in order to say that we have here nothing of the sort. The case before your Lordships is a case of shorthand reporting, pure and simple. It so happens that Lord Rosebery's speeches are so conceived and expressed as to require on the part of the reporter nothing but literal accuracy in order to their presentation to the public as literary compositions. In so saying I am in no way disparaging the gifts of the shorthand writer, and, as the nature of his work is really of the essence of the present controversy, I dwell on it for a moment. The reporters of *The Times* are educated gentlemen, as are many other practitioners of the art of stenography, while there are reporters less highly equipped in knowledge of literature and history. What is the difference between the educated and the less educated in reporting, let us say, Lord Rosebery? An allusion or a quotation is made by the speaker, more recondite or less hackneyed than those which do daily duty on the platform—the educated reporter recognizes the allusion or the quotation and simply takes it faithfully down; the other reporter misses the point and tries to supply it himself and the passage is blundered. Or a phrase or nuance occurs, finer or more exquisite than the parlance of paragraphs; by the one man it is appreciated and exactly taken down, by the other it is rejected as incredible and is supplanted by some banality, foreign to the diction of the speaker, but congenial to that of his reporter. Now the inference I draw from all this is that the contribution which education enables the good reporter to make to the speech is of a purely negative kind—he does not interfere, but faithfully acts as conduit. In fact the merit of the reports now before your Lordships is that they present the speaker's thoughts untinged by the slightest trace or colour of the reporter's mind. These observations apply to the stage of taking down in shorthand what the speaker says. The next stage, copying out the notes, is purely clerical work. Now, I recognize the skill of the stenographer, I find that, for the reasons which I have mentioned, an educated man is the better qualified to be a faithful reporter. But I fail entirely to see how, in the widest sense of the term "author," we are in the region of authorship. A very striking illustration of the subject is obtained by remembering who, or rather what, is the rival of a good stenographer—it is the phonograph. In reporting the kind of speech of which I am speaking—the speech of allusion and of phrase—the phonograph, which has no literary taste, good or bad, and no intellect, great or small, will record Lord Rosebery's speeches better than the best of reporters. The appellants think that if

the owner of a phonograph publishes the speech as taken down by the phonograph he is the author of the report and entitled to copyright. I should have thought (and think) this a *reductio ad absurdum* of the whole argument of the appellants. When it is remembered that there is no manner of composition, as the term is generally used, even in the sense of arrangement, by a shorthand reporter, I find it difficult to understand what attribute of an author belongs to him. Some of the judicial decisions have indeed applied the words of the Act to very pedestrian efforts of the mind. But, although time-tables and furniture catalogues are not great things, there has been structure and arrangement on the part of the maker. I think that the recording by stenography the words of another is in a different region from the making up a time-table. I do not say it is lower or higher, but in a different plane, because there is no construction. Upon this clear principle I reconcile those decisions with the judgment which I am now supporting. Nor do I consider it legitimate to justify a novel application of the Copyright Act by treating its most extreme applications as if they represented its normal scope. I do not think that a sound method of dealing with any statute. I prefer the tone and the words of my noble and learned friend Lord Davey in 1894, when, in *Hollinrake's case*, he thought that the preamble of the Act might be usefully referred to for the purpose of ascertaining the class of works it was intended to protect. The word "author," occurring as it does, not in the preamble, but in the enacting section, seems to me to present a criterion consistent with the widest application of the Act to all who can claim, as embodying their own thought whether humble or lofty, the letterpress of which they assert the authorship. The fact that the man who speaks in public is not a competitor with the reporter for copyright has not the slightest effect in altering the intellectual relation of the reporter to the words of the speech, nor does it render less inappropriate the result of holding the statute to confer on the stenographer a reward which has no relation whatever to his art. For these reasons I am unable to concur in the judgment proposed.

THE LORD CHANCELLOR.—Before putting the question from the woolsack, I must mention to counsel something that is involved in the proposition that Mr. Justice North's judgment is to be restored. If I understand rightly, it was an interim injunction, but there was an agreement between the parties that it should be treated as if it was the hearing of the cause.

MR. BIRRELL.—When we came into the Appeal Court.

THE LORD CHANCELLOR.—Not till then?

MR. BIRRELL.—No.

THE LORD CHANCELLOR.—The result will be simply this—that the judgment the Court will pronounce will be that there shall be a perpetual injunction. That is all.

[Solicitors—Soames, Edwards, and Jones, for the appellant; Upton, Atkey, and Co., for the respondent.]

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.JJ.) } Aug. 6.

THE ECCLESIASTICAL COMMISSIONERS V. PINNEY.*

Vendor and purchaser—Glebe lands—Sale by Vicar—Purchase by trustee of settled estates—Purchase not authorized by the trust—Non-payment of principal moneys—Vendor's lien.
Decision of Byrne, J. ([1899] 2 Ch., 729), affirmed.

This was an appeal against the decision of Mr. Justice Byrne which was reported in *The Times* of

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

August 14 last year. By a contract made in 1873 between the then incumbent of the vicarage of Coleshill, Warwickshire, G. Digby Wingfield Digby (the patron of the living), the Ecclesiastical Commissioners, and R. B. Wingfield Baker, described as the surviving trustee of the will and codicils of Edward, Earl Digby, the incumbent, in pursuance of the powers conferred by the Ecclesiastical Leasing Acts, 1842 and 1858, with the consent of G. Digby Wingfield Digby as patron, and with the approval of the Ecclesiastical Commissioners, agreed to sell, and R. B. Wingfield Baker, with the consent of G. Digby Wingfield Digby as tenant for life of the estates settled by the will of Earl Digby, agreed to purchase, the glebe lands of the vicarage for £24,963. It was agreed that R. B. Wingfield Baker should pay the purchase-money into the Bank of England on or before September 29, 1874, at which time the purchase should be completed and a conveyance executed; but if, from any cause except the wilful default of the vendor, the purchase should not be then completed, the purchaser should pay interest at 4 per cent. until completion, but that condition was to be without prejudice to the vendor's right to enforce completion or to any of his rights under the contract and to rescind the contract. Under the will of Earl Digby the settled estates were limited to G. D. Wingfield Digby for life, with remainder to his sons successively in tail male, with remainder to J. D. Wingfield Digby (No. 1) for life, with remainder to J. D. Wingfield Digby (No. 2) for life, with remainder to the sons of J. D. Wingfield Digby (No. 2) successively in tail male, with remainders over. By the will residuary personalty was given on similar limitations and upon trusts for investment in the purchase of land with the approbation of the tenant for life. On the death of the testator in 1856 without issue, G. D. Wingfield Digby entered into possession of the settled estates, and on the marriage of J. D. Wingfield Digby (No. 2) he covenanted to exercise a power of creating portions under the testator's will in favour of younger children to the extent of £20,000. J. D. Wingfield Digby (No. 1) died in 1878, and R. B. Wingfield Digby in 1880. In 1881 a disentailing deed was executed, to which G. D. Wingfield Digby, J. D. Wingfield Digby (No. 2), and J. K. Digby, the eldest son of J. D. Wingfield Digby (No. 2), were parties. By the recitals of this deed it appeared that the trustees had invested the greater part of the residuary personalty, and that a considerable part of the remainder had been advanced for the purposes of a fund known as the "Digby Estate Improvement Fund" and expended generally on the improvement of the estates. Repayment of part of that sum, amounting to £158,000, was secured by policies of assurance on the life of the tenant for life. The disentailing deed operated on all the estates, including the hereditaments settled by the will, and therefore also the glebe lands comprised in the contract of 1873, and assured them, subject and without prejudice to the uses and estates limited by the will preceding the estate in tail male or the estates tail of J. K. Digby and the powers annexed or exercisable during the continuance thereof, to such uses as G. D. Wingfield Digby, J. D. Wingfield Digby (No. 2), and J. K. Digby should jointly appoint. The £158,000 secured by the policies and any other money subject to be laid out in the purchase of land secured thereby were also disentailed and assured so as to be subject to a similar power of joint appointment as the land. By a re-settlement made in 1882 the joint power was executed and all the settled lands were settled to uses whereunder J. D. Wingfield Digby and J. K. Digby were created successively tenants for life, with remainders in strict settlement. By deeds of assignment and re-settlement of even date the policies for £158,000 and all moneys payable thereunder were,

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subject to a mortgage for £30,000 created in 1872, vested in the defendants, Adderley and Madan, in trust for the younger children of J. D. Wingfield Digby, with a proviso that the sums appointed should be taken in satisfaction of the £20,000 covenanted to be appointed by J. D. Wingfield Digby's marriage settlement, and with a proviso that the receipts of the children should operate to discharge the settled estates from their proportions of the £20,000. The whole of the £158,000 secured by the policies had been distributed by the trustees, Adderley and Madan. No part of the purchase money of £24,963 was ever paid, nor had the conveyance been executed, but the successive tenants for life, while in possession, had paid to the vicar of Coleshill interest at 4 per cent. per annum, but recently 3½ per cent. only, upon the purchase money. The value of the lands comprised in the contract had considerably decreased. The Ecclesiastical Commissioners in 1896 brought the present action, claiming specific performance of the agreement of 1873, or in the alternative that they were entitled to their vendors' lien on the land and for its enforcement by sale. The defendants were the incumbent Pinney; J. K. D. Wingfield Digby, tenant for life of the settled real estate; the legal personal representatives of R. B. Wingfield Baker, the purchasing trustee; and Adderley and Madan, the trustees of the settlement of 1882. It was admitted that the plaintiffs were entitled to their vendors' lien. After the judgment of Mr. Justice Byrne the tenant in tail was added as a defendant. Mr. Justice Byrne held that the plaintiffs were entitled to enforce their vendors' lien for unpaid purchase money upon the land sold, but that they were not entitled to any other remedy against the defendants. As, however, the land is now worth much less than the purchase money fixed by the contract, the lien would not extend to the full amount of the plaintiffs' claim. The plaintiffs appealed.

Mr. Levett, Q.C., and Mr. Pochin were for the plaintiffs; Mr. Neville, Q.C., and Mr. Norton, Q.C., were for the present tenant for life and the tenant in tail of the settled estates; Mr. T. H. Carson was for the vicar; Mr. Sargent was for the trustees of the re-settlement of the estates; Mr. Brinton was for the personal representative of the surviving trustee of Earl Digby's will.

The COURT affirmed the decision.

The MASTER of the ROLLS said that the Court had been asked to assume for the purposes of the case that the contract for the purchase of the land was made by the trustee in pursuance of the power to invest in land contained in the will of Earl Digby, and that the trustee intended to enter into the contract in exercise of that power and to apply part of Earl Digby's personal estate in payment of the purchase money. In fact, a large part of the personal estate had been already advanced on the security of some policies of assurance on the life of the tenant for life. His Lordship was by no means satisfied that the contract was entered into by the trustee in the exercise of the power and in the discharge of his duty under that power. The foundation of the plaintiffs' claim was that the trustee could have been compelled to pay the money out of the personal estate, and that the plaintiffs were entitled to enforce the rights of unpaid vendors against the defendants who were entitled to the settled estates. In his Lordship's opinion, this contract was not one in which the vendors were entitled to say that, because the land had become part of the settled estates, they had a right, not only to enforce a lien on the land for unpaid purchase money, but also to have the purchase money made good out of the whole settled property. His Lordship came to the conclusion that the decision of Mr. Justice Byrne was right.

LORD JUSTICE RIGBY said that the real question was

who was to bear the loss resulting from the very serious depreciation in the value of this land. The first question was whether there was a valid purchase of this land for the settled estates. In his Lordship's opinion there was not, and, if so, the right of the trustee to be indemnified never arose. It did not appear that when the contract was entered into the trustee had a farthing of the personal estate under his control for the purpose of being invested. The personal estate had been advanced by way of loan, and was to be repaid out of the proceeds of some policies of insurance which would not fall in until the death of the tenant for life. There were no means of getting the money until that time. Till then the money would not be available for the purchase of land or any other purpose. If, in entering into the contract, the trustee committed a breach of trust, he did not act from any improper motive. He was, no doubt, endeavouring to do his best for the persons interested. But he could not possibly tell what the value of the land would be at the time when he would have the money to pay for it, and such a speculative purchase was not authorized by the trust. Consequently the trustee had no right to an indemnity against the settled estates, and the plaintiffs could have no right of subrogation, and they had no right against the defendants. His Lordship based his judgment on this—that there never was a contract for purchase which was valid as against the settled estates.

LORD JUSTICE COLLINS concurred.

[Solicitors—Miller, Jennings, White, and Foster; Dawson, Bennett, and Kyle; Hulberts, Hussey, and Metcalfe.]

Court of Appeal (A. L. Smith and } 1900.
Vaughan Williams, L.J.J.) } Aug. 6.
BARNETT V. HOWARD—UNION BANK OF LONDON,
GARNISHEES.*

Married Woman—Separate estate—Restraint
against anticipation—Contract—Married
Women's Property Act, 1893.

This was an appeal from an order of Mr. Justice Bucknill's at chambers, discharging a garnishee order made by the Master. The facts as stated, so far as material, were as follows:—The defendant was a lady who was married in 1894, and on October 8, 1896, while still a married woman, she incurred a contractual liability in respect of which the judgment hereinafter set out was obtained against her. On January 22, 1900, a decree for dissolution of the marriage was made absolute. In April, 1900, the writ in the present action was issued. On June 12, 1900, judgment under Order 14 was obtained against her for £261 9s. 2d. The judgment was in the following form:—"The defendant, G. A. Howard, having appeared to the writ of summons herein, and the plaintiff having by order of Master Pollock, dated June 11, 1900, obtained leave to sign judgment under the rules of the Supreme Court, Order 14, r. 1, for the amount endorsed on the writ with interest, if any, and costs to be taxed, and such order directing that as regards the said G. A. Howard execution be limited to such property as during her coverture was the defendant's separate estate not subject to any restraint against anticipation, unless by reason of section 19 of the Married Women's Property Act, 1892, the property shall be liable to such execution notwithstanding such restriction, and to any property which she may after October 8, 1896 (being the date when she entered into the contracts sued on), while discoverable be possessed of or entitled to, provided that nothing in that order contained should render

available to satisfy the said sum and costs, or any part thereof, any separate property which at the said time of entering into the said contracts or thereafter she was or may be restrained from anticipating; it is this day adjudged that the plaintiff recover against the defendant £261 9s. 2d. and costs to be taxed, such sum and costs to be payable out of her separate property as hereinafter mentioned, and not otherwise; and it is ordered that execution hereon against the said G. A. Howard be limited to such property as during her coverture was the defendant's separate estate not subject to any restraint against anticipation, unless by reason of section 19 of the Married Women's Property Act, 1892, the property shall be liable to such execution notwithstanding such restriction, and to any property which she may after October 8, 1896 (being the date when she entered into the contracts sued on), while discoverable be possessed of or entitled to, provided that nothing in this judgment contained shall render available to satisfy the said sum and costs, or any part thereof, any separate property which at the said time of entering into the said contracts or thereafter she was or may be restrained from anticipating." In May, 1900, two sums amounting together to the sum of £375 were paid into the defendant's account at the Union Bank of London by her trustees. This sum represented income from property which had become vested before October, 1896, in trustees upon trust for the defendant for her life, subject to a restraint against anticipation. It was admitted that part of the above sum represented income which had accrued due before the decree absolute for dissolution of marriage, and part since the decree absolute. On June 30, 1900, the plaintiff obtained a garnishee order nisi, attaching the balance of this sum—namely, £88 0s. 2d., in the bank, and of Mr. Justice Bucknill, overruling the order of the Master, discharged the order nisi. The plaintiff appealed.

Mr. E. C. Macnaghten, Q.C., and Mr. Buckmaster appeared for the plaintiff: Mr. Danckwerts, Q.C., and Mr. Rayner Goddard appeared for the defendant and the garnishees.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question turned upon the true construction of section 1 of the Married Women's Property Act, 1893. The judgment against this lady was drawn up as regards the first part in the form given in "Scott v. Morley" (20 Q.B.D., 130), and as regards the last part in order to carry out section 1 of the Act of 1893. At the date of the contracts sued upon the defendant was entitled to separate property upon which there was a fetter against anticipation. In construing the section, his Lordship protested against going beyond the ordinary meaning of the language used. Section 1 of the Act of 1893 might be described as passed partly for the benefit of creditors and partly not. The section enacted that "every contract hereafter entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract." That clause was clearly in favour of creditors. Then came clause (b):—"Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to." That clause was also in favour of creditors. Up to the present not a word was said about separate property which a married woman was restrained from anticipating. The words "at that time" clearly referred to the time when she entered into the contract. Then came clause (c):—"Shall also be enforceable by process of law against all property which she may thereafter while discoverable be possessed of or entitled to." That clause was also in favour of creditors. If the

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

section had stopped there there would have been no difficulty in the way of the plaintiff. But a proviso followed. He (the Lord Justice) could not construe the proviso as the learned counsel for the plaintiff had asked the Court to do. It ran as follows:—"Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." It was said that the "separate property" ceased to be such when the defendant ceased to be a married woman. The words "at that time" were the material words. They meant at the time when she entered into the contract—namely, October 8, 1896. At that time she was restrained from anticipating this property. The case fell within the clear words of the proviso. The appeal must therefore be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS said that he did not differ from the judgment just pronounced, but he was far from saying that the words of the section were clear. He would first say that he did not agree with the contention for the plaintiff as to the meaning of the words "separate property" in the section. The Court could only adopt that contention if they said that the Legislature intended that after the coverture had come to an end the judgment should be in the same form as against a single woman. With regard to the construction of the section, he wished to notice one or two things. The proviso at the end was not limited to clause (c), but was a proviso upon the whole section. That being so, two expressions were used throughout the section—namely, "separate property" and "property." The proviso spoke of "any separate property." One looked back into the section to see what had been dealt with as separate property, and one found that expression used in clauses (a) and (b). In clause (c) the words "separate property" did not occur. He had no doubt that the words in the proviso, "at that time or thereafter," had the same meaning as in clause (b). If one looked at clause (b), it seemed to him to be plain that these clauses were not meant to have any reference to separate property, which, by reason of its receipt by the married woman, had been freed from the restraint against anticipation. A serious doubt was raised in his mind whether they ought to give such a meaning to the proviso as to affect separate property fettered by a restraint against anticipation when the property had been actually received by the married woman.

[Solicitors—B. Barnett, for the plaintiff; Taylor, Son, and Humbert, for the defendant and garnishees.]

Court of Appeal (A. L. Smith and } 1900.
Vaughan Williams, L.JJ.) } Aug. 6.

BRIGHT V. KILLEY.*

Practice—Staying proceedings—O. 19, r. 27.

On an application to stay proceedings as frivolous and vexatious and an abuse of the process of the Court, the Judge has no jurisdiction to impose conditions on his assent to or refusal of the application.

This was an appeal from an order of Mr. Justice Bucknill's at Chambers. The action was brought to set aside a judgment for £5,000. Upon the application of the defendant the learned Judge ordered the statement of claim to be struck out and the action stayed with costs, unless the plaintiff paid the sum of £5,000 into Court or

gave security for the same to the satisfaction of the Master within one month. The case is only reported on account of the form of the order.

Mr. Cooper Willis, Q.C., and Mr. Ward Coldridge appeared for the plaintiff; Mr. Buckmaster appeared for the defendant.

"Wyatt v. Palmer" ([1899] 2 Q.B., 106) was referred to.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH, after saying that the issue in dispute in the action had not been tried before, and that the Court should not, in the exercise of its inherent jurisdiction, stay the action as being frivolous and vexatious and an abuse of the process of the Court, said that the learned Judge had allowed the plaintiff to continue the action if he paid £5,000 into Court or gave security for that amount. In other words, the Judge thought that the action should be stayed, but he said that he would not stay it if the plaintiff complied with the above condition. "Wyatt v. Palmer" was not an authority for saying that such a condition could be imposed upon an application to the Court either to exercise its inherent jurisdiction to stay the action or to act under Order 19, r. 27. The Judge at Chambers had only jurisdiction to say whether or not the action was frivolous and vexatious and an abuse of the process of the Court. If it was, the action should be stayed, and if it was not, the action should go on. The appeal must be allowed with costs in any event.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Petch and Smurthwaite, for the plaintiff; Prior, Church, and Adams, for the defendant.]

Chan. Div. } 1900.
(Stirling, J.) } Aug. 7.

IN RE DASH, DECEASED—THE SOLICITOR TO THE
TREASURY V. LEWIS.*

Donatio mortis causa—Deposit note—Validity of gift.

Held, in the circumstances of the case, that there was no valid *donatio mortis causa*.

The plaintiff in this action was the legal personal representative of Mrs. Eliza Dash, widow, who died intestate at Bristol on January 31, 1899. The object of the action was to recover from the defendant Edwin Thomas Lewis property of the deceased of very considerable amount, to which he claimed to be entitled by virtue of a *donatio mortis causa* made to him by the intestate shortly before her death. The other defendants were the representatives of certain charitable institutions who claimed to be beneficially interested in the property so given to Mr. Lewis. The question to be determined was whether the alleged *donatio mortis causa* was valid in law. The circumstances in which the alleged gift took place will be found stated in his Lordship's judgment.

The Solicitor-General (Sir E. Carson) and Mr. Ingle Joyce appeared for the plaintiff; Mr. Swinfen Eady, Q.C., and Mr. Christopher James for the defendant Lewis; and Mr. Upjohn, Q.C., and Mr. Buckmaster for three of the charities interested, who had been made parties to the action.

MR. JUSTICE STIRLING, in delivering his reserved judgment, after stating the nature of the question, said:—Mrs. Dash, the intestate, was born about 1812. She was twice married, and became a widow for the second time about 20 years ago. She derived from her second husband, Mr. John Dash, a

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by G. A. STREETEN, Esq., Barrister-at-Law.

considerable fortune. The defendant, Mr. Lewis, whose integrity and straightforwardness are beyond question, realised her husband's property, and afterwards managed her affairs for her. He was in the habit of seeing her once a week, generally on Thursday evenings. He stated that he had on many occasions urged her to make a will, but she always refused; one reason being that she objected to the payment of duty and another that she did not wish any one to know her means. Some months before her death she said to Mr. Lewis that she had been thinking over how she would like her property disposed of, and asked him to "jot it down." He proceeded to do so, but after a time she said she would go no further, and Mr. Lewis went away and left the paper with her. Thus matters stood on Thursday, January 26, when Mr. Lewis called on her and found her very ill. What took place was thus stated by him in a written statement, of which a copy was furnished to the plaintiff:—"I went there on the Thursday evening and found her very unwell. She then said 'I think you had better go on with what we were talking about the other night.' She produced the bit of notepaper, on which I had previously made a memo. of amounts which she wished to give. She then said, 'You will please to write down what I tell you,' I said, 'It will be of no use Mrs. Dash.' She said, 'Don't tell me that. If I give you everything you can certainly do what I tell you with it.' I said, 'How am I to begin?' She said, 'You know what to say. I give you everything subject to your settling my affairs, seeing to my burial, and paying the amounts to the charities and persons I name.' Before writing out the paper I said, 'I don't know what to say. You ought to have a solicitor here.' 'No,' she said, 'I am going to give you everything if you promise me (and I am sure if you promise me you will fulfil) that you will do what I tell you.' After this I wrote out on a bit of paper the heading in my own words and copied the amounts and names from the memos. previously made by me. She made her cross, and I wrote her name on the paper after she had made the cross." The paper there referred to was in these terms:—"40, Horsfield-road, Bristol, Jan. 26, 1899.—I, Eliza Dash, residing at the above address, do give the whole of my property, whatever it may consist of at the time of my decease, to Edwin Thomas Lewis, of Upton-lodge, Cotham-park, Bristol, upon the distinct promise that he will settle up my affairs and see to my burial, and will also give the following sums to the charities and persons named." Then followed a list of charities and individuals, with sums of money set opposite their names, including Muller's Orphan Asylum, £10,000; Hook's Mill Orphan Asylum, £5,000; Dr. Barnardo's Homes, Stepney, London, £3,000; and many others. Mr. Lewis's statement then proceeded:—"She told me where to find her securities. She said, 'Go upstairs into the back room and in a basket near the bedside you will find the deposit note and Usher's shares.' There were two keys on the table. She gave me one. I took it and went upstairs. I found the door locked, and unlocked it. I lifted up some clothes from the top of the basket and found a banker's deposit note for £30,000 and a certificate for 200 £5 preference shares in Usher's Brewery Company. There were two or three small parcels done up in paper. I have since found they were gold. She had particularly mentioned the deposit note and Usher's shares. I brought down the deposit note and the share certificate and gave them to her. She had them in her hands. She handed them back to me and said, 'You take charge of them. If I get better of course you will bring them back.' " Mr. Lewis saw her again on January 30, when he called between 5 and 6. He went again on the following day. (His Lordship then again

referred to the defendant's statement, in which he gave a further account of other property of the deceased's which had come to his hands, including a sum of £300 in notes and some gold and silver.) She died (continued his Lordship) on the same evening about 10 45. It was decided in "Hills v. Hills" (8 M. and W., 401) that a gift may be good as a *donatio mortis causa* although it is coupled with a trust or condition that the donee shall provide the funeral of the donor, but, as is pointed out by Parke, B., such a circumstance affords "a strong argument that the deceased did not intend to make a *donatio mortis causa*, but, as it were, to make the defendant her executor under a nuncupative will." That is one mode of formulating the question which arises in such cases. It was put to the jury in another way by the learned Judge who tried the case of "Hills v. Hills" (Lord Cranworth)—viz., "whether it was intended as an absolute gift to the defendant after the death of the intestate or whether she intended to retain a control over the property during her life." I understand that to refer to what is established law—viz., that in order to constitute a good *donatio mortis causa* the donor must not merely part with the possession of, but also with the dominion over, the thing given; see "Hawkins v. Blewett" (2 Rep. N.C.C., 663); "Riddell v. Dobree" (10 Sim., 241). In determining such a question all the circumstances must be taken into consideration. The case for the defendant is strongest with reference to the deposit note, and that I proceed to consider. According to the written statement of Mr. Lewis, Mrs. Dash more than once stated her intention to give him everything. She directed him to write down what she told him; he said it would be of no use. She then said, "Do not tell me that; if I give you everything you can certainly do what I tell you with it." He agreed to write, and asked her how he was to begin. She said, "You know what to say. I give you everything if you promise me, and I am sure if you promise me you will fulfil, that you will do what I tell you." Her intention therefore being to give everything, she could not mean to divest herself of everything at the moment when she called on him to record her wishes. That is made perfectly clear in the written document, which I regard as of the greatest importance, as being a formal contemporary record of what was intended to be done. It begins:—"I . . . do give the whole of my property, whatever it may consist of at the time of my death." Over all that property therefore she intended during her life to retain a power of disposition. Further the document seems to me to be distinctly of a testamentary character. In substance it contains directions for payment of debts and funeral expenses and legacies. After the paper was written and signed by a cross she directed Mr. Lewis to a place where he would find the deposit note. Upon his return she took it from him and handed it back to him, saying, "You take charge of it; if I get better of course you will bring it back"; to which is added, "If I do not you will know what to do with the money." That language might be used so as to create a *donatio mortis causa*; but it must, as I conceive, be interpreted in connexion with what had previously taken place. In my judgment Mrs. Dash meant that Mr. Lewis was to take charge of the note and deal with it simply as part of that which she meant to dispose of as from her death, and over which she showed her intention to reserve dominion during her life. The reference to the note being brought back if she recovered does not seem to me to exclude such dominion; it only shows that she did not at the time consider that she was likely to exercise it. This is I think shown by the additional statement made by the deceased to Mr. Lewis—viz., "If I do not get better you will know what to do with the

money," referring, as Mr. Lewis admitted, to the document of January 26. In my opinion, therefore, there was no valid *donatio mortis causa* of the deposit note; and, as the gift fails as to that, it *a fortiori* fails as to the other subjects of disposition.

[Solicitors—The Solicitor to the Treasury; Arber and Lewis, for Press, Inskip, and Co., Bristol; Nisbet, Daw, and Nisbet, for Isaac Cooke, Sons, and Acton, Bristol.]

Court of Appeal (Lord Halsbury, L.C.,
A. L. Smith and Vaughan Williams, } 1900.
L.JJ.) Aug. 8.

BROWNE V. PETO.*

Mortgage—Lease by mortgagor in possession—
Lease of mansion-house and right of shooting
over land—Occupation lease—Conveyancing
Act, 1881 (44 and 45 Vict., c. 41), ss. 2, 18.

A mortgagor in possession of a furnished mansion-house and of lands let to tenants granted a lease of the mansion-house, together with the furniture therein, and the right of shooting over the lands.

Held, that the lease was valid as an "occupation lease" under s. 18 of the Conveyancing Act, 1881.

Decision of Bigham, J. (*ante*, p. 131; [1900] 1 Q.B., 346), affirmed.

This was an appeal by the plaintiff from the judgment of Mr. Justice Bigham, reported *ante*, p. 131; ([1900] 1 Q.B., 346). The plaintiff, Alexander Browne, claimed possession of Knowlton Court and 45 acres of land, parcel of the Knowlton estate, near Dover, in the county of Kent, held by the defendant under a lease granted on November 26, 1890. Notice to quit expiring on March 25, 1899, had been given on February 21, 1898. The defendant contended that under his lease he was entitled to remain in possession until the year 1904.

The questions in the case were—first, whether this lease was binding on the plaintiff; secondly, whether the plaintiff had so conducted himself as to become bound by its terms; and, thirdly, whether, if not, the notice to quit was given by the person legally entitled to give such notice. The material facts were shortly as follows:—In the year 1887 Captain L. N. H. D'Aeth mortgaged Knowlton Court and the Knowlton estate to three persons, trustees of the estate of Henry Forman, deceased, to secure a sum of £30,000 and further advances. Captain D'Aeth, being mortgagor in possession, granted to the defendant a lease of Knowlton Court mansion-house, 45 acres of the Knowlton estate, eight acres of meadow land, and the right of shooting and sporting over the Knowlton estate, for a term of 14 years from March 25, 1890, at the yearly rents of £315 10s. for the mansion-house, furniture, and sporting rights, £55 for the 45 acres, and £13 for the meadow land. There was a covenant by the tenant to spend £746 18s. 6d. on the property in internal repairs, which sum he was to be allowed to deduct from the rent at the rate of £50 each quarter. The tenant also covenanted to keep the interior and also the furniture in good repair, and it was provided that the tenant should not be entitled to require the lessor to do any internal repairs unless the same should be rendered necessary by the neglect of the lessor to keep the outside in repair. The lessor covenanted to do the outside repairs. There were provisions for the termination of the lease in certain events, and also for re-entry in case of breach of the

lessee's covenants. The furniture in the mansion, and let therewith, was stated to be of the value of £1,100. The defendant was in possession under this lease when the notice to quit was served upon him. In April, 1891, after the mortgagees had notice of the lease they made a further advance of £2,500. In January, 1893, the estate of Henry Forman, deceased, was resettled and conveyed to trustees to the use of A. H. Browne, father of the plaintiff, for life, after his death to the use of the trustees for a term of 1,000 years to secure a jointure to the widow of A. H. Browne, and subject thereto to the use of the plaintiff for life, remainder to his first and other sons in tail. In 1894 the interest under the mortgage was falling into arrear, and on September 23, 1896, the interest being still in arrear, proceedings for foreclosure were commenced, which resulted in a foreclosure decree made on November 11, 1896. In December, 1896, the trustees repudiated the lease, but the defendant insisted on his rights under it. He regularly paid rent to and got receipts from the trustees of the resettlement and not the tenant for life, and correspondence passed between the defendant and the solicitors to the trustees referring to the repairs to be done under the lease. On June 1, 1897, a summons was taken out in the Chancery Division before Mr. Justice Stirling, who made an order that the mortgagees should convey Knowlton Court and the Knowlton estate to the trustees of the resettlement of January 18, 1893, to the uses and upon the trusts declared concerning the freehold hereditaments therein comprised. In pursuance of this order the mortgagees conveyed Knowlton Court and the Knowlton estate to one Gray to the use of A. H. Browne for life, then to the use of the trustees of the resettlement for a term of 1,000 years, and subject thereto to the use of the plaintiff for life. On February 21, 1898, a notice to quit was served on the defendant in the following terms:—"To William Herbert Peto, of Knowlton Court, near Dover, in the county of Kent, Esquire,—I, the undersigned Charles Dorman, of 23, Essex-street, Strand, in the county of London, as the agent for and on behalf of your landlord, A. H. Browne, hereby give you notice to quit and deliver up possession of Knowlton Court and the premises above mentioned, including the right of shooting, on the 25th day of March, 1899, or at the expiration of the year of your tenancy, which will expire at or next after the end of one half-year from the time of your being served with this notice.—CHARLES DORMAN." On April 11, 1898, Mr. A. H. Browne died. The plaintiff became tenant in tail in possession, and the notice to quit expiring, he issued the writ in this action for possession. Mr. Justice Bigham held that the lease was valid as against the mortgagees under section 18 of the Conveyancing Act, 1881, and that, therefore, the defendant was not a mere yearly tenant. He accordingly gave judgment for the defendant.

Mr. Dickens, Q.C., and Mr. T. R. Warrington, Q.C. (Mr. Morton Smith with them) appeared for the plaintiff; Mr. R. M. Bray, Q.C., and Mr. J. R. Atkin appeared for the defendant.

The COURT, having taken time to consider, delivered judgment dismissing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—Upon August 3, 1887, Mr. Lewis Narborough Hughes D'Aeth, who was the owner of the Knowlton-park estate, in the county of Kent, mortgaged it in fee to secure an advance of £30,000. The estate consisted of a furnished mansion-house, stables, and gardens, of some demesne lands, and of agricultural lands of about 1,900 acres in extent. At the time of this mortgage the 1,900 acres were leased to agricultural tenants, the shooting thereon being reserved, as is very commonly the case, to the landlord, Mr. D'Aeth. These shootings were thus severed from the occupation of the agricultural lands and were reserved to the land-

*Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

lord. After this mortgage Mr. D'Aeth was left in possession and enjoyment of the estate by the mortgagees. Upon November 26, 1890—that is, about three years after the mortgage—Mr. D'Aeth, by lease under seal, demised the whole estate, excepting the 1,900 acres (which were then, as before stated, in lease to agricultural tenants), together with the shootings over the 1,900 acres, to the defendant, Mr. Peto, for a term of 14 years from March 25, 1890, at the rental of £383 per annum. The parcels of this lease are as follows. They become, in my opinion, material when considering, as I must do, whether the lease is an occupation lease, so as to come within the meaning of section 18 of the Conveyancing Act, 1881. The parcels are, first, the mansion-house, with stables, outbuildings, gardens, and pleasure grounds, containing 11 acres or thereabouts, together with the furniture and fixtures and other effects in the mansion-house; secondly, part of the park opposite the house, containing 45 acres or thereabouts; thirdly, a parcel of meadow land known as Dog-Kennel pasture, containing 8a. 0r. 5p. or thereabouts; fourthly, the right of shooting and sporting over the whole of the lessor's Knowlton estate, containing about 1,900 acres. In my judgment this is a lease of a very common description where a landlord is letting his mansion-house, grounds, and shootings reserved over lands leased to agricultural tenants, and was a well-known lease both before and since the Act of 1881. It is sought by the mortgagees in the present action to eject Mr. Peto some four years before the lease has expired upon the ground that it is not authorized by the Conveyancing Act of 1881. Many points have been taken and argued, but the above point goes to the whole root of the case, and if Mr. Justice Bigham was right in holding as he did that the lease was a valid lease and within the Act, no other points arise. That section 18 of the Conveyancing Act, 1881, was passed to enable mortgagors to grant leases as well as mortgagees is plain, and that the section also enacts in express terms what kind of leases mortgagors and mortgagees may grant is equally clear. Now what is it that section 18 of the Conveyancing Act, 1881, enacts? To ascertain this I must read section 18 and section 2, the interpretation section, together. It enacts that a mortgagor of land—that is, of tenements and hereditaments whether corporeal or incorporeal—while in possession shall as against every encumbrancer have by virtue of the Act power to make from time to time any such lease of the mortgaged tenements and hereditaments, whether corporeal or incorporeal, or any part thereof, as in the section is described and authorized—that is to say, an agricultural or occupation lease for any term not exceeding 21 years, or a building lease for any term not exceeding 99 years. This section also enacts that every such lease shall reserve the best rent that can reasonably be obtained, and shall contain a covenant by the lessee for payment of rent and a condition of re-entry on non-payment thereof. This being the section, the question arises whether the lease of November 26, 1890, is “any such lease of the mortgaged premises,” or, in other words, whether the lease comes within either of the three classes of leases which section 18 of the Act of 1881 expressly authorizes a mortgagor in possession to make—viz., an agricultural lease, an occupation lease, or a building lease. I agree that it is not an agricultural lease, nor is it a building lease; but why is it not an occupation lease? It is a lease by which the mansion-house and the stables and gardens, part of the park, and the incorporeal hereditament, that is the right of shooting, severed as it was when the lease was made from the 1,900 acres, are leased to the defendant for him to occupy. Why is this not an occupation lease? It is a lease, as I have before said,

of a very common description, and for myself, if not fettered by authority, I should have had no doubt but that it was an occupation lease. It was argued that a lease of the shooting *per se* would not be an occupation lease, for that no rent could be reserved, and that no right of re-entry could be reserved; but why could not both of these be reserved by contract? However, I do not decide this point, for what I have to deal with is not a lease of shooting *per se*, but a lease of a house, stables, and lands, and coupled therewith, and as incident to the occupation thereof, is the right of shooting over the lands already let to other lessees. It is argued on behalf of the mortgagees that the case of “Dayrell v. Hoare” (12 A. and E. 356) shows that the lease of November 26, 1890, is an invalid lease, because, as the lease in that case was held not to be in accordance with the power granted in that case, so the present lease is not in accordance with the power given by section 18 of the Act of 1881. But in my opinion this argument is fallacious, for the two powers are not the same. “Dayrell v. Hoare” was decided in the year 1840, and had of course nothing to do with the Conveyancing Act of 1881 or the express statutory power given thereby to mortgagors to grant leases. The question which was raised in “Dayrell v. Hoare” upon demurrer was whether a lease which demised part of the premises, with the right of shooting over the whole, was a good execution of a power authorizing a lease of “the said several estates, hereditaments, and premises so given and limited”; and it was held that it was not, because that power did not authorize a lease of part of the land with liberty to sport over the rest, Mr. Justice Littledale holding the lease bad on the ground that the entirety in the particular part was not demised, for the demise must be of the whole which covers the part demised, and Mr. Justice Patteson saying that the power does not contemplate the separation of the incident from the land. It is quite true that “Dayrell v. Hoare” was approved of by Sir Nathaniel Lindley in the case of “*In re Gladstone*” ([1900] 2 Ch., at page 105), where that learned Judge says, “The decision in ‘Dayrell v. Hoare’ was plainly right, both under the old law and the new law—namely, that a power for a tenant for life to lease settled estates or any part or parts thereof did not authorize a lease of part of the land with liberty to sport over the rest. It is clear that a power to lease land cannot enable the donee of the power to impose a burden on the land.” I do not doubt the accuracy of “Dayrell v. Hoare” or of the judgment of the Master of the Rolls in “*In re Gladstone*”; but in the present case the Conveyancing Act expressly enacts that the donee of the power may grant occupation leases for not exceeding 21 years, and that such leases may consist of both corporeal and incorporeal hereditaments. In the present case the right of shooting was severed before the lease in question was granted, and was an incorporeal hereditament the leasing of which the Act of 1881 expressly authorizes. Take the case of a lease by a mortgagor in possession of a mansion-house and grounds together with a right of way over lands leased to agricultural tenants, why would not such a lease be a good occupation lease within the Act? It seems to me that it would, and if so, the lease of the mansion-house and grounds in the present case together with the right of shooting over lands leased to agricultural tenants would equally be within the Act. The case of “Dayrell v. Hoare” is no authority as to the true construction of section 18 of the Act of 1881, and the learned Judges who decided that case and Sir Nathaniel Lindley in “*In re Gladstone*” were not dealing with what was the meaning of an express power to grant occupation leases of both corporeal and incorporeal hereditaments,

which I have to deal with in this case. I can find nothing in the Act of 1881 to show "a contrary intention" so as to exclude the interpretation of the word "land" in section 2 (ii.), as including tenements and hereditaments corporeal and incorporeal, as was sought to be made out by the learned counsel for the mortgagees. In my judgment the lease in the present case is an occupation lease, and falls within section 18 of the Act of 1881, and is a lease which the Act contemplated either a mortgagor or mortgagee should be empowered to grant. For the reasons above I think Mr. Justice Bigham's judgment as to the validity of the lease of November 26, 1890, should be upheld and this appeal dismissed.

LORD JUSTICE VAUGHAN WILLIAMS delivered a written judgment to the same effect.

The LORD CHANCELLOR concurred.

[Solicitors—Kingsford, Dorman, and Co., for the plaintiff; Lee and Pembertons, for the defendant.]

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.JJ.) } Aug. 8.

COWLEY V. COWLEY.*

Husband and Wife—Dissolution of marriage—
Title—Wife continuing to take husband's
title.

The Countess Cowley, having been divorced from her husband on her own petition, married again, and continued to use the title of Countess Cowley.

Held, that the Court could not restrain her.

Decision of Gorell Barnes, J. (*ante*, p. 186; [1900] P., 118). reversed.

This was an appeal against the decision of Mr. Justice Gorell Barnes, reported *ante*, p. 186. The question was whether the lady, who was formerly the wife of Earl Cowley, but has been divorced from him on her own petition, and has since married again, is entitled still to describe herself as Countess Cowley, or can be restrained by injunction from so doing. Mr. Justice Gorell Barnes granted an injunction restraining her from making use of the title. She appealed against that decision.

Mr. Lawson Walton, Q.C., and Mr. Mark Romer were for the appellant; Mr. Bargrave Deane, Q.C., and Mr. Willock were for Earl Cowley.

The appeal was heard on July 23 and 24 last, when the judgment of the Court was reserved.

The COURT allowed the appeal.

LORD JUSTICE COLLINS read the judgment of the Court as follows:—We have come to the conclusion that the judgment of Mr. Justice Barnes in this case cannot be supported. We agree entirely with the learned Judge in his statement of the legal status of the two parties to this litigation. There can be no doubt whatever that Earl Cowley possesses in his title an incorporeal hereditament and that the petitioner has no legal right to the designation Countess Cowley. The authorities which the learned Judge cites fully establish both propositions. See also "*In re Sir J. Rivett-Carnac's Will*" (30 Ch. D., 136). But it is here, as the learned Judge himself felt, that the real difficulty begins. The application, as is pointed out in the judgment, was made by the respondent, Earl Cowley, in a divorce suit in which his marriage with the petitioner had been dissolved at her instance, and was originally placed on the ground of molestation, upon which it was impossible to support it, and it is

admitted that there is no element of malice in the case. The learned Judge, however, dealt with it as though it were a proceeding instituted in the High Court invoking its general jurisdiction to restrain the commission of a legal wrong, and the question is, whether the earl has established such a legal wrong committed against him by the lady who was his wife as to entitle him to the relief which he seeks against her. It is a remarkable thing that, if such a right exists, no precedent can be produced of such relief ever having been sought or obtained, though there must have been many instances in which it was desired. The case is not even one of another person calling himself Earl Cowley, as to which possibly different considerations might arise, and the right claimed by the earl, which stands entirely outside the marital relation, must be put high enough to entitle him to enjoin any one from using without his consent any mere courtesy title derivable under his own—for instance, to restrain his mother, if she married a commoner, from continuing to call herself countess, or his daughter from calling herself lady. These, having no legal justification in either case, would, on the argument, be equally invasions of his right, which, put broadly, is to insist on all such persons being remitted to their strict legal position if without his consent they purport to hold titles as members of his family. In this view, and counsel did not shrink from it, it would be immaterial whether the title was unusually accorded by the courtesy of society or not. Indeed, pushed home to its logical consequences, it would seem to cover a claim to interfere with and restrain the use of a name expressly sanctioned by the Crown, as mentioned in the judgment of Mr. Justice Barnes, and the affidavit of Sir A. W. Woods there referred to. It is strange that no such right has ever been enforced. We have been unable to find, and counsel were unable to point out, any analogous cause of action. The owners of franchises can maintain actions if such franchisees are invaded; for instance, the owner of a market may complain of another being opened, but it must be shown to be near enough, and held on such days, as to interfere with, and be "a nuisance" to, his own. (See Comyn's Digest, Market, C. 2; Action on the case for Nuisance, A). The owner of a freehold office, whose case seems to present the nearest analogy, might have maintained an assize for disseizin, or an action on the case for disturbance. (See Comyn's Digest, Assize B. 2. Action on the case for disturbance, A. 5). But it must have been an office of profit, and there must have been "disseizin" or "disturbance." The acts of the lady in this case fall far short of either the one or the other. Even if trespass could be maintained in respect of such a tenement, we do not think that the acts of the petitioner could by any latitude of expression be described as a "trespass." They at most amount to an assertion, which is true in fact, that she was at one time the wife of Lord Cowley. Section 57 of the Divorce Act, 20 and 21 Vict., c. 85, provides that the parties shall be at liberty to marry again, as though the prior marriage had been dissolved by death. Here the earl's enjoyment of his hereditament is unaffected. He has suffered, so far as we can see, no *injuria* or *damnum* cognisable by law. The learned Judge was of opinion that the fact that there was property in the title carried with it the right claimed, thus distinguishing it from the case of names in which there is no property. But, even if the property in the title could found a claim to enjoin any one else from assuming it without proof of other facts, as to which we give no opinion, the title assumed here is not identical, and Earl Cowley's remedy, if any, would seem to be by some form of action on the case, for which we can find no foundation in the facts here proved. But we think the case does not rest

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

merely on the negative evidence of absence of precedent. The existence of the cause of action for jactitation of marriage, and the conditions upon which alone it was maintainable, furnish an argument against the earl. Though a person has in English law no property in his name, his *status*, whether married or single, is recognized by law, and carries with it certain rights and obligations; yet he could not complain if a woman who was not his wife claimed to be his wife, or enjoin her from so doing, unless she did it maliciously. We are not, of course, dealing with a common law action of defamation, which might conceivably be supported by such facts. Peers were, no doubt, plaintiffs in suits for jactitation as often as other persons, yet, if the right here claimed existed, they had a much simpler remedy. Indeed the case of "*Hawke v. Corri*" (2 Hag. Con., 280) is a good illustration of this. There, in a suit brought by Lord Hawke for jactitation of marriage, the oppugnant called herself Lady Hawke; she set up a case of marriage which she, however, abandoned, and rested her defence on the fact that Lord Hawke had at one time consented to her bearing the title. This was held by Sir W. Scott to negative malice on her part, and the suit failed. The experienced counsel, arguing for Lord Hawke before Sir W. Scott, are reported to have said, in excusing their client for proceeding after his former conduct to the lady (p. 284):—"A suit for jactitation is the only remedy by which the party could protect himself and his family from such an assumption of a false relation to himself and to them." This is more than negative evidence. The suit for jactitation has itself fallen into disuse, and it seems late in the day to find a substitute for it in the case of titled persons. In the present case the lady has married again, but the right claimed by the earl would, if allowed, be equally effective to restrain her, whether she had married again or not. It is not necessary to consider how far, if at all, social usage would support the lady in continuing to use the style Lady Cowley. The existence of such usage might be material in any proceeding where malice was part of the cause of action, but it seems irrelevant on the present inquiry. We are of opinion that the appeal must be allowed.

Leave was given to appeal to the House of Lords.

[Solicitors—Lewis and Lewis; Wontner and Sons.]

Court of Appeal (Lord Alverstone, M.R.,) 1900.
Rigby and Collins, L.J.J.) { Aug. 8.

THE SACCHARIN CORPORATION V. THE CHEMICAL AND DRUGS COMPANY.*

Patent—Practice—Discovery—Infringement of patent—Accounts of profits—Disclosing names of customers.

In an action the defendants were held to have infringed the plaintiffs' patent, and an account was directed to be taken of all profits made by the defendants by means of articles which infringed the patent. The defendants, upon producing their books for the purpose of taking the accounts, covered up the names of their customers.

Held, that the defendants were bound to disclose the names.

"*Powell v. Birmingham Vinegar Brewery Company*" (14 Rep. Pat. Cas., 1) followed.

This was an appeal against a decision of Mr. Justice Cozens-Hardy's. The action was brought to restrain the

infringement by the defendants of the plaintiffs' patent (Monnet's, No. 25,273 of 1894). Mr. Justice North at the trial of the action held that the patent was valid, and that the defendants had infringed it, and he directed an account to be taken of all profits made by the defendants by means of articles which infringed the patent. The question on the present occasion was, whether the defendants, who had produced their books, but had covered up the names of their customers, were bound to disclose those names. Mr. Justice Cozens-Hardy was of opinion that it would be oppressive to compel the defendants to disclose the names, especially as this would enable the plaintiffs to take proceedings against the customers. The plaintiffs appealed.

Mr. Moulton, Q.C., and Mr. J. C. Graham were for the plaintiffs; Mr. A. J. Walter and Mr. J. A. Bucknill were for the defendants.

The COURT allowed the appeal, holding that the discovery asked for was relevant, and that it ought not to be refused merely because of the consequences which might possibly result from it. It had been held that discovery of this kind ought to be given in cases in which a plaintiff had elected to take an inquiry as to damages and not an account of profits. In their Lordships' opinion the same principle applied in both cases, and, indeed, the point was covered by the decision of this Court in "*Powell v. The Birmingham Vinegar Brewery Company*" (14 Rep. Pat. Cas., 1).

[Solicitors—J. H. and J. Y. Johnson; Joseph W. Asprey.]

Chan. Div. }
(Wright, J.) }

1900.
Aug. 8.

IN RE OLYMPIA (LIMITED).*

Company—Winding up—Reconstruction—Sale of assets to new company—Reservation of right to take misfeasance proceedings.

Upon a reconstruction scheme under which the assets of the old company were transferred to a new company and the shareholders of the old company were entitled to take shares, partly paid-up, in the new company, the order sanctioning the scheme reserved the right of the liquidator of the old company to take misfeasance proceedings under sec. 10 of the Companies (Winding Up) Act, 1890, against the officers of the old company and others, and the proceeds of any such proceedings were to be held by the liquidator for the benefit of the shareholders of the old company. Misfeasance proceedings were taken and a large sum was recovered.

Held, that this sum belonged to the shareholders of the old company, whether they came in under the scheme or not.

This was a summons to obtain a decision of the Court as to the persons entitled to a portion of the assets of the old company of this name. The old company was incorporated in 1893, and a compulsory winding-up order was made against it in July, 1895. On September 24, 1895, an order was made under the Joint Stock Companies Arrangement Act, 1870, sanctioning a scheme of arrangement under which the assets of the old company were to be transferred to a new company of the same name, the shareholders of the old company being entitled to take shares, partly paid up, in the new com-

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

*Reported by F. EVANS, Esq., Barrister-at-Law.

pany. The order sanctioning the scheme was intitled "in the matter of" the old company, and ordered that "upon the assignment of the undertaking and property of the above-named company to the new company . . . the rights of the official receiver and liquidator to take any proceedings . . . under section 10 of the Companies (Winding Up) Act, 1890, against the officers of the above-named company and others shall be reserved, and the proceeds of any such proceedings shall be held by the official receiver and liquidator for the benefit of the shareholders of the above-named company." Some of the shareholders only of the old company came in under the scheme and took shares in the new company; others did not. Misfeasance proceedings were taken and resulted in the decision in the House of Lords of the case of "Gluckstein v. Barnes" ([1900] A.C., 240), in which the liability of the appellant was finally decided, and under these proceedings a sum of about £8,000 was recovered. In other proceedings or under compromises a further sum of about £14,000 was recovered by the official receiver, and as these sums, together about £21,000, were excepted by the order from the assets passing to the new company and were claimed both by the old shareholders who had not come in under the scheme, and by those who had come in under it on behalf of all the old shareholders, the question which claim was right was now brought before the Court by the official receiver.

Mr. Gore Browne was for the official receiver: Mr. Hammond-Chambers, Q.C., and Mr. F. Cooper Willis were for the shareholders who had not come in under the scheme; and Mr. Donaldson Rawlins, Q.C., and Mr. Kirby for the shareholders who had come in under the scheme.

MR. JUSTICE WRIGHT, in delivering judgment, said the order of the Court sanctioning the scheme expressly excepted from the assets transferred the misfeasance assets, and said what their destination was to be—namely, that they were to be held for the benefit of the shareholders of the old company. If it had been meant that the only shareholders who were to take were those who had not come in under the scheme, the order would have said so. There might have been words in the scheme sufficient to control the meaning of the order, but no such words had been pointed out or could be found in it. The scheme contained no language to show that the shares of the old company were to be exchanged or extinguished or cancelled; and it was unnecessary to say whether if any such language had been inserted it would have had any effect. It must be declared that the misfeasance assets belonged to the shareholders of the old company whether coming in under the scheme or not.

Q.B. Div. (Day and) 1900.
Darling, J.J.) } Aug. 8.

THE QUEEN V. BARRY DISTRICT COUNCIL (EX PARTE JONES).*

Local Government—Hackney carriage—Licence—
—Towns Police Clauses Act, 1847 (10 and 11
Vict., c. 89), ss. 37, 46.

Mandamus directed to issue to the district council to hear and determine applications for licences for hackney carriages, the Court coming to the conclusion that the district council had in refusing certain licences exercised no discretion in the matter, but had acted in accordance with the terms of an agreement, then cancelled, only to grant licences to two hackney carriage proprietors and their drivers.

In this case cause was shown on behalf of the Barry District Council against a rule *nisi* for a *mandamus*, granted on July 20 last, on the relation of John Jones and John Robert Chamings, cab and omnibus proprietors, commanding the Barry District Council to hear and determine the applications of the relators for licences for hackney carriages and omnibuses, and for licences as drivers of hackney carriages and omnibuses. These licences are granted by the council under and by virtue of the Towns Police Clauses Act, 1847 (10 and 11 Vict., c. 89), section 37 of which provides that the commissioners, now the district council, may from time to time license to ply for hire within the prescribed limits "such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons as they think fit." Section 46 provides that no person shall act as driver of any hackney coach or carriage licensed in pursuance of that Act or the special Act to ply for hire within the prescribed limits without first obtaining a licence from the commissioners, now the district council, for which a fee of 1s. shall be paid. The ground on which the rule *nisi* was obtained was that the district council on August 14, 1899, entered into an agreement with two proprietors, Paulett and Grimshire, to license no omnibuses, brakes, carriages, or drivers except those belonging to or in the employ of those proprietors, and that, though that agreement had since been cancelled, the council continued in fact to grant licences exclusively to the two favoured proprietors.

Mr. MACMORRAN, Q.C. (with whom was Mr. John Sankey), showed cause. He read affidavits filed on behalf of the council. In these the agreement of August 14, 1899, was admitted, but it was said that it was cancelled as soon as the council discovered that it was *ultra vires*. The council heard and determined the applications of the relators and refused them on the ground that there were already a sufficient number of licences in existence, having regard to the population and wants of the district and the nature of the traffic in the streets. Before 1897 the persons to whom licences were granted used to run their brakes and omnibuses during the summer months, but neglected and refused to run any brakes or omnibuses during the rest of the year. At the annual licensing meeting held in 1898 the council interviewed the persons who applied for licences, all of whom, including the relators, agreed to run their brakes and omnibuses throughout the year in accordance with a time-table. With the exception, however, of Paulett and Grimshire all the licensees neglected and refused to run their brakes after September. In 1899 the licences of the proprietor other than Paulett and Grimshire were refused. The relators, notwithstanding such refusal, continued to ply for hire, and were summoned for plying for hire without a licence. The summonses were afterwards withdrawn. In 1900 the relators again applied for licences, which were again refused, and licences were granted to Paulett and Grimshire and to one other firm. The relators were again summoned for plying for hire without licences and were convicted. The applications were made on May 16 to the licensing committee, to whom the council had delegated their authority to grant or refuse the licences.

Mr. S. G. LUSHINGTON, in support of the rule, contended that, assuming that the council were entitled to refuse licences for omnibuses and hackney carriages on the ground that a sufficient number of such licences already existed, they had no power to refuse drivers' licences on that ground. He also contended that the council had no power to prescribe the times at which the brakes and omnibuses should run or to compel an applicant for a licence to ply his trade at times when he did not choose to do so.

MR. JUSTICE DARLING said that the rule must be

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

made absolute. The Barry District Council entered into an agreement that they would license no one except Paulett and Grimshire to ply for hire within their district, and those two persons, on the other hand, agreed to be bound by certain rules and to do certain things which were pleasing to the council. If that agreement had remained in force the council could not have properly exercised their discretion in granting and refusing licences. It, however, occurred to them that the agreement was *ultra vires*, and it was therefore cancelled. Nevertheless, the committee, to whom the power of the council with reference to these licences was delegated, acted absolutely in accordance with the terms of the agreement. It was beyond a case of mere suspicion. They exercised no discretion, but merely licensed Paulett and Grimshire, and with regard to the drivers they would license those who were authorized to apply by Paulett and Grimshire, and would refuse the applications of those who were not so authorized. It was clearly an attempt to give effect to the illegal agreement. The committee professed to exercise a free judgment, but, as a matter of fact, they did not do so. The *mandamus* must therefore go.

MR. JUSTICE DAY concurred.

The rule was accordingly made absolute.

Q.B. Div. } 1900.
(Bigham, J.) } Aug. 8.

THE GORSEDD STEAMSHIP COMPANY (LIMITED) V.
FORBES.*

Ship—Policy of insurance—Construction of policy—"Whole currency of policy."

The currency of a policy of insurance on a ship ends when the vessel is lost, and does not endure for the whole period for which the ship is insured.

Judgment was delivered in this case, the question being whether, in the circumstances of the case, the plaintiffs were entitled to a return of premium under the terms of a policy of marine insurance underwritten by the defendant.

MR. RUFUS ISAACS, Q.C., and Mr. Montague Lush appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. H. W. Loechnis for the defendant.

MR. JUSTICE BIGHAM read the following judgment:—This was an action to recover back part of the premium paid to the defendant for the insurance of the plaintiffs' ship. On April 1, 1899, the plaintiffs insured their ship, the Gorsedd, with the defendant for 12 months at a premium of eight guineas per cent. The policy contained the following provision:—"Returning one guinea per cent. should the vessel be employed in the Eastern trade during the whole currency of this policy." The vessel was lost some time before the 12 months expired, and from April 1, 1899, to the date of her loss she was employed only in the Eastern trade. The plaintiffs claim the return premium, alleging that the vessel was employed during the whole currency of the policy in the Eastern trade, and that, therefore, the condition has happened which entitles them to the return they claim. The defendant, on the other hand, contends that the vessel was not so employed "during the whole currency of the policy," and that, therefore, no return premium is payable. The question is as to the meaning to be put upon the expression "the whole currency of the policy." The plaintiffs say the currency of the policy ends when the ship is lost; the defendant says the expression means

the 12 months for which the vessel was insured. I think the plaintiffs' contention is the right one. The risk no longer exists after the ship is lost; the amount insured is immediately payable, and, being paid, the policy, and all obligations created by it, are at an end; the policy is no longer in any sense current. It was current while the risk was alive, and no longer, and as, during the whole of that time, the vessel was employed in the Eastern trade, the plaintiffs are entitled to the return premium. The defendant says this interpretation is unreasonable, because it would make them responsible for the return premium though the ship were lost one day after the policy was effected. But if the defendant's contention is right, the plaintiffs would not be entitled to recover though the ship were not lost until the day before the policy expired. If the provision was intended to bear the construction contended for by the defendant, it would have been simple to have used the words "during the whole 12 months." The words "during the whole currency of the policy" were, in my opinion, used because it was contemplated that the policy might cease to be current before the 12 months ran out. The defendant made another point. There is a clause in the policy—"to return 13s. 4d. per cent. for each uncommenced month, if this policy be cancelled." This clause enables the assured to cancel at any time, and to ask for a return of 13s. 4d. for each uncommenced month; and it was said on behalf of the defendant that, if the plaintiffs' contention were right, the plaintiffs could terminate the risk in the first month, and claim, not only a return of 13s. 4d. in respect of the 11 uncommenced months, but also the guinea per cent. under the provision now in question, which it was said was absurd. And it would be absurd if it were true; but the answer is that if the assured chooses to cancel, the amount that he is to get back is fixed by the very clause under which he cancels; he gets back the 13s. 4d. for each uncommenced month, and no more.

Judgment for the plaintiffs, with costs.

[Solicitors—Botterell and Roche; Waltons, Johnson, Bubb, and Whatton.]

Court of Appeal (Lord Alverstone, M.R., } 1900.
Rigby and Collins, L.JJ.) } Aug. 9.

IN RE LEYLAND AND TAYLOR'S CONTRACT.*

Vendor and Purchaser—Conditions of sale—Error, misstatement, or omission—Liability to pave, flag, and sewer street.

This was an appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster. It raised a question of conveyancing law of importance to vendors and purchasers of property in towns—viz., whether a vendor of house property, who shortly before the contract of sale has been served by the local authority with notices calling upon him to pave, flag, and sewer the street opposite the houses agreed to be sold, and has not complied with the requirements of the notices at the date of the contract, is bound to disclose to the purchaser the fact that he has been served with the notices. There was a further question as to the effect of the conditions of sale in this particular case upon the vendor's liability.

The facts, as appeared by the statement agreed on by the parties, were as follows:—On May 8, 1899, some cottages in Radcliffe were put up for sale by auction by Mr. Henry Leyland under conditions of sale of which the following are material. Condition 4 provided that, if before the completion of the purchase the vendor should have expended any money in complying with any requirement enforceable against him and made after the sale by the

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

local authority in respect of paving, flagging, or sewerage of the streets, the purchaser should on completion of the purchase repay to the vendor the amount so expended by him, and in case any such requirements should not have been complied with before the completion of the purchase, the purchaser should indemnify the vendor in respect thereof. Condition 13 provided that, if any error, misstatement, or omission in the particulars should be discovered, the same should not annul the sale, but, if the same was pointed out by either vendor or purchaser before the completion of the purchase, compensation should be allowed, to be settled by two referees as therein mentioned. At the sale Mr. James Taylor became the purchaser of the property in question for the sum of £300, and by a memorandum of agreement endorsed upon the particulars and conditions of sale the date for completion was to be June 8, 1899. It appeared on the investigation of the title that on April 13, 1899, the local authority had given notices to the vendor to pave, flag, and sewer the street opposite these cottages, and that the work was to be done in accordance with plans and sections then lying for inspection by the vendor at the offices of the local authority, and that these plans and sections showed that the level of the street opposite the said cottages would be several inches above the ground floors. The purchaser objected that the particulars of sale contained no mention of these notices, and that if he had been aware of the notices having been given he would not have bid for the property, or at any rate would not have bid so much as he did in fact bid. This was admitted in the agreed statement of facts. On the other hand, the vendor contended that, at the date of the sale, there was no charge upon the property, and that the purchaser was bound to complete with the liability created by these notices hanging over it. Ultimately, on June 19, 1899, the purchase was completed and the purchase money was paid, but without prejudice to the question whether the purchaser was entitled to compensation in respect of these notices. It was conceded that the omission to disclose the fact that these notices had been given was not due to any fraud on the part of the vendor. When the fact was discovered by the purchaser no steps had been taken either by the vendor or by the local authority to execute the works mentioned in the notices, but subsequently, in January, 1900, the works were completed by the local authority. By agreement between the parties a summons was taken out by the vendor for a declaration that the purchaser was not entitled to compensation under condition 13. The Vice-Chancellor was of opinion, first, that the particulars of sale were not full and fair as between vendor and purchaser, inasmuch as they omitted to state a fact of great importance in determining the value of the property, and secondly, that condition 4 was so framed as to lead to the inference that no notices had been given to the vendor prior to the date of the contract, and that consequently it was calculated to mislead. In these circumstances the Vice-Chancellor thought that the purchaser was clearly entitled to compensation under condition 13. The vendor appealed. The appeal was heard on July 6 last, when the Court reserved their judgment.

Mr. Daniel Jones and Mr. W. Ambrose Jones were for the vendor; Mr. Upjohn, Q.C., and Mr. Tweedale were for the purchaser.

The COURT allowed the appeal.

The MASTER of the ROLLS said,—"I have had very great difficulty in arriving at a conclusion in this case. After stating the facts and the decision of the Vice-Chancellor his Lordship continued:—"In the face of the agreed statement of facts I do not think it is possible to hold that the non-disclosure of the notice was immaterial. The purchaser, however, elected to complete the contract, and to rely upon his rights under condition 13. I have felt very considerable difficulty in coming to the conclu-

sion that the neglect of the vendor to disclose the notice was "an error, misstatement, or omission of particulars" within the meaning of condition 13. But, upon the whole, I am not prepared to say that, if the omission to disclose the notice could affect the value of the property, no claim for compensation could have been made. The ground upon which I come to the conclusion that the judgment of the Vice-Chancellor cannot be supported is, that I do not see how the mere omission to disclose such a notice can possibly have affected the value of the property sold. The time when and the circumstances under which such a notice may be served, and the character of the work to be executed rest with the local authority, and, buying such property, the purchaser must be taken to have known that such a notice might be served at any time, and to have bought subject to such a contingency. And, in my opinion, the fact that the notice was served at one time or the other could not possibly have affected the value of the property sold for the purpose of the contract. For these reasons, I think, the appeal must be allowed.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS delivered judgments to the same effect.

[Solicitors—Nicol, Son, and Jones, for Pickston and Jones, Radcliffe; Alfred Grundy, Son, and Co., Manchester.]

Prob., Divorce, and Adm. Div. } 1900.
(Gorell Barnes, J.) } Aug. 9.

THE NORMANDY.*

Ship—Collision—Damage—Delay caused by repairing ship—Extra expense of coal.

Two steamships, N. and O., having collided in the Mersey, the N. agreed to pay 75 per cent. of the damage to the O. The O. carried mails and passengers from Liverpool for South America, and after leaving Liverpool her practice was to call at Cardiff to coal and then proceed to Havre, where the bulk of her passengers embarked. Upon the occasion in question she was delayed at Liverpool repairing the damage caused by the collision, and in order to save time and to get to Havre as soon as possible, she filled up with coal at Liverpool and did not call at Cardiff. The extra expense thereby caused was £309.

Held, that this sum could not be recovered as part of the damages.

This case came before the Court by way of objection to a report of the Liverpool District Registrar. The matter arose out of a collision which occurred in the river Mersey on December 7, 1899, between the plaintiffs' steamship Obidense and the defendants' steamship Normandy, by which the Obidense sustained considerable damage. Actions were instituted on behalf of both vessels, but were subsequently settled, the owners of the Normandy agreeing to pay 75 per cent. of the damage to the Obidense, and it was referred to the Liverpool District Registrar, assisted by merchants, to assess the amount of this damage. The plaintiffs put forward a claim asserting that the total amount of the damage to the Obidense was £2,744 0s. 2d. The Registrar by his report, which was dated June 18, 1900, allowed the sum of £2,232 15s. 1d. The amounts disallowed by the Registrar with respect to four items were objected to by the plaintiffs, who appealed to the Court. With

*Reported by J. H. MURPHY, Esq., Barrister-at-Law.

regard to three of these items no question of public interest arose. The fourth item raised a point of some novelty. It appeared that the Obidense was one of the "Red Cross" Line of steamers, carrying mails and passengers to South America, and was advertised to leave Liverpool on December 19. In the ordinary course she would have proceeded thence to Cardiff to coal, the owners having a contract with a firm there which enabled them to coal at considerably less cost than filling their bunkers at Liverpool would entail. From Cardiff it was intended that the Obidense should proceed to Havre, whence she was advertised to sail on December 25. Owing to the repairs in consequence of the collision she was not ready to leave Liverpool until December 22. It was stated in evidence before the Registrar that, inasmuch as the bulk of the passengers usually embark at Havre, it was the practice of the owners of the Red Cross Line when any of their vessels were delayed in starting to coal at Liverpool, thereby saving two days at Cardiff on the voyage from Liverpool to Havre. This course was adopted in the present case, and the extra expense caused by coaling at Liverpool was £309 5s. 0d. By adopting this course the Obidense was only one day late at Havre. At first the plaintiffs put forward a claim for £120 for demurrage, being for three days at £40 a day, but they subsequently withdrew this claim, and substituted a claim for £309 5s. 0d., the extra cost entailed by coaling at Liverpool. The Registrar held that there was no doubt that, having regard to their own interests, the owners of the Obidense acted wisely in adopting the practice referred to, but in this case the only result of coaling at Cardiff in the ordinary way would have been that the Obidense would have been three days late at Havre instead of one, and he only allowed the sum of £120 originally claimed. On the hearing of the appeal,

Mr. ASPINALL, Q.C. (Mr. Glynn with him), for the appellants, contended on this point that the plaintiffs were justified in claiming £309 5s. 0d. The practice of coaling at Liverpool had been adopted to preserve as far as possible the reputation of the line for punctuality in their sailings, and this was a head of damage which naturally arose from the collision.

Mr. CARVER, Q.C., and Mr. BATESON, for the respondents, argued that the only heads of damage which were recoverable in a collision action were the cost of the actual repairs and demurrage, and that the plaintiffs were not entitled to aggravate the demurrage from a desire to preserve the reputation of their line.

The COURT dismissed the appeal on this as well as on the other three items objected to.

MR. JUSTICE GORELL BARNES, in giving judgment, said that it did not seem to him that it would be right to increase the amount allowed by the Registrar for this head of damage. It could not be said that the extra cost of the coal could fairly be taken to be a consequence of the collision, and the appeal must be dismissed with costs.

[Solicitors—Hill, Dickinson, and Co., Liverpool, for the appellants; Batesons and Co., Liverpool, for the respondents.]

Q.B. Div. }
(Lawrance, J.) }

1900.
Aug. 10.

MILMAN V. LANE.*

Will—Construction—Devise for a term to persons and to the "heirs and assigns of the survivor."

A testator devised certain land, after successive chattel interests to five persons, to the "heirs and assigns of the survivor."

Held, upon the construction of the whole of the will, that the word "assigns" had no conveyancing meaning, and that the heiress of the survivor took the land as a *persona designata*.

This was an action by Miss Amelia Milman against Mr. William Lane, the younger, to recover possession of a farm called Ranscombe, in the parish of Sandford, Devonshire. The action was tried at Exeter Assizes.

Mr. M. W. McKellar and Mr. Alfred Loosemore were for the plaintiff; Mr. Alderson Foote, Q.C., Mr. Duke, Q.C., and Mr. W. Howland Roberts for the defendant.

MR. JUSTICE LAWRENCE read a written judgment to the following effect:—The testator, John Vicary, of Sandford, by his will after a devise of an estate tail, which has determined and never was barred, devised the premises, the subject of this action, after successive chattel interests to five persons, to the heirs and assigns of the survivor of those five persons—i.e., in the events which happened, to the heirs and assigns of Richard Milman. Now, the preceding devises being of chattel interests, no question upon the rule in Shelley's case arises here. It is to all intents and purposes as if the testator had devised the premises to the heirs and assigns of Richard Milman, and the only question is whether the plaintiff, as heiress of Richard Milman, or the defendant, as purchaser from him, has the better right; in other words, the question is, What is the effect of a devise to the heirs and assigns of a named person, to whom no particular freehold estate has been limited? The authorities are by no means unanimous. [His Lordship then referred to "Tapner v. Merlott" (Willes, 177); "Quested v. Michell," (24 L.J., Ch. 722); "Brookman v. Smith," (L.R., 6 Ex., 291)]. The last cited case is at any rate an authority for the proposition that the will itself is to be looked at in order to discover the meaning of the words "heirs and assigns." Upon the general aspect of the question it is to be observed that "the words 'to assigns for ever' have at the present day no conveyancing virtue at all, but are merely declaratory of that power of alienation which the purchaser would have without them" (see Williams's Real Property, 18th edition, p. 145). The matter being therefore, so far as the authorities are concerned, practically at large, I am entitled to look at the express terms of the will to see if the testator himself has given any indication of what he intends by the phrase "heirs and assigns." On page 3 of the will I find a rent-charge vested in two trustees, their heirs, and assigns to secure payment of an annuity. In this case it is clear that the word "assigns" has, in the words of the learned Mr. Joshua Williams, "no conveyancing virtue." On page 5 the receipt of the annuitant is to be a good discharge to the trustees, their heirs, and assigns; powers of distress are also given to the trustees, their heirs and assigns. On page 9 an estate in fee simple in hereditaments in the parish of Sandford is limited to the trustees, their heirs and assigns, upon the trusts mentioned. Here again the word "assigns" adds nothing to what is already conveyed in the word "heirs." On page 10, however, an interest for 99 years, if he shall so long live, is conferred upon William Milman and his assigns without any mention of his heirs. Here the heirs are properly not mentioned, while "assigns" again expresses nothing more than would have been expressed without that word. Similar interests, in similar words, are conferred on John Milman, Edward Milman, William Milman, and Richard Milman (see page 10.) On page 11 occurs a limitation, similar to the one in question in this action, to the "heirs and assigns" of the survivor. Then with regard to the Ranscombe property and the

*Reported by J. F. WALKER, Esq., Barrister-at-Law.

residue of the real estate at Sandford there is an interest for 99 years, if he shall so long live, conferred upon Edward Milman and his assigns, the word "assigns" having here again no conveyancing value. After this life estate there is given an elaborate power of appointment by deed or will among the children of Edward Milman, and, in default of appointment among the children, an estate in tail male is limited to the heirs male of the body of Edward Milman. Upon this part of the case two observations are to be made—first, that the testator knows well how to confer a power of appointment; second, that in this part of the will, at all events, the interest for 99 years, if he shall so long live, conferred upon Edward Milman and his assigns does not give him a general power of appointment. Then follow interests exactly similar to those already mentioned in favour of William, John, Edward, William the younger, Richard, and their respective assigns for 99 years, if they shall respectively so long live, the word "assigns" conveying nothing. There follow on page 17 two gifts—one a residuary gift to Edward Milman, his heirs, executors, administrators, and assigns, of all property of whatsoever kind not as yet disposed of; and, secondly, a devise of all trust estates in similar terms, the word "assigns" having a similar—that is, no—effect. Upon the construction of this will, therefore, seeing that "assigns," as used by the testator, has no conveyancing effect, and that in one instance at all events it clearly does not confer a power of appointment, I arrive at the conclusion that the "heirs and assigns" of the survivor means no more than the "heirs" of the survivor, and the plaintiff as heiress at law took as a *persona designata* and is entitled to recover. It follows, in the view I take of this case, that section 1 subsection 3 and section 3 of the Land Transfer Act, 1897, have no application. With regard to the authorities cited, it is clear that the plaintiff took by an executory devise. "*Harris v. Barnes*" (1 W. Bl., 643), cited with approval in *Fearne on Contingent Remainders*, 4th edition, p. 64; "*In re Walton's Estate*" (25 L.J., Ch., 569), which decided that a gift of personalty to A or his heirs or assigns confers on A an absolute interest; and "*Doe d. Calkin v. Tomkinson*" (2 M. and S., 165), which decided that a devise to the testator's two sisters or the survivor, and to be disposed of by the survivor as she should by will devise, did not create a tenancy in common between the two sisters, do not appear to me to assist the discussion. The same may be said of "*Attorney-General v. Brackenbury*," (32 L.J., Ex., 108). Having dealt with the legal question, his Lordship added that he regretted having to come to this conclusion, because Richard Milman left the whole of his property to the present plaintiff, so that she had the estate in one hand and the money in the other.

A stay of execution was granted with a view to an appeal.

[Solicitors—Maddisons, agents for R. F. Loosemore, of Tiverton, for the plaintiff; Guscombe, Wadham, and Bradbury, agents for Sparkes, Pope, and Thomas, of Crediton and Exeter, for the defendant.]

Chan. Div. } 1900.
(Cozens-Hardy, J.) } Aug. 11.

IN RE THE BARROW HEMATITE STEEL COMPANY
(LIMITED).*

Company—Reduction of capital—Confirmation
by Court—Principles applicable.

The Court refused to sanction a reduction of capital, the evidence not satisfying it that the value of the Company's assets had decreased as alleged. In ascertaining what are the assets of the Company for this purpose, the reserve fund, the amount standing to profit and loss account, and the goodwill must be taken into account.

This was a petition for reduction of the capital of the company. The arguments were heard on the 8th inst., when his Lordship reserved judgment. This morning judgment was delivered.

MR. JUSTICE COZENS-HARDY said,—This petition for reduction of capital raises several points of importance and difficulty. The company was incorporated in 1864. Its capital was from time to time increased, and in 1886 it was £2,037,700, divided into 150,000 ordinary shares of £10 each, 377 £8 per cent. preference shares of £100 each, and 50,000 £6 per cent. preference shares of £10 each. The preference shares have no priority as regards capital, but are cumulative as to dividend, and the holders of these shares have no right of voting at meetings of the company. In 1888 the company resolved to reduce its capital rateably to the extent of 25 per cent. The petition seeking the confirmation by the Court came before Mr. Justice North. It is reported in 39 Ch.D., 582, 4 *The Times* L.R., 775. It was there decided that the preference shareholders could not insist upon the reduction being confined to the ordinary share capital, and the Court confirmed the proposed reduction. The principle of this decision is binding upon me, and I think it is not open to me to regard some of the arguments I have heard on the present occasion. The company now desire further to reduce their reduced capital by writing off 50 per cent. all round, and they have passed a special resolution for this purpose which they ask the Court to confirm. The petition is stoutly opposed by a very large body of preference shareholders. The precise number is not very important, but I take it that, putting aside shareholders who hold both ordinary and preference shares and who may, therefore, be indifferent to the change, the petition is opposed by a very large majority of the preference shareholders. It is alleged by the company, and it is necessary for the company to establish, that the 50 per cent. which they propose to cancel is "lost or unrepresented by available assets." Unless this is made out there is no jurisdiction to make the order. Assuming that the company can establish this and that I have power to sanction the reduction I am guided in considering how my discretion ought to be exercised by the observations of Lord Herschell in "*British and American Trustee and Finance Corporation v. Couper*" ([1894] A.C., 399, 10 *The Times* L.R., 415). It is not the duty of this Court to confirm unless it is satisfied that the reduction will not work unjustly or inequitably. Lord Herschell ([1894] A.C., at p. 406) lays down this proposition:—"No such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably." In other words, the change ought not to be sanctioned in a doubtful case. It remains to consider these two points. The case on the part of the company may be shortly stated as follows. They say that the iron ore mines stand in the balance-sheet at twice their value, and they propose to reduce it by roughly £177,000. They say their works, which stand at upwards of £2,000,000, are over-estimated by £486,000, and that their freehold land and house property, which stands at £200,000, is over-estimated by £100,000. These three items make up the £764,000 which they propose to write off. They support

*Reported by D. FITCALRN, Esq., Barrister-at-Law.

their contention by a mass of evidence. As to the first item, their expert evidence goes to show the extreme probability that the iron ore which has been hitherto worked in a part of a large tract of land near their works is approaching exhaustion and that there is no reasonable probability of further mines or veins being discovered. With reference to the second item, the works, the company say that although they are in a high state of efficiency and have been kept up in this state out of revenue, yet their value is really dependent upon the value of the adjacent mines, and that if ere has to be purchased and brought from a distance they will not be able to employ the works at so great an advantage. With reference to the third item, they say that by reason of subsidences and excessive prices paid to avoid claims for compensation and other causes the present value of land and house property is only 50 per cent. of the amount at which it stands in the balance-sheet. On the part of the opponents there is also a great mass of evidence. In some respects it is not so direct or so weighty as that of the company. But the evidence as a whole leaves, in my mind, the impression that the value of the mines and of the works is really a pure matter of speculation, upon which no satisfactory or conclusive judgment can be formed. I think I might dispose of this petition on the short ground that the company have not satisfied me that items 1 and 2 are proved. Capital ought not to be reduced in an opposed case on the mere balance of speculative expert evidence. There are circumstances under which the Court is obliged to rely upon such evidence but this is not such a case. The opponents, in addition to challenging the figures in these three items, raise several further points. First, they say that among the assets of the company there is a sum of £40,000 to the credit of reserve account which ought to be but has not been reckoned. They say that according to the articles of association of the company this sum is made applicable towards depreciation of this nature. Secondly, they say that there is a further sum of, roughly, £90,000 to the credit of profit and loss, which is an available asset. Thirdly, they say that the goodwill of a company of this nature is an asset to which some value, and probably a considerable value, ought to be attributed. See "*In re Abstainers and General Insurance Company*" ([1891] 2 Ch., 124). Fourthly, they further say that a colliery which is only valued at £175,000 ought to be appreciated. On this point there is a mass of evidence on both sides. Most of the observations which I have made as to speculative expert evidence apply to this point. I am certainly not satisfied that the colliery is not worth much more than £175,000 having regard to the present prices of coal, but I do not intend to base my judgment upon any such consideration. Dealing then with the first three points made by the opponents, I can see no answer to the argument that the £40,000 ought to have been treated as an available asset. So far as I am aware, this is the first instance in which a company possessing a large reserve fund has sought to reduce capital without taking account of the reserve fund. As to the £90,000 to the credit of profit and loss, the directors have not yet recommended any dividend and it rests with them to consider whether all or any part of this sum ought to be placed to reserve account. Upon the whole I think that similar observations apply to it. As to goodwill, it is no doubt true that the company never has entered goodwill as an asset. For the purposes of the company as a going concern there was no necessity for doing this, but, nevertheless, any goodwill must be regarded as an available asset for the purpose of a reduction petition. The decision of Mr. Justice North above referred to is clear upon the point. I think, upon the balance of the evidence, that a company of this magnitude, whose goods are known almost all over the world by their particular brand, must have a

goodwill of considerable value. For all these reasons I think that the company have not proved that £764,000 is capital lost or unrepresented by available assets and it follows that I cannot confirm the reduction. I am unwilling to part with the case without stating that even if the fact of the loss of £764,000 had been established, I should not have thought it right to confirm the reduction. What is the necessity for the reduction? The company is making large and increasing profits from its trading. In round figures, 1897, £55,000; 1898, £65,000; 1899, £89,000; probably more in the current year, having regard to the price of coal. It has paid, and having regard to decisions which are binding upon every Court short of the House of Lords it has properly paid, dividends out of such profits notwithstanding the loss of capital. Why should any change be made? The earning capacity of the company will not be in any way increased by the reduction of the capital, and I do not think that in dealing with two classes of shareholders I ought to make an unnecessary reduction for the avowed purpose of relieving the ordinary shareholders from the burden of preferential interest. At the present moment there are arrears of the cumulative preferential dividend, the whole or a greater part of which may be speedily paid off out of profits. The annual preferential charge is in round figures £24,000, subject to which all the profits go to the ordinary shareholders. The proposal is that the ordinary shareholders should in future take all the profits subject to a preferential charge of £12,000 only. In substance it is a proposal by the ordinary shareholders to deprive the preferential shareholders of £12,000 a year for the benefit of the ordinary shareholders, without any necessity for so doing and without any advantage to the company as a whole. This does not strike me as fair and equitable. It seems to have been assumed in 1888 that some reduction of capital was necessary, and the fight raged over the mode in which this reduction should be effected. None of the decisions to which I have referred had then been given, and probably all parties, including counsel and the Judge, may have been under the impression that no dividend could legally be paid unless and until lost capital had been replaced. This view was widely held until the Court of Appeal in "*Lee v. Neuchatel Asphalte Company*" in 1889 (41 Ch.D., 1; 5 *The Times* L.R., 260) and "*Verner v. General, &c., Trust*" in 1894 (2 Ch., 239; 10 *The Times* L.R., 341 and 393) laid down that a trading profit may be applied in payment of dividends notwithstanding a depreciation in the fixed capital of the company. This is an important matter for consideration in all cases where there are several classes of shareholders who may be unequally affected by reduction. Where all shareholders rank alike, both as to dividends and as to capital, it is of less importance, for nobody can be hurt by reduction. I have not forgotten the argument that directors ought to keep true and honest accounts. Of course they ought. I see no reason to suppose that they have not done this in the past or that they will not do it in the future. They have not stated that the items in question represent the actual value. On the contrary, the balance-sheets which they have published state that the figures as to the three items in question are given, "as per the last balance-sheet," with a note by the auditor that no depreciation has been written off. If the directors are minded to change this system and to reduce the figures and to add a fresh balancing item under the head of depreciation they can do so. Nothing that I have said will prevent them from taking this course. But the decisions to which I have referred necessarily imply that directors may honestly and properly prepare a balance-sheet showing or implying a loss of capital, and at the same time may honestly and properly prepare a profit and loss account showing a balance available for dividend. The result is that I must

dismiss the petition and the company must pay the costs of the opponents.

Mr. Swinfen Eady, Q.C., and Mr. Cassel were for the company in support of the petition; Mr. Eve, Q.C., and Mr. Kirby for preference shareholders; and Mr. E. C. Macnaghten, Q.C., and Mr. Simey for various shareholders.

[Solicitors—Walker and Pettitt; Currey, Holland, and Currey.]

Q.B. Div. } 1900.
(Bigham, J.) } Aug. 11.

STEAMSHIP BALMORAL COMPANY (LIMITED) v.
MARTEN.*

Insurance, Marine—General average—Policy on ship valued at £33,000—Ship of the value of £40,000—Contribution.

A ship was insured for and valued at £33,000. During the currency of the policy she incurred general average expenses, and had to pay a salvage award. In the salvage action the value of the ship was proved by her owners to be £40,000, and that figure was taken by the average adjusters as the contributory value of the ship for the purpose also of the general average. The ship-owners sought to recover from the underwriters the whole of the ship's proportion of the salvage and of the general average contribution.

Held, that the plaintiffs could only recover 33-40ths of the amount.

This was an action to recover a loss under a policy on the plaintiffs' ship *Balmoral* subscribed by the defendant and others, underwriters at Lloyd's. By the policy the ship was insured for, and valued at, £33,000. During the currency of the policy the *Balmoral* received certain salvage services, in respect of which a salvage award was made in the Admiralty Court against ship, freight, and cargo; certain general average expenses were also incurred. In the salvage action the value of the *Balmoral* was proved by affidavit of her owners to be £40,000, and that figure was taken by the average adjusters as the contributory value of the ship for the purpose also of the general average. The plaintiffs sought to recover from the underwriters on the ship the whole of the ship's proportion of the salvage and of the general average contribution. The underwriters contended that, as the ship was valued in the policy at £33,000, the plaintiffs could only recover under the policy 33-40ths of the amount due, and that 7-40ths must be borne by the plaintiffs themselves. Although the actual amount in dispute in this particular case was but small, the principle involved was one of very great importance to shipowners and underwriters. Mr. F. C. Danson, an average adjuster of many years' experience, gave evidence on behalf of the defendants. He said that there was a well-known practice in the English underwriting world extending over a long time that where a vessel was insured for a sum less than the contributory value upon which general average was adjusted, or less than the amount at which the vessel was valued in a salvage action, the underwriters were only liable to pay in the proportion of the insured value to the contributory or salvage values. The plaintiffs called no witnesses, contending that evidence as to the practice of average adjusters was inadmissible, and that the practice deposed to was wrong in law, and ought not to govern the decision of this case.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Mr. D. C. Leck (Mr. Joseph Walton, Q.C., with him), appeared for the plaintiffs; Mr. Pickford, Q.C., Mr. T. E. Scrutton, and Mr. F. D. Mackinnon for the defendants.

MR. JUSTICE BIGHAM, having taken time to consider, read the following judgment:—In this case the defendants underwrote a policy of marine insurance on the plaintiffs' ship for £33,000, the ship being valued in the policy at the same sum. While the policy was current a general average loss was sustained and a salvage claim had to be paid, and thereupon an average statement was made up. The real value of the ship at the time of the average statement was £40,000, and the rights of the different parties interested—namely, owners of ship, freight, and cargo respectively—were regulated *inter se* on that footing. The question is whether the defendants must indemnify the plaintiffs against the whole of the average loss payable by them, or only against 33-40ths thereof. The first question divides itself into two parts—viz., that relating to the general average loss, and that relating to the salvage claim. As to the general average loss, the evidence satisfies me that the practice in this country is for the underwriter on a valued policy to pay only the proportion which the value in the policy bears to the actual value on which the statement has been made up. Applying the rule of practice to the present case, the defendants will only be liable to make good to the plaintiffs 33-40ths of the general average loss. The plaintiffs say that this rule is inconsistent with the contract contained in the policy, because, as between themselves and the defendants, the ship is a fully insured ship. She is, they say, by agreement valued at £33,000, and she is insured for that same sum; and being fully insured they are entitled to a full indemnity against the general average claim. But I think it is the plaintiffs' contention, rather than the defendants', which is inconsistent with the terms of the policy; for the defendants have promised to be bound on the basis of the ship being worth £33,000, whereas the plaintiffs are asking them to pay on the footing of the ship being worth £40,000. The plaintiffs have not satisfied me that their contention is right. The rule of practice to which I have referred has been in force for nearly a century. I am asked to disregard it. If I did so, I should unsettle the basis on which existing policies for many millions of money have been made. I am not disposed to do this unless I see clear reasons for it. I see reasons rather the other way, and, therefore, on this part of the question I find for the defendants. As to the claim for salvage loss, the practice has been for more than a century to treat such claims precisely as claims for general average are treated. I think, therefore, the defendants succeed on this part of the case also.

Judgment for the defendants with costs.

[Solicitors—Lowless and Co.; Waltons, Johnson, Bubb, and Wharton.]

Q.B. Div. } 1900.
(Bigham, J.) } Aug. 11.

EPSOM URBAN DISTRICT COUNCIL v. LONDON COUNTY COUNCIL.*

Highway—Extraordinary Traffic—"Person by or in consequence of whose order" the traffic has been conducted—Highways and Locomotives Act, 1878 (41 and 42 Vict., c. 77), s. 23—Locomotives Act, 1898 (61 and 62 Vict., c. 29), s. 12.

The defendants entered into contracts with two contractors for the erection of a temporary hospital, and for the alteration of certain exist-

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

ing buildings. The work involved the carriage of exceptionally heavy traffic along some of the roads in the plaintiffs' district.

Held, that the traffic had been conducted along the roads in consequence of the defendants' orders within s. 12 of the Locomotives Act, 1898, and that the defendants were liable for the expense of the repairs to the roads caused thereby. The fact that the contracts were made before the coming into operation of the Locomotives Act, 1898, is immaterial, provided the damage to the roads is done after. "*Kent County Council v. Lord Gerard*" ([1897] A.C., 633) distinguished.

Judgment was delivered in this case. The action was brought to recover the extra cost of the repairs to certain roads in the plaintiffs' district alleged to be due to extraordinary traffic in connexion with the erection by the London County Council of a lunatic asylum at Horton in the plaintiffs' district. The case was one of some importance, being the first case in which the Court has had to construe the provisions of the Locomotives Act, 1898.

Mr. Macmorran, Q.C., Mr. R. C. Glen, and Mr. Swinburne Hanham appeared for the plaintiffs; Mr. Dickens, Q.C., and Mr. Daldy for the defendants.

MR. JUSTICE BIGHAM read the following judgment:—The question in this case is whether the plaintiffs were entitled to recover from the defendants the cost of repairing the damage done to some roads in their district by certain exceptionally heavy traffic thereon. They contend that the traffic came on to the roads by or in consequence of the order of the defendants, and that, therefore, the defendants are liable under section 23 of the Highways Act, 1878, as amended by section 12 of the Locomotives Act, 1898. The facts are these:—The defendants in the year 1898 entered into agreements with two firms of contractors for the erection of a temporary hospital and for the alteration of certain existing buildings so as to adapt them for use as a permanent hospital. The site of both buildings was in the plaintiffs' district, and the works involved the carriage of exceptionally heavy traffic along certain roads in the district. The work under one of these contracts (Kirk and Randall's) was completed by April 15, 1899. On July 12, 1899, the plaintiffs' surveyor granted a certificate in the following form for the purpose of complying with the requirements of section 23 of the Act of 1878:—"Extraordinary Traffic.—I hereby certify that, having regard to the average expenses of repairing highways along the line of traffic to the Horton Asylum temporary buildings, extraordinary expenses to the amount of £484 15s. 11d. have been incurred by you in repairing such highways by reason of the damage caused by excessive weight passing along the same or extraordinary traffic thereon. In calculating the above amount I have ascertained the cost of repairs of these roads for the past five years, and have deducted the average annual cost from the total expended. (Signed) EDWARD R. CAPON." The writ was issued on December 22, 1899. The first question is whether the defendants are persons "by or in consequence of whose order" the traffic was conducted within the meaning of the two Acts of Parliament. Under the earlier Act the persons made liable were those persons "by whose order" the traffic was conducted. By the later Act the words "by or in consequence of whose order" are substituted for the words "by whose order." In the case of "*Kent County Council v. Lord Gerard*" ([1897] A.C., 633) the question arose as to the meaning of the expression "by

whose order" which occurs in the earlier Act. In that case Lord Gerard had contracted with several persons for the delivery at his residence of certain material. Extraordinary expenses within the meaning of the statute were incurred by the road authority in repairing the roads over which the materials were brought to the house, and the plaintiffs sought to recover the amount from Lord Gerard. The House of Lords held that inasmuch as Lord Gerard had bought the material "delivered," he had nothing to do with the conduct of the traffic along the roads; that the traffic was conducted by the order of the persons who had sold the goods "delivered," and that, therefore, Lord Gerard was not liable. In the Court of Appeal Lord Justice Lopes had read the words "by whose order" as equivalent to the words "in consequence of whose order," and had come to the conclusion (differing from the other members of the Court) that Lord Gerard was liable. The Lords did not think that this view was right, but they do seem to me to have expressed an opinion (which, of course, was *obiter*) that, if it had been possible to give to the words of the statute the meaning which Lord Justice Lopes gave to them, then Lord Gerard would have been liable. The amendment in the Act of 1898 was introduced in consequence of the decision in Lord Gerard's case. The words "by whose order" were discarded and the words "by or in consequence of whose order" were substituted. There can be no doubt that the object of the Legislature was to alter the earlier Act in such a way as to bring a case like Lord Gerard's within its scope. Whether the Legislature has succeeded may be open to doubt, but I am of opinion that it has succeeded, and that if Lord Gerard's case had been decided under the later Act Lord Gerard would have been held to be liable. Then is there any distinction in principle between Lord Gerard's case and the present case? In the former, the building owner contracted for the delivery of the building materials on his land; in the latter, the building owners, the London County Council, contracted for the erection of the buildings on their land. In each case the same consequence follows from the contract—namely, that the materials are conducted along the road. The only difference is that in the one case the materials belong to the building owner as soon as they are delivered, whereas in the other the materials do not belong to the building owner until they are worked into the structure by the contractor. In both cases orders were given—that is to say, contracts were made—and in both cases the consequence of the orders or contracts was that the traffic was conducted along the roads. I think that the plaintiffs are entitled on this, the main question in the case, to succeed. But then it was said that, inasmuch as the two building contracts were made before the later Act came into force—namely, before January 1, 1899—no orders within the meaning of that Act can be said to have been given at all. But I think it is not the giving of the order which creates the liability; it is the doing of the damage, and, therefore, though the contracts were made before the new Act, yet, if, and to the extent that, damage was done afterwards, I think the defendants are liable. Another point was taken on behalf of the defendants. It was said that in respect of the damage done in the execution of Kirk and Randall's work the proceedings to recover the amount were begun too late. I think that is so. The damage done by Kirk and Randall was, in my opinion, the consequence of their particular building contract, and, therefore, Clause 6 of subsection 1 of section 12 of the Act of 1898 applies. That provision is that "proceedings for the recovery of any expenses where the damage is the consequence of any particular building contract shall be commenced not later than six months after the completion of the contract." Kirk

and Randall's contract was completed on April 15, 1899, and the writ was not issued until December 22, 1899. Finally, it was said that the form of the surveyors' certificate was not sufficient because it does not appear on its face that in making it regard has been had to "the average expenses of repairing highways in the neighbourhood" within the meaning of the 23rd section of the Act of 1878. I think nothing of this point. I am quite satisfied that the certificate did make it appear to the plaintiffs that extraordinary expenses within the meaning of the section had been incurred; and, if it

did that, it was a certificate which complied with the requirements of the law. His Lordship added that the question of the amount recoverable must be ascertained according to the principle laid down in the judgment, and he hoped that neither party would spend any more of the ratepayers' money in litigating this question. If any difficulty arose in settling the amount, the question could be referred to his Lordship. There would be no costs of the action.

[Solicitors—Lycell and Co., for E. G. Wilson, Epsom; W. A. Blaxland.]

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Construction—Estate in special tail—Rule in Shelley's case].—A testator devised certain estates to a younger son, Charles, with a provision that his eldest son might purchase and redeem those estates for certain sums of money, and the will continued :—" The proceeds to go with the limitations of this will—that is to		Hotchpot clause—Rent owing—Real Property Limitation Act, 1874, sec. 1].—Decision of North, J. ([1900] 1 Ch., 292), reversed.—IN RE JOLLY—GATHERCOLE V. NORFOLK [C.A.]	521

